From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Yoo, John C <John.C.Yoo@usdoj.gov>
BCC: timothy flanigan (timothy flanigan [WHO])
Sent: 9/17/2001 3:28:35 AM
Subject: : 4A issue

```
###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )
CREATION DATE/TIME:17-SEP-2001 07:28:35.00
SUBJECT:: 4A issue
TO:"Yoo, John C" <John.C.Yoo@usdoj.gov> ( "Yoo, John C" <John.C.Yoo@usdoj.gov> [ UNKNOWN ]
)
READ:UNKNOWN
BCC:timothy flanigan ( timothy flanigan [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Any results yet on the 4A implications of random/constant
surveillance of phone and e-mail conversations of non-citizens who are in
the United States when the purpose of the surveillance is to prevent
terrorist/criminal violence?
```

From: Powell, Benjamin A.
To: william_smith@judiciary.senate.gov <william_smith@judiciary.senate.gov>;Brian.A.Benczkowski@usdoj.gov <Brian.A.Benczkowski@usdoj.gov>;William.Hall2@usdoj.gov <William.Hall2@usdoj.gov>;William.Hall2@usdoj.gov <Kavanaugh, Brett M.>;William.Hall2@usdoj.gov <Snee, Ashley>;ehaden@balch.com <ehaden@balch.com>;ehaden@balch.com <Smith, Matthew E.>
Sent: 6/5/2003 3:33:58 PM
Subject: 4pm conference number

We are having a 4pm conf call to discuss Pryor and coordinate plans and efforts. Let me know if you are not available. Call-in number below.

Time: 4:00pm, June 5

Dial in #: 202-395-6392

Code: 976638

Ben Powell

456-7909

From: CN=Bradford A. Berenson/OU=WHO/O=EOP [WHO]
To: Courtney S. Elwood/WHO/EOP@EOP [WHO] <Courtney S. Elwood>
CC: brett m. kavanaugh/who/eop@eop [WHO] <brett m. kavanaugh>;alberto r. gonzales/who /eop@eop [WHO] <alberto r. gonzales>;timothy e. flanigan/who/eop@eop [WHO] <timothy e. flanigan>;bradford a. berenson/who/eop@eop [WHO] <bradford a. berenson>;helgard c. walker/who/eop@eop [WHO] <helgard c. walker>;stuart w. bowen/who/eop@eop [WHO] <stuart w. bowen>;h. christopher bartolomucci/who/eop@eop [WHO] <h. christopher bartolomucci>;rachel l. brand/who/eop@eop [WHO] <rachel l. brand>;noel j. francisco/who /eop@eop [WHO] <noel j. francisco>;robert w. cobb/who/eop@eop [WHO] <robert w. cobb>
Sent: 3/27/2001 3:15:40 AM
Subject: : Re: Adarand -- other considerations

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###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Bradford A. Berenson ( CN=Bradford A. Berenson/OU=WHO/O=EOP [ WHO ] )
CREATION DATE/TIME:27-MAR-2001 08:15:40.00
SUBJECT:: Re: Adarand -- other considerations
TO:Courtney S. Elwood ( CN=Courtney S. Elwood/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
CC:brett m. kavanaugh ( CN=brett m. kavanaugh/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:alberto r. gonzales ( CN=alberto r. gonzales/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:timothy e. flanigan ( CN=timothy e. flanigan/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:bradford a. berenson ( CN=bradford a. berenson/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:helgard c. walker ( CN=helgard c. walker/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:stuart w. bowen ( CN=stuart w. bowen/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:h. christopher bartolomucci ( CN=h. christopher bartolomucci/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:rachel l. brand ( CN=rachel l. brand/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:noel j. francisco ( CN=noel j. francisco/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
CC:robert w. cobb ( CN=robert w. cobb/OU=who/O=eop@eop [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Of course the Clinton administration gave us some cover on this by
declining to defend the constitutionality of the statute at issue in
Dickerson last Term -- to near-universal praise by the media.




Courtney S. Elwood
03/27/2001 08:12:14 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Adarand -- other considerations

Another consideration: Although Olsen would likely find it troubling to
do so, he and the AG, in deciding whether to defend the program, may take
into consideration the "long-standing practice" of the Department "to
defend [a] statute against [constitutional] challenge unless there is no
reasonable argument that could be made in defense. See, e.g. The Attorney
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General's Duty To Defend the Constitutionality of Statutes, 43 Op. Atty. Gen. 325 (1981) (Opinion of Attorney General Smith); The Attorney General's DutyTo Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Atty. Gen. 275 (1980)." Letter from Dick Thornburgh to Senator Strom Thurmond, dated Oct. 7, 1999 (appended to the Brief of Amici Curiae former Attorneys General of the United States William P. Barr and Edwin Meese III Supporting Affirmance in Dickerson v. United States, No. 99-5525.

While in Adarand, the constitutionality challenged law is a regulatory program and not a statute, the practice may nonetheless have some application. I don't know. In any event, if the decision is made not to defend the constitutionality of the program, I suspect we will hear the words of these Republican attorneys general repeated back to us in the press and in briefs before the Supreme Court.

Brett M. Kavanaugh
03/26/2001 08:58:32 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: Adarand -- other considerations

A few more preliminary thoughts, although they are phrased somewhat more definitively. But these are really just initial ideas.

1. My sense, for what it is worth, is that it would be better for the SG to independently assess and come to a constitutional conclusion about the program -- and only then advise the President of it -- than for the White House to dictate -- or even hint -- to the SG what the SG's position should be. Indeed, in my view, the White House should not be involved in the SG's formulation of a position in the first instance, but rather only in approving or disapproving what the SG proposes.

This is admittedly not my ideal of how a unitary executive should work, but it is the real world, and there is a very strong tradition in the Executive Branch -- and in the Congress and media -- that the SG is independent and should come to his or her own independent conclusions about the constitutionality of laws. It is also why SG is such a critically important position. That is not to say that the SG's office cannot be overruled by the President/White House; it can be and has been in the past and will be in the future. It is to say, however, that there is a serious long-term political cost to the perception or reality that the SG's positions and recommendations are being driven in the first instance by the White House. Lincoln Caplan's book The Tenth Justice is a fine example of the kinds of criticism that can occur.

Apart from that public relations/political consideration, as a matter of standard process, moreover, the SG is in the best position to assess a case like this in the first instance and propose a course of action.

I thus would recommend that, if asked and forced to answer, the President and Ari might say something like the following about the President's position:

In the Executive Branch, it is the role of the Solicitor General, acting under the Attorney General and ultimately the President, to represent the United States in the Supreme Court. In cases involving the United States, therefore, it is properly the role of the Solicitor General and the Department of Justice to examine and study the facts and the law in the first instance and to make appropriate decisions and

recommendations. Of course, the President is the head of the Executive Branch and in particularly important Supreme Court cases previous Presidents have approved -- and, on occasion, disapproved -- the Department of Justice's recommended course of action. In any particularly important case like that, however, this President would await the Department of Justice's recommendation before making any decision.

I also would recommend that the Judge communicate to the Attorney General that the President will await the recommendation of the Attorney General and Solicitor General as to the constitutionality of this program and the proper course of action in the Supreme Court. I would propose that there be no other communications between the White House and Department about this case.

2. This case makes Ted Olson's hearing more likely to gain attention and draw fire given what he has written and who he has represented in race cases.

3. An approach referenced but not elaborated in my earlier e-mail is for the SG to file a brief saying that the program is unconstitutional, thus refusing to defend the constitutionality of the program and forcing the Supreme Court to appoint counsel to defend the program. That is, in fact, my personal opinion about what the SG ought to do, but that is only my personal opinion. Again, however, if this is the SG's ultimate position, this is much better coming from the SG than being dictated or hinted in any way to the SG.

Message Sent
To:_____
Alberto R. Gonzales/WHO/EOP@EOP
Timothy E. Flanigan/WHO/EOP@EOP
Bradford A. Berenson/WHO/EOP@EOP
Helgard C. Walker/WHO/EOP@EOP
Courtney S. Elwood/WHO/EOP@EOP
Stuart W. Bowen/WHO/EOP@EOP
H. Christopher Bartolomucci/WHO/EOP@EOP
Rachel L. Brand/WHO/EOP@EOP
Noel J. Francisco/WHO/EOP@EOP
Robert W. Cobb/WHO/EOP@EOP

Message Copied
To:_____
alberto r. gonzales/who/eop@eop
timothy e. flanigan/who/eop@eop
bradford a. berenson/who/eop@eop
helgard c. walker/who/eop@eop
stuart w. bowen/who/eop@eop
h. christopher bartolomucci/who/eop@eop
rachel l. brand/who/eop@eop
noel j. francisco/who/eop@eop
robert w. cobb/who/eop@eop

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Dinh, Viet <Viet.Dinh@usdoj.gov>
Sent: 4/3/2002 3:49:22 AM
Subject: : RE: Owen

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 3-APR-2002 08:49:22.00
SUBJECT:: RE: Owen
TO:"Dinh, Viet" <Viet.Dinh@usdoj.gov> ("Dinh, Viet" <Viet.Dinh@usdoj.gov> [UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

I assume we are not giving anything out this morning, correct?

"Dinh, Viet" <Viet.Dinh@usdoj.gov>
04/03/2002 07:42:43 AM
Record Type: Record

To: "Keefer, Wendy J" <Wendy.J.Keefer@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Willett, Don" <Don.Willett@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Koebele, Steve" <Steve.Koebele@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
cc: "Newstead, Jennifer" <Jennifer.Newstead@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP
Subject: RE: Owen

Wendy, thank you for your extraordinary efforts here. Jennifer and Don, can we get some temporary paralegal help in ASAP to help with the ministerial collation work?

Please make sure that whatever talkers we put out to anyone on the bypass Doe cases are reviewed and signed off by Brett Kavanaugh. I would also like to see them.

thanks much.

-----Original Message-----
From: Keefer, Wendy J
Sent: Tuesday, April 02, 2002 9:31 PM
To: Willett, Don; Koebele, Steve
Cc: Dinh, Viet; Newstead, Jennifer
Subject: Owen

Guys:

I have the 9 binders for the GOP members of the Judiciary Committee put together. I have also made 5 additional copies for extra staffers who may show up and for you two to have. I have made myself a binder (the perogative of the binder-maker) to use during the meeting. The only thing left to do is I want, with the copies not in binders (because we ran out of binders big enough), to at least put the tabs in each bundle. So, I will do that tomorrow morning. We will also want to make sure a copy is available for Viet and for Jen, but I assume we can take care of that either tomorrow a.m. or when we return from the meeting, as I am sure the

binder materials will be evolving. We also need to look carefully at the "case summaries" that are currently included and make sure (for future, i.e. actual prep once a hearing is schedule) there is a need for them. Some of the cases, although somewhat noteworthy, are not likely to be real issues and just create the potential for confusion. The big issues are clearly the judicial bypass/abortion cases and Enron. The other issues are those that many of our nominees face and are basic and general allegations of conservatism (e.g. pro-business, anti-plaintiff, pro-tort reform, etc.) and I think we have good responses to those with Owen as the basic response for all of those cases is her application of already settled Texas law and her respect for stare decisis.

As I am likely not to get home until about 11pm, I may be a little late tomorrow a.m., but should be here by about 9:15-9:30. I assume that although Don you are meeting us at the Owen meeting that Pat O'Brien has a car coming. I will need some help carrying the box(es) of binders/materials.

See you guys tomorrow.

Don -- I have reviewed much of the info on Howard, but not all, and should have a pretty good idea by the end of the day if there are any troubling issues other than basic conservative actions while AUSA and N.H. A.G. and the campaign fiasco re: the 2000 gubenatorial primary.

Wendy

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: H. Christopher Bartolomucci/WHO/EOP@EOP [WHO] <H. Christopher Bartolomucci>
Sent: 5/15/2002 3:10:38 PM
Subject: : Re: Justice Owen

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:15-MAY-2002 19:10:38.00
SUBJECT:: Re: Justice Owen
TO:H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

She should not talk about her views on specific policy or legal issues. She should say that she has a commitment to follow Supreme Court precedent, that she understands and appreciates the role of a circuit judge, that she will adhere to statutory text, that she has no ideological agenda. She probably should deal with the contributions issue emphasizing the themes that were in Judge Gonzales' letter.

H. Christopher Bartolomucci
05/15/2002 07:02:30 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: Justice Owen

Tomorrow, Sen. Hutchison is taking Owen to meet with Sen. Feinstein (at 11:45) and Sen. Kohl (at 3:30). Hutchison's office wants to know if there are any subjects we do not want Owen to talk about at these meetings. What do you suggest we tell them?

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Dinh; Viet <Viet.Dinh@usdoj.gov>;Willett; Don <Don.Willett@usdoj.gov>;Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 7/18/2002 8:34:56 AM
Subject: : Highly confidentail

```
###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [ UNKNOWN ] )
CREATION DATE/TIME:18-JUL-2002 12:34:56.00
SUBJECT:: Highly confidentail
TO:"Dinh; Viet" <Viet.Dinh@usdoj.gov> ( "Dinh; Viet" <Viet.Dinh@usdoj.gov> [ UNKNOWN ] )
READ:UNKNOWN
TO:"Willett; Don" <Don.Willett@usdoj.gov> ( "Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN ] )
READ:UNKNOWN
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Brett,
It looks like Biden's staff is asking him not to attend the hearing. This
does not bode well. It means that they will depend on paper since they
have refused to meet with her. This increases reliance on Leahy's staff.
Think thru what options you all have down there. If we think that it is
better for him to be there, perhaps Hatch could call him but Hatch may not
want to. Hatch may need a butch from the WH to call Biden. Is any direct
pressure on Biden possible...a Gonzales meeting?
On a related note, the Nation article linking Owen to Rove is being
distributed by the Leahy staff.
Manny
```

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Kyle Sampson/WHO/EOP@EOP [WHO] <Kyle Sampson>
Sent: 12/16/2002 9:57:43 AM
Subject: : Re: CA11

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:16-DEC-2002 14:57:43.00
SUBJECT:: Re: CA11
TO:Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

call me

Kyle Sampson
12/16/2002 01:35:42 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: CA11

How did the Pryor interview go?

From: James C. Ho <JamesCHo@stanfordalumni.org>
To: Steve.Koebele@usdoj.gov [UNKNOWN] <Steve.Koebele@usdoj.gov>;Nathan.Sales@usdoj.gov [UNKNOWN] <Nathan.Sales@usdoj.gov>;Alex_Dahl@Judiciary.senate.gov [UNKNOWN] <Alex_Dahl@Judiciary.senate.gov>;Makan_Delrahim@Judiciary.senate.gov [UNKNOWN] <Makan_Delrahim@Judiciary.senate.gov>;Brian.A.Benczkowski@usdoj.gov [UNKNOWN] <Brian.A.Benczkowski@usdoj.gov>;Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>;Rena_Johnson_Comisac@Judiciary.senate.gov [UNKNOWN] <Rena_Johnson_Comisac@Judiciary.senate.gov>
CC: Beth_Jafari@cornyn.senate.gov [UNKNOWN] <Beth_Jafari@cornyn.senate.gov>
Sent: 3/8/2003 11:51:51 AM
Subject: : Re: TX Justice Priscilla Owen vs. LA Justice James L. Dennis

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###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"James C. Ho" <JamesCHo@stanfordalumni.org> ( "James C. Ho"
<JamesCHo@stanfordalumni.org> [ UNKNOWN ] )
CREATION DATE/TIME: 8-MAR-2003 16:51:51.00
SUBJECT:: Re: TX Justice Priscilla Owen vs. LA Justice James L. Dennis
TO:Steve.Koebele@usdoj.gov ( Steve.Koebele@usdoj.gov [ UNKNOWN ] )
READ:UNKNOWN
TO:Nathan.Sales@usdoj.gov ( Nathan.Sales@usdoj.gov [ UNKNOWN ] )
READ:UNKNOWN
TO:Alex_Dahl@Judiciary.senate.gov ( Alex_Dahl@Judiciary.senate.gov [ UNKNOWN ] )
READ:UNKNOWN
TO:Makan_Delrahim@Judiciary.senate.gov ( Makan_Delrahim@Judiciary.senate.gov [ UNKNOWN ] )
READ:UNKNOWN
TO:Brian.A.Benczkowski@usdoj.gov ( Brian.A.Benczkowski@usdoj.gov [ UNKNOWN ] )
READ:UNKNOWN
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
TO:Rena_Johnson_Comisac@Judiciary.senate.gov ( Rena_Johnson_Comisac@Judiciary.senate.gov [
UNKNOWN ] )
READ:UNKNOWN
CC:Beth_Jafari@cornyn.senate.gov ( Beth_Jafari@cornyn.senate.gov [ UNKNOWN ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Thanks -- is the letter in PDF or some other format that could be e-mailed
to me? If not, could someone fax me the letter, at 202-228-2856 (pls be
sure to address to James Ho)? Thanks!

At 04:21 p.m. 3/8/2003, Brett_M._Kavanaugh@who.eop.gov wrote:
>The gonzales letter on this issue to leahy last year cited dennis. Need
to dust
>that off.
>
>----- Original Message -----
>From:<JamesCHo@stanfordalumni.org>
>To:Makan_Delrahim@Judiciary.senate.gov,
> Rena_Johnson_Comisac@Judiciary.senate.gov,
> Alex_Dahl@Judiciary.senate.gov,
> Brett M. Kavanaugh/WHO/EOP@EOP,
> Nathan.Sales@usdoj.gov,
> Brian.A.Benczkowski@usdoj.gov,
> Steve.Koebele@usdoj.gov
>Cc:Beth_Jafari@cornyn.senate.gov
>Date: 03/08/2003 02:44:11 PM
>Subject: TX Justice Priscilla Owen vs. LA Justice James L. Dennis
>
>Looking through Leahy's written Qs and As, I wonder if a simple defense
can be
>made on behalf of Justice Owen and TX's practice of judicial campaign
>contributions, by looking at current 5th Circuit Judge James L. Dennis, a
>Clinton appointee and former Louisiana state supreme court justice.
```

>
>Has anyone looked at him? If not, can anyone task someone to look into
Dennis's
>confirmation proceedings? I believe it was a rather contentious
confirmation
>process for Judge Dennis because of substantial ethical allegations, so
perhaps
>it's not a clean comparison. Still, the guy did get eventually confirmed
>(albeit on a close vote).
>
>Anyone think this is worth pursuing?
>
>
>James C. Ho
>901 North Wayne Street #302
>Arlington, VA 22201
>(202) 224-2934 (work) (NEW)
>(202) 491-8227 (mobile)
>(703) 812-8152 (home)
><JamesCHo@stanfordalumni.org>

From: Kavanaugh, Brett M.
To: <Grubbs, Wendy J.>
Sent: 4/9/2003 1:27:33 PM
Subject: From Manny on Frist's staff

"According to Democrat sources, several Democrat Senators have expressed concern about any filibuster of a judicial nominee that is based on substance, as opposed to process. The Senators that may be wavering or opposed to an extended debate are: Lincoln, Pryor, Carper, Graham, Nelson (Fl), Nelson (NE), Bayh, Landrieu, Breaux, Dorgan, Conrad, Baucus, Hollings, Bryd and Miller."

From: Joel Pardue <judicialumbrella@yahoo.com>
To: jpardue@fed-soc.org [UNKNOWN] <jpardue@fed-soc.org>
BCC: Brett M. Kavanaugh (Brett M. Kavanaugh/WHO/EOP [WHO])
Sent: 6/5/2003 10:06:28 AM
Subject: : Emergency Umbrella Meeting Tomorrow
Attachments: P_LCTYG003_WHO.TXT_1.txt

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Joel Pardue <judicialumbrella@yahoo.com> (Joel Pardue <judicialumbrella@yahoo.com>
[UNKNOWN])
CREATION DATE/TIME: 5-JUN-2003 14:06:28.00
SUBJECT:: Emergency Umbrella Meeting Tomorrow
TO:jpardue@fed-soc.org (jpardue@fed-soc.org [UNKNOWN])
READ:UNKNOWN
BCC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

There will be an emergency umbrella meeting tomorrow at 2:30 PM (right
after the 1:30 call) at the law firm of Baker & Hostetler (1050
Connecticut Ave., Suite 1100). We need to discuss nominee Bill Pryor's
hearing next Wednesday and there are important confirmation process issues
with Judge Kuhl that need to be addressed.

Do you Yahoo!?
Free online calendar with sync to Outlook(TM).
- att1.htm
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_LCTYG003_WHO.TXT_1>

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Wednesday, August 08, 2001 2:12 PM
To: Timothy E. Flanigan (CN=Timothy E. Flanigan/OU=WHO/O=EOP@EOP [WHO])
Cc: noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO]); alberto r. gonzales (CN=alberto r. gonzales/OU=who/O=eop@eop [WHO]); brett m. kavanaugh (CN=brett m. kavanaugh/OU=who/O=eop@eop [WHO])
Subject: : Re: Adarand

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 8-AUG-2001 14:12:06.00
SUBJECT:: Re: Adarand
TO:Timothy E. Flanigan (CN=Timothy E. Flanigan/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO]) READ:UNKNOWN CC:alberto r. gonzales (CN=alberto r. gonzales/OU=who/O=eop@eop [WHO]) READ:UNKNOWN CC:brett m. kavanaugh (CN=brett m. kavanaugh/OU=who/O=eop@eop [WHO]) READ:UNKNOWN
End Original ARMS Header

I agree with point 2.

As to point 1, that would introduce a concept that, at least to my knowledge, has not previously appeared in the Supreme Court's equal protection jurisprudence, which means it would require an elaboration and justification in the brief.

As to merits of a deliberate indifference standard, four questions. First, would it mean that a victim of private discrimination could sue the government on some theory that the government was merely deliberately indifferent to (rather than the cause of) the private discrimination? If so, that might suggest an extraordinary expansion of governmental responsibility and liability for private racial discrimination. Second, how would one prove that the federal government was deliberately indifferent to private discrimination apart from simply proving widespread private discrimination in the relevant jurisdiction and
field, which presumably is the requirement under current law anyway?
Third, and looking at it from the flip side, what precisely would this new requirement add in terms of limiting the government's use of race-based classifications? What exactly would be allowed under current law but be prohibited with the deliberate indifference standard? Fourth, the argument itself as outlined in the e-mail does not really hang together to the extent it presupposes that these regulations do not use race-based remedies. The brief assumes that these regulations are in fact race-based (although I do not believe the brief should assume as much).

The fundamental problem in this case is that these DOT regulations use a lot of legalisms and disguises to mask what in reality is a naked racial set-aside. I have no doubt that Rehnquist, Scalia, Thomas, and Kennedy will realize as much in short order and rule accordingly -- unless the Court DIGs the case. I assume O'Connor will so rule as well, although
that is less certain.

Timothy E. Flanigan
08/08/2001 12:49:12 PM
Record Type: Record

To: Noel J. Francisco/WHO/EOP@EOP
cc: alberto r. gonzales/who/eop@eop, brett m. kavanaugh/who/eop@eop
bcc:
Subject: Re: Adarand

I agree with Noel's suggestions.

Noel J. Francisco
08/08/2001 11:59:28 AM
Record Type: Record

To: Alberto R. Gonzales/WHO/EOP@EOP, Timothy E. Flanigan/WHO/EOP@EOP, Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:Adarand

I have read the brief and have two initial reactions. First, in the "compelling interest" section, we should incorporate the deliberate indifference standard. That is, argue that the widespread nature of the disparities gives rise to a presumption that the Government, in the course of funding highway construction, was aware of the discrimination and deliberately indifferent to it. This may not be sufficient in and of itself to justify race-conscious remedies. It is, however, sufficient to justify the narrowly tailored regulations implementing this program.
Second, in the narrow tailoring section, I would simply move the last 8 parpagraphs of the brief -- which address the certification requirement that limits the race preference only to DBE's that have actually suffered discrimination -- into a separate argument that would be the first argument under narrow tailoring. Since we're making this argument anyhow, I don't see how the SH could object to a imple reordering of it. This, moreover, would focus the Court on the aspect of the program that makes it most likely to survive strict scrutiny.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Thursday, January 17, 2002 9:58 AM
To: Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re: Racial Profiling

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:17-JAN-2002 10:57:53.00
SUBJECT:: Re: Racial Profiling
TO:Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

The people who favor some use of race/natl origin obviously do not need to grapple with the "interim" question. But the people (such as you and I) who generally favor effective security measures that are race-neutral in fact DO need to grapple -- and grapple now -- with the interim question of what to do before a truly effective and comprehensive race-neutral system is developed and implemented.

Helgard C. Walker
01/17/2002 10:47:08 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
bcc:
Subject: Re: Racial Profiling

I do, b/c that is what Noel was purporting to represent. His opening words were something to the effect of, "Well I think Joel's point was. . .
."

You are right that we will have to grapple with the interim issue eventually, if we decide that our general policy will somehow be one that relies on more information and a system that take time to set up. But until we decide the general policy we can't get to the q of interim, which I admit is hard. I am not sure what the answer is to that.

Brett M. Kavanaugh
01/17/2002 10:37:29 AM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc:
bcc:
Subject: Re: Racial Profiling

Understood. I do not really care what Joel was or was not advocating or discussing. At staff meeting, I was curious about your position on the interim issue and explaining that the interim security needs almost by definition have to be one focus of you and the working group. That does not mean there are easy answers to that interim issue.
But that issue certainly cannot -- or at least should not -- be
avoided.

Helgard C. Walker
01/17/2002 10:27:29 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
bcc:
Subject: Re: Racial Profiling

And my only point is that there is no agreement in the working group on the general policy. And when Joel was in here yesterday and we were debating the issue, he was not, as Noel suggested, arguing only about the interim. He was asking about the use of race in the bigger picture.

Brett M. Kavanaugh
01/17/2002 10:22:25 AM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc:
bcc:
Subject: Re: Racial Profiling

I still did not think anyone ever said the interim issue was the "only question" as your e-mail says . . . My only point was that your long-term approach, with which I agree entirely, still leaves the interim question, which actually is of critical importance to the security of the airlines and American people in the next 6 months or so, especially given Al Qaeda's track record of timing between terrorist incidents.

Helgard C. Walker
01/17/2002 10:12:14 AM
Record Type: Record

To: Alberto R. Gonzales/WHO/EOP@EOP, Timothy E. Flanigan/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Racial Profiling

In light of our discussion at staff meeting this morning, I wanted to confirm for everybody -- especially the Judge --the issues up for decision in the internal administration working group.

To be clear, it is not the case that there is widespread agreement in the group that we should be working toward a race-neutral (or as race-neutral as possible) system for airport security and other law enforcement, such that the only question presented is how to handle security between now and the time that such a system is put in place -- i.e., the "what-to-do-in-the-interim" question.

Rather, the question is whether we should work toward a race-neutral system at all or whether we should instead permit the use of race as a factor in certain circumstances. My own view is that , as required by traditional Equal Protection standards, we must at least consider how to construct a race-neutral system. I can imagine such a system that could be effective, perhaps even more effective than one based on racial classifications. For instance, you could break air passengers down into groups of those with/without U.S. passports, those with/without recent international travel, those with/without criminal history, et cetera, and subject persons in higher risk categories to higher levels of scrutiny. This sort of system would require airlines and/or governmental authorities to obtain more personal information from the flying public, and there is some resistance to that within the group on the grounds that that would too burdensome, invasive of privacy, and so forth.

Another school of thought is that if the use of race renders security measures more effective, than perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as Korematsu.

The point being that the foregoing -- the general policy, not the interim policy -- is what we are currently debating in the group. Of course, if it were decided that our general policy should be to try and devise a race-neutral system, we would be at the juncture of deciding upon interim measures. And that is, admittedly, not an easy question. But we are not there yet.

HCW

Message Copied
To:_____
Courtney S. Elwood/WHO/EOP@EOP
Brett M. Kavanaugh/WHO/EOP@EOP
Bradford A. Berenson/WHO/EOP@EOP
H. Christopher Bartolomucci/WHO/EOP@EOP
Robert W. Cobb/WHO/EOP@EOP
Noel J. Francisco/WHO/EOP@EOP
Rachel L. Brand/WHO/EOP@EOP

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) [mailto:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])]
Sent: Wednesday, April 24, 2002 9:40 AM
To: Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re: LRM JAB205 OMB Request for Views on S_____ Native American Small Business

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:24-APR-2002 09:39:34.00
SUBJECT:: Re: LRM JAB205 OMB Request for Views on S_____ Native American Small Business TO:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

FYI
---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 04/24/2002 09:39 AM ----------

Brett M. Kavanaugh
04/23/2002 09:04:57 PM
Record Type: Record

To: Patrick J. Bumatay/WHO/EOP@EOP, James A. Brown/OMB/EOP@EOP
cc:
bcc: Records Management@EOP
Subject: Re: LRM JAB205 OMB Request for Views on S_____ Native American Small Business

White House Counsel objects and raises questions about the constitutionality of this bill, including but not limited to the portions that refer to Native Hawaiians. See Rice v. Cayetano. We believe that an "Office of Native American Affairs" within SBA triggers both policy and constitutional concerns. If the Office will deal solely with tribes, members of tribes, and tribal activities, it is appropriate. But if it grants benefits to Native Americans because of their race/ethnicity alone, that raises serious problems under Rice and the Constitution, which generally requires that all Americans be treated as equal (absent a program narrowly tailored to serve a compelling government interest). The desire to remedy societal discrimination is not a compelling interest, however. See Croson.

OLC needs to review this.

Patrick J. Bumatay
04/23/2002 11:37:40 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:LRM JAB205 OMB Request for Views on S_____ Native American Small Business
---------- Forwarded by Patrick J. Bumatay/WHO/EOP on 04/23/2002 11:37 AM ----------

James A. Brown
04/23/2002 10:57:14 AM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject:LRM JAB205 OMB Request for Views on S_____ Native American Small Business

LRM ID: JAB205
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Tuesday, April 23, 2002

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below
FROM: Richard E. Green (for) Assistant Director for Legislative Reference
OMB CONTACT:James A. Brown
PHONE: (202)395-3473 FAX: (202)395-3109
SUBJECT: OMB Request for Views on S_____ Native American Small Business Development Program

DEADLINE: 10:00 A.M. Friday, April 26, 2002
In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.
COMMENTS: The Small Business Administration is scheduled to testify on this legislation on April 30th.

DISTRIBUTION LIST
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025-COMMERCE - Michael A. Levitt - (202) 482-3151
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107-Small Business Administration - Richard Spence - (202) 205-6700
EOP:
WHGC LRM
NEC LRM
Philip J. Perry
Matthew J. Schneider
OVP LRM
David S. Addington
K. Philippa Malmgren
Aquiles F. Suarez
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Ann Kendrall
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Janis A. Coughlin
Richard E. Green
James J. Jukes
Anna M. Briatico
Dirksen Lehman
Sarah S. Lee
Pamula L. Simms
David Rostker
LRM ID: JAB205 SUBJECT: OMB Request for Views on S_____ Native American Small Business Development Program
RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: James A. Brown Phone: 395-3473 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant):
395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

Message Sent
To:_____
cla@sba.gov @ inet
CLRM@doc.gov
justice.lrm@usdoj.gov
ocl@ios.doi.gov
WHGC LRM
NEC LRM
Philip J. Perry/OMB/EOP@EOP
Matthew J. Schneider/OMB/EOP@EOP
OVP LRM
David S. Addington/OVP/EOP@EOP
K. Philippa Malmgren/OPD/EOP@EOP
Aquiles F. Suarez/OPD/EOP@EOP
Gary Ceccucci/OMB/EOP@EOP
Ann Kendrall/OMB/EOP@EOP
Christine Ciccone/WHO/EOP@EOP
Christine C. McCarlie/OMB/EOP@EOP
Lauren C. Lobrano/OMB/EOP@EOP
Stephen S. McMillin/OMB/EOP@EOP
Alan B. Rhinesmith/OMB/EOP@EOP
James Boden/OMB/EOP@EOP
Janis A. Coughlin/OMB/EOP@EOP
Richard E. Green/OMB/EOP@EOP
James J. Jukes/OMB/EOP@EOP
Anna M. Briatico/OMB/EOP@EOP
Dirksen Lehman/WHO/EOP@EOP
Sarah S. Lee/OMB/EOP@EOP
Pamula L. Simms/OMB/EOP@EOP
David Rostker/OMB/EOP@EOP

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_VM5X6003_WHO.TXT_1>

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>;Sales; Nathan <Nathan.Sales@usdoj.gov>;Koebele; Steve <Steve.Koebele@usdoj.gov>;Willett; Don <Don.Willett@usdoj.gov>
Sent: 7/28/2002 2:38:29 PM
Subject: : Help requested

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN])
CREATION DATE/TIME:28-JUL-2002 18:38:29.00
SUBJECT:: Help requested
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:"Sales; Nathan" <Nathan.Sales@usdoj.gov> ("Sales; Nathan" <Nathan.Sales@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
TO:"Koebele; Steve" <Steve.Koebele@usdoj.gov> ("Koebele; Steve" <Steve.Koebele@usdoj.gov>
[UNKNOWN])
READ:UNKNOWN
TO:"Willett; Don" <Don.Willett@usdoj.gov> ("Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

I would ask that no action be taken by any of your offices on this for now except as I request. It is important that it be confidential to the recipients of this email and up your chains of authority only.

As I mentioned on Friday, Senator Leahy?s staff has distributed a ?confidential? letter to Dem Counsel on Thursday from Collyn Peddie, who served as the attorney for ?Jane Doe? in some or several of the Texas bypass cases. According to either the letter or the Leahy staff Ms. Peddie sent this letter in the strictest confidence because she is up for partner, and believes she will be fired if it is publicized. Several members of her firm are lead supporters of the Owen nomination. Leahy?s staff is only sharing with Democratic counsels. However, we might expect this letter to be used like the Brenda Polkey in Pickering at a moment when we are unable to respond.

Ms. Peddie is being portrayed as a small oppressed lawyer fearing repercussions if her name gets out and the brave attorney who represented the ?girl in trouble? in Jane Doe 1. In fact, she is the attorney for Planned Parenthood who argued JD cases and the Buffer Zone case and on the board of Planned Parenthood of Texas, among other things. I will copy you on our research on her.

For now I need priority help early Monday from the A team in briefly commenting on these items (two or three sentences). I have not seen the letter but it strongly criticizes Owen?s actions on the Doe cases, especially for her ?appalling insensitivity? to the pregnant minors before her court.

Owen violated the confidentiality of the Jane Does in her written opinions Specifically, Peddie accuses Owen of publishing ?dissents and concurrences in which paragraph after paragraph of confidential testimony was quoted in great detail.?

Owen sought delay of order granting bypass

Owen sought to stop the entry of Jane Doe l?s bypass until the court had published all its opinions. The court issued the order over Owen?s objection, but if the Court had adopted Owen?s position, the pregnant minor would have had to wait three more months to get the abortion.

3. Owen?s Dissent in Jane Doe 4

Peddie criticized Owen?s dissent in Jane Doe 4 which argued that parental rights should trump the risk that ?parents would throw a minor girl out on the street upon finding out she was pregnant.?

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN] <Manuel_Miranda@judiciary.senate.gov>
CC: sales; nathan <nathan.sales@usdoj.gov>;koebele; steve <steve.koebele@usdoj.gov>;willett; don <don.willett@usdoj.gov>
Sent: 7/28/2002 3:03:12 PM
Subject: : Re: Help requested

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:28-JUL-2002 19:03:12.00
SUBJECT:: Re: Help requested
TO:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN])
READ:UNKNOWN
CC:"sales; nathan" <nathan.sales@usdoj.gov> ("sales; nathan" <nathan.sales@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
CC:"koebele; steve" <steve.koebele@usdoj.gov> ("koebele; steve" <steve.koebele@usdoj.gov>
[UNKNOWN])
READ:UNKNOWN
CC:"willett; don" <don.willett@usdoj.gov> ("willett; don" <don.willett@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

Nathan and Steve should elaborate, but my preliminary take:

1. First, the name Jane Doe is used precisely to protect privacy of the individuals. Second, all Justices in these cases discussed and quoted from the record extensively. See the majority opinion in Doe 2, the Gonzales opinion in Doe 3, the Enoch opinion in Doe 3, the majority opinion in Doe 4, etc. This is simply a bogus charge to direct at Owen.

2. Justice Owen believed that opinions could be written in a few days as courts often do in emergency cases of this nature. She specifically stated that the judgment with opinions should have been issued on March 13 instead of a summary order without opinions on March 10. She did not suggest delaying decision "for months."

3. In this case, the court unanimously agreed that the record did not meet the standard for a bypass. Six Justices concluded that a remand was appropriate. Justice Owen and two others argued, however, that Doe simply failed to make the required showing and that a remand was inappropriate. Justice Owen argued, moreover, that the potentially negative reaction of the parents of a pregnant minor when the minor becomes an adult does not meet the statutory "best interest" standard for a bypass.

Manuel_Miranda@judiciary.senate.gov (Manuel Miranda)
07/28/2002 06:33:10 PM
Record Type: Record

To: "Willett; Don" <Don.Willett@usdoj.gov>, "Sales; Nathan"
<Nathan.Sales@usdoj.gov>, "Koebele; Steve" <Steve.Koebele@usdoj.gov>,

Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: Help requested

I would ask that no action be taken by any of your offices on this for now except as I request. It is important that it be confidential to the recipients of this email and up your chains of authority only.
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Ms. Peddie is being portrayed as a small oppressed lawyer fearing repercussions if her name gets out and the brave attorney who represented the ?girl in trouble? in Jane Doe 1. In fact, she is the attorney for Planned Parenthood who argued JD cases and the Buffer Zone case and on the board of Planned Parenthood of Texas, among other things. I will copy you on our research on her.
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Owen sought delay of order granting bypass
Owen sought to stop the entry of Jane Doe l?s bypass until the court had published all its opinions. The court issued the order over Owen?s objection, but if the Court had adopted Owen?s position, the pregnant minor would have had to wait three more months to get the abortion.
3. Owen?s Dissent in Jane Doe 4
Peddie criticized Owen?s dissent in Jane Doe 4 which argued that parental rights should trump the risk that ?parents would throw a minor girl out on the street upon finding out she was pregnant.?

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
CC: dinh; viet <viet.dinh@usdoj.gov>;Heather Wingate/WHO/EOP@EOP [WHO] <Heather Wingate>;willett; don <don.willett@usdoj.gov>
Sent: 7/30/2002 8:30:08 AM
Subject: : Re[2]: NEWS
Attachments: P_OGI49003_WHO.TXT_1.pcx

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN])
CREATION DATE/TIME:30-JUL-2002 12:30:08.00
SUBJECT:: Re[2]: NEWS
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
CC:"dinh; viet" <viet.dinh@usdoj.gov> ("dinh; viet" <viet.dinh@usdoj.gov> [UNKNOWN])
READ:UNKNOWN
CC:Heather Wingate (CN=Heather Wingate/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
CC:"willett; don" <don.willett@usdoj.gov> ("willett; don" <don.willett@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

They appear not to be worried about Kohl.

_____Reply Separator_____
Subject: Re: NEWS
Author: Brett_M._Kavanaugh@who.eop.gov
Date: 7/30/2002 11:45 AM

What about Kohl?

(Embedded
image moved Manuel_Miranda@judiciary.senate.gov (Manuel
to file: Miranda)
pic23048.pcx) 07/30/2002 11:43:04 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, "Willett; Don"
<Don.Willett@usdoj.gov>,
"Dinh; Viet" <Viet.Dinh@usdoj.gov>, Heather Wingate/WHO/EOP@EOP

cc:
Subject: NEWS

I have it on 100% info that Leahy is trying to convene the Dems this
afternoon

after Policy Lunch to check on where they stand on Owen. He is seeking to
place
Owen on for this Thursday with the view that we would hold over. Feinstein
and
Feingold are still not saying how they will vote and this bothers them.
The bad
news is that they are not concerned about Biden. That bothers me.

Suggested action. WH should intervene with Feingold and Feinstein as soon
as
possible. OLP might write Leahy and remind him that he promised Owen the
ample
opportunity to respond to questions (Kennedy's came out today. In either
case,
refer only to rumor, not to me.

Received: from mailsims1.senate.gov ([156.33.203.10]) by
mailexch.senate.gov
with SMTP
(IMA Internet Exchange 3.13) id 004B95E5; Tue, 30 Jul 2002 11:48:34 -0400
Received: from eop1.eop.gov (eop151.eop.gov)
by mailsims1.senate.gov (Sun Internet Mail Server
sims.3.5.2000.03.23.18.03.p10)
with SMTP id <0H0200658JVFBI@mailsims1.senate.gov> for
Manuel_Miranda@judiciary.senate.gov; Tue, 30 Jul 2002 11:47:44 -0400 (EDT)
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id <01KKPDRUE11S9PP30Z@EOP.GOV> for Manuel_Miranda@judiciary.senate.gov;
Tue,
30 Jul 2002 11:46:39 -0400 (EDT)
Received: from mhub2.eop.gov ([198.137.241.11])
by EOP.GOV (PMDF V5.2-33 #41062) with ESMTP id
<01KKPDRFVRD29OFKRE@EOP.GOV>;
Tue, 30 Jul 2002 11:46:09 -0400 (EDT)
Received: from sgeop03.eop.gov ([165.119.1.37])
by mhub.eop.gov (PMDF V6.1-1 #41014)
with SMTP id <01KKPDR7AALI9D9D1R@mhub.eop.gov>; Tue,
30 Jul 2002 11:45:56 -0400 (EDT)
Received: by sgeop03.eop.gov(Lotus SMTP MTA v4.6.7 (934.1 12-30-1999))
id 85256C06.0056956D ; Tue, 30 Jul 2002 11:45:43 -0400
Date: Tue, 30 Jul 2002 11:45:37 -0400
From: Brett_M._Kavanaugh@who.eop.gov
Subject: Re: NEWS
To: Manuel_Miranda@judiciary.senate.gov (Manuel Miranda)
Cc: "willett; don" <don.willett@usdoj.gov>, "dinh; viet"
<viet.dinh@usdoj.gov>,
Heather_Wingate@who.eop.gov
Message-id: <85256C06.00569447.00@sgeop03.eop.gov>
MIME-version: 1.0
Content-type: MULTIPART/MIXED;
BOUNDARY="Boundary_(ID_otFiB0RhPTtS2y0ROlJJug)"
X-Lotus-FromDomain: EOP
- pic23048.pcx
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_OGI49003_WHO.TXT_1>

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>;Willett; Don <Don.Willett@usdoj.gov>
Sent: 8/13/2002 2:45:08 PM
Subject: : Sept 5th

```
###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [ UNKNOWN ] )
CREATION DATE/TIME:13-AUG-2002 18:45:08.00
SUBJECT:: Sept 5th
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
TO:"Willett; Don" <Don.Willett@usdoj.gov> ( "Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN ] )
READ:UNKNOWN
###### End Original ARMS Header ######
```

Two things about Sept 5th. My info is that it is a go unless, according to the Leahy staff, there is a problem with the Dem vote count. This means that, as of today, they are not certain about their count.

From: Sales, Nathan <Nathan.Sales@usdoj.gov>
To: 'Manuel_Miranda@frist.senate.gov' <Manuel_Miranda@frist.senate.gov>;Benczkowski, Brian A <Brian.A.Benczkowski@usdoj.gov>
CC: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 2/14/2003 3:06:24 PM
Subject: : Re: Estrada event on Tuesday

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Sales, Nathan" <Nathan.Sales@usdoj.gov> ("Sales, Nathan" <Nathan.Sales@usdoj.gov> [UNKNOWN])
CREATION DATE/TIME:14-FEB-2003 20:06:24.00
SUBJECT:: Re: Estrada event on Tuesday
TO:"'Manuel_Miranda@frist.senate.gov'" <Manuel_Miranda@frist.senate.gov> ("'Manuel_Miranda@frist.senate.gov'" <Manuel_Miranda@frist.senate.gov> [UNKNOWN])
READ:UNKNOWN
TO:"Benczkowski, Brian A" <Brian.A.Benczkowski@usdoj.gov> ("Benczkowski, Brian A" <Brian.A.Benczkowski@usdoj.gov> [UNKNOWN])
READ:UNKNOWN
CC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

I have no way of guessing. Several thousand pages, I would think, but short of sitting down and counting, there's no way to know for sure. Also, my connections with law firms aren't the greatest, since I've never worked at one, so I'm not going to be much help there either.

-----Original Message-----
From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
To: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>; Sales, Nathan <Nathan.Sales@USDOJ.gov>
CC: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
Sent: Fri Feb 14 19:17:42 2003
Subject: RE: Estrada event on Tuesday

Can one of you price it for us? Figure out how many pages will need to be copied 49 times?

That is necessary to push it on a firm. Of course it would be great if a law firm took the job on an emergency basis to copy the 49 sets. Any chance?

-----Original Message-----
From: Sales, Nathan [mailto:Nathan.Sales@usdoj.gov]
Sent: Friday, February 14, 2003 7:05 PM
To: Benczkowski, Brian A; Miranda, Manuel (Frist)
Subject: Re: Estrada event on Tuesday

Leonard Leo will know. We probably don't want the fed soc paying for it, but he might know some generous donor.

Would Gibson Dunn pay?

-----Original Message-----
From: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>
To: 'Manuel_Miranda@frist.senate.gov' <Manuel_Miranda@frist.senate.gov>
CC: Sales, Nathan <Nathan.Sales@USDOJ.gov>
Sent: Fri Feb 14 19:00:56 2003
Subject: Re: Estrada event on Tuesday

Tough. Can the WH pony up for 49 boxes of goodies?

-----Original Message-----
From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
To: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>
CC: Sales, Nathan <Nathan.Sales@USDOJ.gov>
Sent: Fri Feb 14 18:32:56 2003
Subject: RE: Estrada event on Tuesday

The trouble is we need to copy that 49 times. We need an outside group or law firm to pay for it. Any thoughts?

I have not spoken to Boyden about the cost yet and may not make contact until Tuesday unless he returns the call.

And we will need to have it by 2 pm on Tuesday!!!!

My cell is 262-7789, over the weekend, and I will also be at my desk most of that time. 224-3749

-----Original Message-----
From: Benczkowski, Brian A [mailto:Brian.A.Benczkowski@usdoj.gov]
Sent: Friday, February 14, 2003 6:27 PM
To: Miranda, Manuel (Frist)
Cc: Sales, Nathan
Subject: Re: Estrada event on Tuesday

Manny-

We have assembled a litigation box full of Miguel's record, which I thought had been sent up to you. In addition to the info in the binders we sent up, the box has every brief Miguel has ever authored, plus other stuff. Nathan has the box. This might be the best set of docs for you guys to use. Let me know what you want us to do with it.

BAB

-----Original Message-----
From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
To: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>; Keys, Elizabeth (Republican-Conf) <Elizabeth_Keys@src.senate.gov>; Ledeen, Barbara (Republican-Conf) <Barbara_Ledeen@src.senate.gov>; wgrubbs@who.eop.gov <wgrubbs@who.eop.gov>; Comisac, RenaJohnson (Judiciary) </DDV=Rena_Johnson_Comisac@Judiciary.senate.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/>
CC: Brown, Jamie E (OLA) <Jamie.E.Brown@USDOJ.gov>; krdaly@aol.com <krdaly@aol.com>; Leonard_B._Rodriguez@who.eop.gov <Leonard_B._Rodriguez@who.eop.gov>
Sent: Fri Feb 14 18:12:16 2003
Subject: RE: Estrada event on Tuesday

See attached

-----Original Message-----
From: Keys, Elizabeth (Republican-Conf)
Sent: Friday, February 14, 2003 6:04 PM
To: Miranda, Manuel (Frist); Ledeen, Barbara (Republican-Conf); wgrubbs@who.eop.gov; Comisac, RenaJohnson (Judiciary); Benczkowski, Brian A
Cc: Jamie.E.Brown@usdoj.gov; krdaly@aol.com; Leonard_B._Rodriguez@who.eop.gov
Subject: RE: Estrada event on Tuesday

I have requested for set-up 30 chairs theatre style with a row in the middle, podium, mike/mult and next to the podium a long table with tablecloth for the documents.
-Elizabeth

-----Original Message-----
From: Miranda, Manuel (Frist)
Sent: Friday, February 14, 2003 5:58 PM
To: Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov; Comisac, RenaJohnson (Judiciary); Benczkowski, Brian A
Cc: Jamie.E.Brown@usdoj.gov; krdaly@aol.com; Leonard_B._Rodriguez@who.eop.gov
Subject: Estrada event on Tuesday

I have called Boyden and Brigitta. I will also call Carlos Iturriagui from Hispanic bar. I am copying Kay

We also have to start thinking about who will produce the copies and assemble interns with boxes.

Rena, I assume we can copy the binder that DOJ recently sent us and place the copies in boxes. We do not need the expense of binders.

We will have to make these copies off campus and the expense carried/shared by an outside group. Barbara/ Kay?

Rena and Barbara, we need you to provide interns.

Leonard, can you provide bodies? Also send us a schedule of Hispanic events for the next two weeks.

-----Original Message-----
From: Ledeen, Barbara (Republican-Conf)
Sent: Friday, February 14, 2003 5:24 PM
To: Miranda, Manuel (Frist); Keys, Elizabeth (Republican-Conf); Comisac, RenaJohnson (Judiciary); Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

yes but you have to clear with boyden because he has that federalist society debate too.

-----Original Message-----
From: Miranda, Manuel (Frist)
Sent: Friday, February 14, 2003 5:16 PM
To: Keys, Elizabeth (Republican-Conf); Comisac, RenaJohnson (Judiciary); Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Ledeen, Barbara (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

Brigitta Benitez from Republican National Lawyers Assoc and Carlos Iturriagui from the Hispanic Bar Association,...and then Boyden and Kay.

Does that work?

-----Original Message-----
From: Miranda, Manuel (Frist)
Sent: Friday, February 14, 2003 4:22 PM
To: Comisac, RenaJohnson (Judiciary); Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

We are looking at Boyden and Kay Daly and maybe Tom Jipping. It is developing that these boxes will come from concerned citizens that see that the Senate Democrats need help.

-----Original Message-----
From: Comisac, RenaJohnson (Judiciary)
Sent: Friday, February 14, 2003 3:29 PM
To: Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Miranda, Manuel (Frist); Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

Who is going to speak at this press conference?

-----Original Message-----
From: Dinh, Viet [mailto:Viet.Dinh@usdoj.gov]
Sent: Friday, February 14, 2003 3:22 PM
To: Brown, Jamie E (OLA); Benczkowski, Brian A; Miranda, Manuel (Frist); 'Brett_M._Kavanaugh@who.eop.gov'; Delrahim, Makan (Judiciary); Comisac, RenaJohnson (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); 'wgrubbs@who.eop.gov'
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

Sounds good to me; we have the copies ready to transmit.

-----Original Message-----
From: Miranda, Manuel (Frist) [mailto:Manuel_Miranda@frist.senate.gov]
Sent: Friday, February 14, 2003 3:12 PM
To: Brown, Jamie E (OLA); Benczkowski, Brian A; Dinh, Viet; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Comisac, RenaJohnson (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: Estrada event

Folks,

We would like your input on the idea that Heather first floated that we would like to work on for Tuesday implementation. Some of you may already be in the loop.

The idea is to have a press event to provide a visual and keep whatever little attention we can on the Estrada nomination over Recess.

We would announce an Estrada press conference at 2 pm on Tuesday in Mansfield (SRConf to do) and start the event by having 10 interns walk in with boxes containing 49 copies of all Estrada Supreme Court filings.

We would separately also communicate to Dem staffs to drop by Mansfield at 2 pm to Pick up the Estrada writings. And we tell the press that we did

A possible drawback is that Dems will spin this as "they are only doing this now." But rather, we would announce that these writings are publicly available and have been available for review for over two years, and many were delivered already to the JC, and we are going to the trouble of making sure every Democrat Senator and staff has them to read over the whole Recess week...so we can vote when we return.

Ideas?

Manny

From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
BCC: Brett M. Kavanaugh (Brett M. Kavanaugh/WHO/EOP [WHO])
Sent: 3/18/2003 10:53:29 AM
Subject: : For use and not distribution.
Attachments: P_2CBSE003_WHO.TXT_1.html

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Miranda, Manuel (Frist)" <Manuel_Miranda@frist.senate.gov> ("Miranda, Manuel (Frist)" <Manuel_Miranda@frist.senate.gov> [UNKNOWN])
CREATION DATE/TIME:18-MAR-2003 15:53:29.00
SUBJECT:: For use and not distribution.
BCC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

Please see information below. Also, Kennedy speech about the precedent for legal memos from the Kleindeinst nomination. Also, precedent based on a Robert Jackson quote from 1941 and Kuhl's memos regarding Bob Jones University which were disclosed by the Justice Department to the Finance Committee in the 1980s.

In response to this morning's letter, Dem staffers say that they have confidential information that you all have reviewed the files.

_____

Points they make:

- Rather than face the facts of past precedent and begin a process of negotiating the terms of the release to the Senate of the memos written by Miguel Estrada, Republicans insist on asserting, without any factual basis, that the appeal memos written by attorneys to the Solicitor General were stolen or leaked. This claim defies the facts and is very, very misleading. They alternatively claim that only a few memos have been disclosed but only in narrow circumstances related to claims of criminal misconduct or malfeasance. Again, that is false. Now the Justice Department claims that not even it has reviewed Estrada's memos, implying that this is how sensitive such documents are. Past Justice Department acted much more responsibly and responsively. Here are just a few examples.

- Here are just five examples that clearly refute the Republicans' incorrect claims. Correspondence from the Senate Judiciary Committee clearly shows that memos by attorneys have been requested and provided by prior Administrations that were far more cooperative with the Senate in nominations.

- Past examples include the nominations of Robert Bork to the Supreme Court, William Rehnquist to the Supreme Court, Bradford Reynolds to a term-appointment as Associate Attorney General, Stephen Trott to the Ninth Circuit, and Ben Civiletti to be Attorney General.

First, it is clear that the Reagan Justice Department provided numerous memos to the Senate in the Bork nomination regarding school desegregation cases.

In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos. Included in this request was what was identified as request number 9. That request asked for the Justice Department to provide to the Senate, and I will quote that paragraph in its entirety:

"All documents constituting, describing, referring or relating in whole

or in part to Robert H. Bork ans any study or consideration during the period 1969-1977 by the Executive Branch of the United States Government or any agency or component thereof of school desegregation remedies. (In addition to responsive documents from the entities described at the beginning of this request, please provide any responsive documents in the possession, custody or control of the U.S. Department of Education or its predecessor agency, or any agency, component of document depository thereof.)"

- I think we can all agree that this was a very exhaustive request for all documents on school desegregation cases and deliberations for an 8-year period from 1969 to 1977. It is also apparent that there was no allegation of wrongdoing or malfeasance as the predicate of this request.

? The request for these memos was merely an effort to understand the Department's position on these important issues and Bork's involvement in suggesting or taking litigation positions on this issue in response to recommendations by Department attorneys as well as information from the client agency in school desegregation cases, what was then known as the Health, Education, and Welfare Department (known as HEW).

? What was the Reagan Administration's response?

? Did they say -like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? Did they assert that this would chill Justice Department and HEW attorneys from candidly discussing cases? No.

? Did they assert that the request was too broad or some sort of fishing expedition that it wanted to ignore? No.

? Did they claim that they could not even look at those sensitive legal memos? No!

? Well, what did they say then? They said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? That is already far more cooperation than this Senate has received from this Administration.

? Here is what the Justice Department said specifically about the request for information about school desegregation cases, and I will quote it in its entirety so that there can be no mistake:

"Our search for documents responsive to request number 9 has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files of every case handled by the Civil Rights Division or Civil Division, between 1969 and 1977, which concerned desegregation of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled responsive documents obtained from other Department files.

The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW."

? So, the Reagan Justice Department conducted an exhaustive review of its litigation files and assembled the documents responsive to the Senate's request. This stands in marked contrast to the stonewalling of the current Justice Department.

? What happened next to the boxes of school desegregation memos assembled by the Reagan Justice Department?

? On September 2, 1987, nine days after reporting to the Senate on its efforts to locate and assemble documents responsive to the Senate's request, the Department of Justice sent Chairman Biden a letter, stating:
"Attached is one set of copies of documents assembled by the Department in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork. . . ."

? So, it is clear that the Justice Department transmitted all of the documents not objected to (specifically, not a handful of Watergate documents objected to be Nixon's lawyer).

? What were those school desegregation documents? I have in my hand a sample of the documents provided by the Justice Department to the Senate during the Bork nomination regarding school desegregation.

? For example, there is a memo from Assistant Solicitor General Frank Easterbrook (then acting in the same capacity as Mr. Estrada, now a judge on the Seventh Circuit). In this memo, Easterbrook analyzes school desegregation efforts in Philadelphia. In this memo to the Solicitor General, Robert Bork, Easterbrook states: "The Civil Rights Division and I recommend AMICUS PARTICIPATION in support of petitioner."

? Easterbrook suggested that the Third Circuit's decision in Vorcheimer v. School District of Philadephia, that the local schools were "separate but equal" in this case involving a female student seeking entry could adversely affect the enforcement of Title IX and amendments prohibiting sex discrimination in education. In the memo, one can see Easterbrook's analysis of whether discrimination based on sex should be reviewed under a strict scrutiny standard or the lowest level of review, which is known as rational basis review.

? Attached to that memo is the memoranda of the Acting Assistant Attorney General for the Civil Rights Division, Stanley Pottinger.

? Another example of a school desegregation memo to the Solicitor General disclosed in the Bork nomination involves the desegregation of Nebraska schools in the case of United States v. School District of Omaha. In that case, the memo to Solicitor General Bork argued that the Civil Rights Division should be permitted to appeal an adverse decision by the district court in Nebraska that found erroneously that the school district's segregation was not based on intent to segregate. That memos analyzes why the decision below was wrong and why the law should be corrected to reflect a better understanding of the standards for finding unlawful segregation based on race.

? Specifically, the author of that memo argues that "We believe that an appeal of the district court's decision in this case is essential in order to develop the law on the issue of proof necessary to establish a showing of intent to segregate in a northern school system."

? We believe Mr. Estrada's memos contain similar suggestions about how the law should be developed, which reflect his unscripted views of the state of the law and its direction.

? Yet another memo disclosed in the Bork nomination involves the case of Lee and United States v. Demopolis City School System, relating to desegregation in Alabama. That memo to Solicitor General Robert Bork requests authority to appeal a lower court decision refusing to desegregate elementary schools, one white and one African American, as well as dismantling of the segregation state-wide.

? These are just a few of the memos provided to the Senate by the Justice Department during the Bork nomination relating to school desegregation (with all of those busing cases between 1969 and 1977 enforcing Brown v. Board). They were clearly provided as part of the Justice Department's submission of memos requested by the Senate in document request number 9, which I read in full earlier.

? One would think this would be enough evidence to refute the groundless claims of Republicans that memos from lower level attorneys written to the Solicitor General have never been provided in past nominations or that the above memos were stolen(!), but there is even more evidence.

? A second example also comes from the Bork nomination.

? In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos.

? Included in this request was what was identified as request number 10. That request asked for the Justice Department to provide to the Senate, numerous "documents constituting, describing, referring in whole or in part to the participation of Solicitor General Robert H. Bork in the formulation of the position of the United States . . . ."
? In the Solicitor General's office, line attorneys (Assistant Solicitors General, in the same role as Estrada) write the recommendations to the Solicitor General analyzing what the law is or should be and whether the case would help move the law in one direction or another.

? In those appeals, a lower level attorney would write a memo making the recommendation, that memo would be reviewed by a direct supervisor and then submitted to the Solicitor General who would then make an oral decision whether to accept the recommendation to appeal (or intervene as amicus) or not. Upon reviewing those attorney memos, a Senate staffer would then examine whether the Solicitor General accepted the recommendation and, if so, whether they took the same position in the publicly filed briefs on appeal as amicus.

? If the recommendation were accepted and appeal or amicus were authorized, then the lower attorney would be asked to write briefs (or even lower, like the Civil Division) consistent with the decision of the SG. Those briefs would be edited by direct supervisors (not the SG) and then would be reviewed by a head of the office (for example, the SG if the brief were going to the Supreme Court, or a Deputy in the Civil Division if the case were going to a circuit court, such as the 9th Circuit).

? Many of the memos relating to appeal requested and provided in Bork's nomination were written to Bork, not by Bork.

? What was the Reagan Administration's response to the request of memos by line attorneys to Solicitor General Bork?

? Did they say -like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? Did they assert that the request was some sort of fishing expedition that it wanted to ignore? No.

? Did they assert that they could not even look at the attorney memos to the Solicitor General? Of course not.

? Well, what did they say then?

? On August 20, 1987, Chairman Biden's staff noted that the Justice Department had created three categories of documents. First, those which they would not release due to executive privilege claims [by Nixon's counsel related to some Watergate documents]. Second, those they would release with limited access by staff, and, third, those to which the Senate would have unlimited access. The current administration has made no such overture to this Senate.

? The Reagan Justice Department also said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? Again, that is already far more cooperation than this Senate has received from this Administration.

? Here is what the Justice Department said specifically about request number 10: "We have assembled case files for the cases referred to in question 10, with the exception of Hill v. Stone, for which there is no file." The also said "A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession."

? Again, this is far more cooperation than this Justice Department has provided.

? The Justice Department did, however, express some concerns about internal deliberations, but it still provided the informationrequested.

? Here is the complete statement of the Reagan Justice Department on the issue of providing memos involving internal deliberations:
"As you know, the vast majority of the documents you have requested reflect of disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities."

? According to that letter, "For these reasons, the Justice Department and other executive agencies have consistently taken the position, in Freedom of Information Act [which, as an aside-from Lisa, expressly does not apply to Congress nor limit Congress' authority to seek information from the Executive Branch in any way whatsoever. 5 U.S.C. 552(d) (stating expressly that FOIA "is not authority to withhold information from Congress")] and other request, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications."

? Immediately after stating this, the Reagan Justice Department stated:
"On the other hand, we also wish to cooperate to the fullest

extent possible with the Committee and to expedite Judge Bork's confirmation process."

? The Justice Department then indicated that it was providing the documents requested except those specifically objected to (relating to documents regarding Watergate objected to by Nixon's lawyer).
? Then on September 2, 1987, the Justice Department sent the Senate a letter stating here "is one set of copies of documents assembled in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork."

? Then, the next year, the Justice Department asked for the Senate to return the documents requested. Specifically, the Justice Department in a letter by Thomas Boyd on May 10, 1988, reiterated that the documents it provided "reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch." The Justice Department indicated that it provided those memos "to respond fully to the Committee's request and to expedite the confirmation process." The Department then asked for the return of all documents that except those "that are clearly part of the public record (e.g., briefs and judicial opinions) or that were specifically made part of the record of the hearing."

? Let's contrast that with the position of this Justice Department. In a letter dated June 5, 2002, the Bush Justice Department stated that "the Department has a longstanding policy-which has endured across Administrations of both parties-of declining to release publicly or make available to Congress the kinds of documents you have requested."

? In fact, the opposite is true. The long-standing practice of the Justice Department has been to follow a "policy of accommodation." Senator Schumer put a statement of that policy from the Clinton Administration into the hearing record. That policy provides that it is well established that the Department and the Senate typically work together to find an accommodation to avoid an impasse.

? In fact, the D.C. Circuit has noted that: "The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute . . . . The Constitution contemplates such accommodation." United States v. AT&T, 576 U.S. 121, 127, 130 (D.C. Cir. 1977).
? In fact, in 1982, President Reagan issued a memo to Department heads explaining the policy of accomodation:
"The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with constitutional and statutory obligations of the Executive Branch . .. . . Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving the conflicts between the Branches."

? This is what the current administration is denying and ignoring. This was the policy and practice dating from the Carter Administration (which disclosed the legal memos to and from Benjamin Civiletti to the Senate in the course of his nomination to be Attorney General) through the Reagan Administration (which disclosed the legal memos to the Solicitor General and others in the nomination of Brad Reynolds to be Associate AG, the appeal memos to Bork and other memos by Bork in his nomination).

? The Reagan Administration also provided numerous legal memos to and by William Rehnquist about the broad issues "civil rights and civil liberties," and the first Bush Administration also disclosed internal legal memos related to the special prosecutor decisions in

connection with Stephen Trott's nomination to the Ninth Circuit. The Clinton Administration disclosed a broad range on memos in the oversight process. [In addition, the Justice Department encouraged its nominees to be responsive to every request no matter how intrusive, such as the request for how Margaret Morrow voted in the ballot box on California Referenda and how Marsha Berzon voted on ACLU board meeting issues, among others.]

? A third example, also stems from the Bork nomination.

? In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos, including all memos from 1973 to 1977 relating to Bork's analysis of the President's pocket veto power, in addition to the memos relating to appealing or petitioning for certiorari in pocket veto cases.

? On August 24, 1987, the Justice Department responded that "[a]ll documents responsive to request number 5, concerning pocket veto, have been assembled."

? On September 1, 1987, Senator Kennedy's counsel wrote that the materials produced had not included one of the memos to the Solicitor General in a pocket veto case. The Justice Department responded by conducting further searches and then producing that memo to the Committee.

? A fourth example comes from the Rehnquist nomination. On July 23, 1986 (before the Department shared the memos requested in the Bork nomination), then-Ranking Member Biden asked Chairman Strom Thurmond to provide copies of "all memoranda, correspondence, and other materials prepared by Mr. Rehnquist or by his staff, for his approval, or on which his name or initials appear" from 1969 to 1971 related to "civil rights," "civil liberties," "national security," "domestic surveillance," "wiretapping," "anti-war demonstrators," "executive privilege," and other issues.

? What was the Reagan Administration's response?

? Did they claim that sharing those documents with the Senate would chill deliberations by attorneys about legal policy in these areas? No.

? Did they claim the request was a fishing expedition? No.

? Did they claim that disclosure of documents was only predicated on wrongdoing? No.

? Did these Justice Department officials claim that they did not and could not look at those sensitive legal memos of the Department? Of course not.

? Instead, they accommodated the Senate's request. In a letter dated August 6, 1986, Senator Biden said:
"I wish to express my appreciation for the manner in which we were able to resolve the issue of access to documents which we requested in connection with Justice Rehnquist's confirmation proceedings. I am delighted that we were able to work out a mutually acceptable accommodation of our respective responsibilities."

? Biden then noted that in reviewing the memos provided, "several of the items refer to other materials, most of which appear to be incoming communications" to Rehnquist. Biden then attaches a list of the 14 additional memos.

? That attachment makes clear that voluminous materials were already provided, and it seeks memos from a number of people like Alexander Haig, John Dean, and William Rucklshaus.

? The very next day, the Justice Department responded to Biden's request noting that it had gone "far beyond its routine process to ensure the comprehensiveness of its response." Based on that review, the Justice Department found three other memos related to May Day arrests prepared by Justice Department attorneys as well as another memo. As noted in that letter, "the staff of the Office of Legal Counsel went to extraordinary lengths to ensure that all responsive materials were located, putting literally hundreds of hours into this request."

? The current administration has made no such efforts.

? Yet a fifth example stems from the Reynolds nomination to a short-term appointment to be Associate Attorney General. In that nomination, the Senate requested a wide range of memos, including appeal memos to the Solicitor General (Rex Lee) relating to civil rights. In fact, some of these memos appear in the hearing record.

? For example, Senators placed a memo to the Solicitor General relating to seeking to intervene as amicus in an employment discrimination case called Hishon v. King & Spaulding (involving a gender discrimination claim) as well as memos relating to redistricting cases. None of the Senators present or Mr. Reynolds claimed that such memos were protected or were stolen or leaked as the current administration has claimed about our document request memos.

? In addition, some memos written by Bork himself to President Nixon about broader legal issues were provided, for example, legal memos assessing the pocket veto power, the scope of executive privilege, and how to structure a special prosecutor or independent prosecutor process.

? As noted earlier, in the case of the pocket veto, the Senate received and reviewed both Bork's memo describing his views on the pocket veto power, as well as memos from Assistant SGs or lower level attorneys recommending for or against appeal in litigation challenging the President Nixon's use of pocket veto.

? As you can see, none of these memos related to allegations of malfeasance or criminal misconduct by Bork or others. They simply reflect a desire of Senators to know how Bork approached those (controversial) issues and whether his views influenced litigation moving the law in one direction or another. (SG memos were also provided in Reynolds nomination (to a short-term appointment as Associate AG-not even a lifetime appointment) about the impact of his views on appealing civil rights cases (discrimination cases and school prayers cases for example). A sample of such memos written to the SG was actually published in the hearing transcript. In addition, legal memos written to or from Rehnquist in the Office of Legal Counsel were also provided in his nomination. These are just a few examples.)

- att1.htm
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_2CBSE003_WHO.TXT_1>

Please see information below. Also, Kennedy speech about the precedent for legal memos from the Kleindeinst nomination. Also, precedent based on a Robert Jackson quote from 1941 and Kuhl's memos regarding Bob Jones University which were disclosed by the Justice Department to the Finance Committee in the 1980s.

In response to this morning's letter , Dem staffers say that they have confidential information that you all have reviewed the files.

Points they make:

- Rather than face the facts of past precedent and begin a process of negotiating the terms of the release to the Senate of the memos written by Miguel Estrada, Republicans insist on asserting, without any factual basis, that the appeal memos written by attorneys to the Solicitor General were stolen or leaked. This claim defies the facts and is very, very misleading. They alternatively claim that only a few memos have been disclosed but only in narrow circumstances related to claims of criminal misconduct or malfeasance. Again, that is false. Now the Justice Department claims that not even it has reviewed Estrada's memos, implying that this is how sensitive such documents are. Past Justice Department acted much more responsibly and responsively. Here are just a few examples.

- Here are just five examples that clearly refute the Republicans' incorrect claims. Correspondence from the Senate Judiciary Committee clearly shows that memos by attorneys have been requested and provided by prior Administrations that were far more cooperative with the Senate in nominations.

- Past examples include the nominations of Robert Bork to the Supreme Court, William Rehnquist to the Supreme Court, Bradford Reynolds to a term-appointment as Associate Attorney General, Stephen Trott to the Ninth Circuit, and Ben Civiletti to be Attorney General.

First, it is clear that the Reagan Justice Department provided numerous memos to the Senate in the Bork nomination regarding school desegregation cases.

In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos. Included in this request was what was identified as request number 9. That request asked for the Justice Department to provide to the Senate, and I will quote that paragraph in its entirety:

"All documents constituting, describing, referring or relating in whole or in part to Robert H. Bork ans any study or consideration during the period 1969-1977 by the Executive Branch of the United States Government or any agency or component thereof of school desegregation remedies. (In addition to responsive documents from the entities described at the beginning of this request, please provide any responsive documents in the possession, custody or control of the U.S. Department of Education or its predecessor agency, or any agency, component of document depository thereof.)"

- I think we can all agree that this was a very exhaustive request for all documents on school desegregation cases and deliberations for an 8- year period from 1969 to 1977. It is also apparent that there was no allegation of wrongdoing or malfeasance as the predicate of this request.</o:p>

? ; The request for these memos was merely an effort to understand the Department's position on these important issues and Bork's involvement in suggesting or taking litigation positions on this issue in response to recommendations by Department attorneys as well as information from the client agency in school desegregation cases, what was then known as the Health, Education, and Welfare Department (known as HEW).

? ; What was the Reagan Administration's response?

? ; Did they say –like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? ; Did they claim that past document disclosures were based on a claim of wrongdoing?< span style='mso-spacerun:yes'> No, because that was not true.

? ; Did they assert that this would chill Justice Department and HEW attorneys from candidly discussing cases? No.

? ; Did they assert that the request was too broad or some sort of fishing expedition that it wanted to ignore? No.</o:p>

? ; Did they claim that they could not even look at those sensitive legal memos? No!

? ; Well, what did they say then? They said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? ; That is already far more cooperation than this Senate has received from this Administration.

? ; Here is what the Justice Department said specifically about the request for information about school desegregation cases, and I will quote it in its entirety so that there can be no mistake:

"Our search for documents responsive to request number 9 has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files of every case handled by the Civil Rights Division or Civil Division, between 1969 and 1977, which concerned desegregatio n of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled responsive documents obtained from other Department files. The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW."

? ; So, the Reagan Justice Department conducted an exhaustive review of its litigation files and assembled the documents responsive to the Senate's request. This stands in marked contrast to the stonewalling of the current Justice Department.

? ; What happened next to the boxes of school desegregation memos assembled by the Reagan Justice Department?

? ; On September 2, 1987, nine days after reporting to the Senate on its efforts to locate and assemble documents responsive to the Senate's request, the Department of Justice sent Chairman Biden a letter, stating:

"Attached is one set of copies of documents assembled by the Department in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork. . . ."

? ; So, it is clear that the Justice Department transmitted all of the documents not objected to (specifically, not a handful of Watergate documents objected to be Nixon's lawyer).

? ; What were those school desegregation documents? I have in my hand a sample of the documents provided by the Justice Department to the Senate during the Bork nomination regarding school desegregation.

? ; For example, there is a memo from Assistant Solicitor General Frank Easterbrook (then acting in the same capacity as Mr. Estrada, now a judge on the Seventh Circuit). In this memo, Easterbrook analyzes school desegregation efforts in Philadelph ia. In this memo to the Solicitor General, Robert Bork, Easterbrook states: "The Civil Rights Division and I recommend AMICUS PARTICIPATION in support of petitioner."

? ; Easterbrook suggested that the Third Circuit's decision in Vorcheimer v. School District of Philadephia, that the local schools were "separate but equal" in this case involving a female student seeking entry could adversely affect the enforcement of Title IX and amendments prohibiting sex discrimination in education. In the memo, one can see Easterbrook's analysis of whether discrimination based on sex should be reviewed under a strict scrutiny standard or the lowest level of review, which is known as rational basis review.

? ; Attached to that memo is the memoranda of the Acting Assistant Attorney General for the Civil Rights Division, Stanley Pottinger.

? ; Another example of a school desegregation memo to the Solicitor General disclosed in the Bork nomination involves the desegregation of Nebraska schools in the case of United States v. < /font>School District of Omaha. In that case, the memo to Solicitor General Bork argued that the Civil Rights Division should be permitted to appeal an adverse decision by the district court in Nebraska that found erroneously that the school district's segregation was not based on intent to segregate. That memos analyzes why the decision below was wrong and why the law should be corrected to reflect a better understanding of the standards for finding unlawful segregation based on race.

? ; Specifically, the author of that memo argues that "We believe that an appeal of the district court's decision in this case is essential in order to develop the law on the issue of proof necessary to establish a showing of intent to segregate in a northern school system."
? ; We believe Mr. Estrada's memos contain similar suggestions about how the law should be developed, which reflect his unscripted views of the state of the law and its direction.

? ; Yet another memo disclosed in the Bork nomination involves the case of Lee and United States v. Demopolis City School System, relating to desegregation in Alabama. That memo to Solicitor General Robert Bork requests authority to appeal a lower court decision refusing to desegregate elementary schools, one white and one African American, as well as dismantling of the segregation state-wide.

? ; These are just a few of the memos provided to the Senate by the Justice Department during the Bork nomination relating to school desegregation (with all of those busing cases between 1969 and 1977 enforcing Brown v. Board). They were clearly provided as part of the Justice Department's submission of memos requested by the Senate in document request number 9, which I read in full earlier.

? ; One would think this would be enough evidence to refute the groundless claims of Republicans that memos from lower level attorneys written to the Solicitor General have never been provided in past nominations or that the above memos were stolen(!), but there is even more evidence.

? ; A second example also comes from the Bork nomination.

? ; In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos.

? ; Included in this request was what was identified as request number 10. That request asked for the Justice Department to provide to the Senate, numerous "documents constituting, describing, referring in whole or in part to the participation of Solicitor General Robert H. Bork in the formulation of the position of the United States
. . . . "

? ; In the Solicitor General's office, line attorneys (Assistant Solicitors General, in the same role as Estrada) write the recommendations to the Solicitor General analyzing what the law is or should be and whether the case would help move the law in one direction or another.

? ; In those appeals, a lower level attorney would write a memo making the recommendation, that memo would be reviewed by a direct supervisor and then submitted to the Solicitor General who would then make an oral decision whether to accept the recommendation to appeal (or intervene as amicus) or not. Upon reviewing those attorney memos, a Senate staffer would then examine whether the Solicitor General accepted the recommendation and, if so, whether they took the same position in the publicly filed briefs on appeal as amicus.

? ; If the recommendation were accepted and appeal or amicus were authorized, then the lower attorney would be asked to write briefs (or even lower, like the Civil Division) consistent with the decision of the SG. Those briefs would be edited by direct supervisors (not the SG) and then would be reviewed by a head of the office (for example, the SG if the brief were going to the Supreme Court, or a Deputy in the Civil Division if the case were going to a circuit court, such as the 9th Circuit).

? ; Many of the memos relating to appeal requested and provided in Bork's nomination were written to Bork, not by Bork.

? ; What was the Reagan Administration's response to the request of memos by line attorneys to Solicitor General Bork?

? ; Did they say –like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? ; Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? ; Did they assert that the request was some sort of fishing expedition that it wanted to ignore? No.

? ; Did they assert that they could not even look at the attorney memos to the Solicitor General? Of course not. < o:p>

? ; Well, what did they say then?

? ; On August 20, 1987, Chairman Biden's staff noted that the Justice Department had created three categories of documents. First, those which they would not release due to executive privilege claims [by Nixon's counsel related to some Watergate documents]. Second, those they would release with limited access by staff, and, third, those to which the Senate would have unlimited access. The current administration has made no such overture to this Senate.

? ; The Reagan Justice Department also said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? ; Again, that is already far more cooperation than this Senate has received from this Administration.

? ; Here is what the Justice Department said specifically about request number 10: "We have assembled case files for the cases referred to in question 10, with the exception of Hill v. Stone, for which there is no file." The also said "A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession."

? ; Again, this is far more cooperation than this Justice Department has provided.

? ; The Justice Department did, however, express some concerns about internal deliberations, but it still provided the information requested.

? ; Here is the complete statement of the Reagan Justice Department on the issue of providing memos involving internal deliberations:

"As you know, the vast majority of the documents you have requested reflect of disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities."

? ; According to that letter, "For these reasons, the Justice Department and other executive agencies have consistently taken the position, in Freedom of Information Act [which, as an aside–from Lisa, expressly does not apply to Congress nor limit Congress' authority to seek information from the Executive Branch in any way whatsoever. 5 U.S.C. 552(d) (stating expressly that FOIA "is not authority to withhold information from Congress")] and other request, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications."

? ; Immediately after stating this, the Reagan Justice Department stated:

"On the other hand, we also wish to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork's confirmation process."

? ; The Justice Department then indicated that it was providing the documents requested except those specifically objected to (relating to documents regarding Watergate objected to by Nixon's lawyer).

? ; Then on September 2, 1987< /span>, the Justice Department sent the Senate a letter stating here "is one set of copies of documents assembled in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork."

? ; Then, the next year, the Justice Department asked for the Senate to return the documents requested. Specifically, the Justice Department in a letter by Thomas Boyd on May 10, 1988, reiterated that the documents it provided "reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch." The Justice Department indicated that it provided those memos "to respond fully to the Committee's request and to expedite the confirmation process." The Department then asked for the return of all documents that except those "that are clearly part of the public record (e.g., briefs and judicial opinions) or that were specifically made part of the record of the hearing."

? ; Let's contrast that with the position of this Justice Department. In a letter dated June 5, 2002, the Bush Justice Department stated that "the Department has a longstanding policy–which has endured across Administrations of both parties–of declining to release publicly or make available to Congress the kinds of documents you have requested."

? ; In fact, the opposite is true. The long-standing practice of the Justice Department has been to follow a "policy of accommodation." Senator Schumer put a statement of that policy from the Clinton Administration into the hearing record. That policy provides that it is well established that the Department and the Senate typically work together to find an accommodation to avoid an impasse. </p>

? ; In fact, the D.C. Circuit has noted that: "The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute . . . . The Constitution contemplates such accom modation." United States v. AT&T, 576 U.S. 121, 127, 130 (D.C. Cir. 1977).

? ; In fact, in 1982, President Reagan issued a memo to Department heads explaining the policy of accomodation:

"The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with constitutional and statutory obligations of the Executive Branch . . . . Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving the conflicts between the Branches."

? ; This is what the current administration is denying and ignoring. This was the policy and practice dating from the Carter Administration (which disclosed the legal memos to and from Benjamin Civiletti to the Senate in the course of his nomination to be Attorney General) through the Reagan Administration (which disclosed the legal memos to the Solicitor General and others in the nomination of Brad Reynolds to be Associate AG, the appeal memos to Bork and other memos by Bork in his nomination).

? ; The Reagan Administration also provided numerous legal memos to and by William Rehnquist about the broad issues "civil rights and civil liberties," and the first Bush Administration also disclosed internal legal memos related to the special prosecutor decisions in connection with Stephen Trott's nomination to the Ninth Circuit. The Clinton Administration disclosed a broad range on memos in the oversight process. [In addition, the Justice Department encouraged its nominees to be responsive to every request no matter how intrusive, such as the request for how Margaret Morrow voted in the ballot box on California Referenda and how Marsha Berzon voted on ACLU board meeting issues, among others.]

? ; A third example, also stems from the Bork nomination.

? ; In a letter dated August 10, 1987, then Chairman Biden wrote to the Justice Department and requested numerous memos, including all memos from 1973 to 1977 relating to Bork's analysis of the President's pocket veto power, in addition to the memos relating to appealing or petitioning for certiorari in pocket veto cases.

? ; On August 24, 1987, the Justice Department responded that "[a]ll documents responsive to request number 5, concerning pocket veto, have been assembled."

? ; On September 1, 1987, Senator Kennedy's counsel wrote that the materials produced had not included one of the memos to the Solicitor General in a pocket veto case. The Justice Department responded by conducting further searches and then producing that memo to the Committee.

? ; A fourth example comes from the Rehnquist nomination. On July 23, 1986 (before the Department shared the memos requested in the Bork nomination), then-Ranking Member Biden asked Chairman Strom Thurmond to provide copies of "all memoranda, correspondence, and other materials prepared by Mr. Rehnquist or by his staff, for his approval, or on which his name or initials appear" from 1969 to 1971 related to "civil rights," "civil liberties," "national security," "domestic surveillance," "wiretapping," "anti-war demonstrators," "executive privilege," and other issues.

? ; What was the Reagan Administration's response?

? ; Did they claim that sharing those documents with the Senate would chill deliberations by attorneys about legal policy in these areas? No.

? ; Did they claim the request was a fishing expedition? No.

? ; Did they claim that disclosure of documents was only predicated on wrongdoing? No.

? ; Did these Justice Department officials claim that they did not and could not look at those sensitive legal memos of the Department? Of course not.</p>

? ; Instead, they accommodated the Senate's request. In a letter dated August 6, 1986, Senator Biden said:

"I wish to express my appreciation for the manner in which we were able to resolve the issue of access to documents which we requested in connection with Justice Rehnquist's confirmation proceedings. I am delighted that we were able to work out a mutually acceptable accommodation of our respective responsibilities."

? ; Biden then noted that in reviewing the memos provided, “several of the items refer to other materials, most of which appear to be incoming communications” to Rehnquist. Biden then attaches a list of the 14 additional memos.

? ; That attachment makes clear that voluminous materials were already provided, and it seeks memos from a number of people like Alexander Haig, John Dean, and William Rucklshaus.

? ; The very next day, the Justice Department responded to Biden’s request noting that it had gone “far beyond its routine process to ensure the comprehensiveness of its response.” Based on that review, the Justice Department found three other memos related to May Day arrests prepared by Justice Department attorneys as well as another memo. As noted in that letter, “the staff of the Office of Legal Counsel went to extraordinary lengths to ensure that all responsive materials were located, putting literally hundreds of hours into this request.”

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? ; Yet a fifth example stems from the Reynolds nomination to a short-term appointment to be Associate Attorney General. In that nomination, the Senate requested a wide range of memos, including appeal memos to the Solicitor General (Rex Lee) relating to civil rights. In fact, some of these memos appear in the hearing record.

? ; For example, Senators placed a memo to the Solicitor General relating to seeking to intervene as amicus in an employment discrimination case called Hishon v. King& Spaulding (involving a gender discrimination claim) as well as memos relating to redistricting cases. None of the Senators present or Mr. Reynolds claimed that such memos were protected or were stolen or leaked as the current administration has claimed about our document request memos.

? ; In addition, some memos written by Bork himself to President Nixon about broader legal issues were provided, for example, legal memos assessing the pocket veto power, the scope of executive privilege, and how to structure a special prosecutor or independent prosecutor process.

? ; As noted earlier, in the case of the pocket veto, the Senate received and reviewed both Bork’s memo describing his views on the pocket veto power, as well as memos from Assistant SGs or lower level attorneys recommending for or against appeal in litigation challenging the President Nixon’s use of pocket veto.

? ; As you can see, none of these memos related to allegations of malfeasance or criminal misconduct by Bork or others. They simply reflect a desire of Senators to know how Bork approached those (controversial) issues and whether his views influenced litigation moving the law in one direction or another. (SG memos were also provided in Reynolds nomination (to a short-term appointment as Associate AG—not even a lifetime appointment) about the impact of his views on appealing civil rights cases (discrimination cases and school prayers cases for example). A sample of such memos written to the SG was actually published in the hearing transcript. In addition, legal memos written to or from Rehnquist in the Office of Legal Counsel were also provided in his nomination. These are just a few examples.)

From: Ho, James (Judiciary) <James_Ho@Judiciary.senate.gov>
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
CC: Ledeen, Barbara (Republican-Conf) <Barbara_Ledeen@src.senate.gov>
Sent: 3/24/2003 7:15:36 AM
Subject: : RE: Pro-choice op-eds in support of Justice Owen?

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> ("Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> [UNKNOWN])
CREATION DATE/TIME:24-MAR-2003 12:15:36.00
SUBJECT:: RE: Pro-choice op-eds in support of Justice Owen?
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
CC:"Ledeen, Barbara (Republican-Conf)" <Barbara_Ledeen@src.senate.gov> ("Ledeen, Barbara (Republican-Conf)" <Barbara_Ledeen@src.senate.gov> [UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

Great points all -- I was struggling with trying to figure out what she would say (as opposed to what I would say). The Souter comparison, for example, is what Stone said last year. But I will be sure to incorporate all of your other suggestions. Thanks!

James C. Ho
Chief Counsel
Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Chairman, Senator John Cornyn
James_Ho@judiciary.senate.gov
(202) 224-9614 (direct line)
(202) 224-2934 (general office number)

PRA 6

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, March 24, 2003 11:39 AM
To: Ho, James (Judiciary)
Cc: Ledeen, Barbara (Republican-Conf)
Subject: RE: Pro-choice op-eds in support of Justice Owen?

On substance, I had a few thoughts.
-- I think it very odd to compare Owen to Souter and thereby imply that she
is another Souter or would be another Souter on the US Supreme Court.
-- I am not sure the women appointee point works all that well, and I
actually doubt that is the D's "real motivation" here as you say in last paragraph. Indeed, that strikes me as odd given that Clement, Raggi, and others
were confirmed without a problem (and the King being a Republican point seems
quite obscure). It seems to me that double standard is a better theme and to
compare her to McConnell.
-- I am not sure that all legal scholars refer to Roe as the settled law of
the land at the Supreme Court level since Court can always overrule its precedent, and three current Justices on the Court would do so. The point there
is in the inferior court point.
-- It is hundreds not thousands, I believe, who have obtained bypasses.

My 2 cents. Thanks.

(Embedded
image moved "Ho, James (Judiciary)"
to file: <James_Ho@Judiciary.senate.gov>
pic12126.pcx) 03/24/2003 10:14:55 AM

Record Type: Record

To: "Ledeen, Barbara (Republican-Conf)"
<Barbara_Ledeen@src.senate.gov>, Brett
M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Pro-choice op-eds in support of Justice Owen?

Thanks, Brett. I assume that you didn't find anything substantively
problematic
with the op-ed draft, then? I don't expect any problems, but just
wanted to
make absolutely certain in case you had a chance to read it.

Barbara, I called you earlier this morning and left a message. If I
don't hear
back from you soon, I will just go ahead and contact Ann Stone. I won't
proceed
on the others, however. Let's talk whenever you get the chance.
Thanks!

James C. Ho
Chief Counsel
Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Chairman, Senator John Cornyn
James_Ho@judiciary.senate.gov
(202) 224-9614 (direct line)
(202) 224-2934 (general office number)
PRA 6

Brett_M._Kavanaugh@who.eop.gov wrote:
> Her e-mail is PRA 6 I alerted her this morning that someone
may
contact
> her about activity this week. I am good with her doing an op-ed.
>
>
> Record Type: Record
> To: Brett M. Kavanaugh/WHO/EOP@EOP
> cc: barbara_ledeen@src.senate.gov
> Subject: Re: Pro-choice op-eds in support of Justice Owen?
>
> I have a one page press release from Ann Stone, dated 7/23/2002, and
her
> two-page letter to Leahy and Hatch. Manny Miranda confirmed that
neither
was

> submitted into the committee record, so at a minimum we should do
that.
>
> Barbara, should the three of us coordinate this morning on how to
proceed
on
> getting Stone to do the op-ed?
>
> James C. Ho
> 901 North Wayne Street #302
> Arlington, VA 22201
> (202) 224-9614 (direct line)
> (202) 224-2934 (general office line)
> PRA 6
> <JamesCHo@stanfordalumni.org>
>
> At 08:28 a.m. 3/24/2003, Brett_M._Kavanaugh@who.eop.gov wrote:
> >Do you have the letter from last summer? Barbara, have you talked to
Ann?
I
> am
> >happy to do so again if need be, but you all may have done so.
> >
> > (Embedded
> > image moved "James C. Ho" <JamesCHo@stanfordalumni.org>
> > to file: 03/23/2003 01:20:29 PM
> > pic07668.pcx)
> >
> >Record Type: Record
> >To: See the distribution list at the bottom of this message
> >cc:
> >Subject: Re: Pro-choice op-eds in support of Justice Owen?
> >
> >I have a copy of that, which I'd be happy to provide to anyone who's
> interested.
> >I don't know if it was in the committee record last time, but we
should
> >certainly put it in (again) this time.
> >
> >At 12:15 p.m. 3/23/2003, Brett_M._Kavanaugh@who.eop.gov wrote:
> >>Ann Stone was helpful and did letter/release last summer that should
be
in
> >>committee record and can be used thursday.
> >>
> >>.
> >>
> >>----- Original Message -----
> >>From:<JamesCHo@stanfordalumni.org>
> >>To:Makan_Delrahim@Judiciary.senate.gov,
> >> Rena_Johnson_Comisac@Judiciary.senate.gov,
> >> Alex_Dahl@Judiciary.senate.gov,
> >> Manuel_Miranda@frist.senate.gov,
> >> Barbara_Ledeen@src.senate.gov,
> >> viet.dinh@usdoj.gov,
> >> Steve.Koebele@usdoj.gov,
> >> Kristi.L.Remington@usdoj.gov,
> >> Jamie.E.Brown@usdoj.gov,
> >> Brett M. Kavanaugh/WHO/EOP@EOP,
> >> Wendy J. Grubbs/WHO/EOP@EOP
> >>Cc:
> >>Date: 03/22/2003 08:55:30 PM
> >>Subject: Pro-choice op-eds in support of Justice Owen?
> >>
> >>I learned late Friday that, although high-profile, pro-choice women
such
as

> Ann
> >>Stone, Victoria Toensing, and former members of Congress Susan
Molinari
and
> >>Tillie Fowler may be willing to publish op-eds supporting Justice
Owen's
> >>confirmation, apparently no one has yet signed up to help write
them.
> >>
> >>I presume that such op-eds would be very helpful as this Thursday's
executive
> >>business meeting on Justice Owen approaches. Accordingly, please
find
below
> >two
> >>op-eds I drafted *relatively quickly*. The first draft is a more
political
> >>piece perhaps more appropriate to someone like Toensing, Molinari,
or
Fowler;
> >>the second draft is geared more specifically for someone like Ann
Stone.
> >>
> >>In order to ensure proper coordination, I don't plan to do anything
with
these
> >>until Monday morning. If, however, there are no expressions of
concern
or
> >>objection by Monday morning, I will work with Barbara Ledeen on
Monday to
try
> >to
> >>get these to appropriate authors to get them placed in time for
Thursday.
> >>
> >>Thanks, everyone!
> >>
> >>-----
> >>
> >>DRAFT #1
> >>
> >>Democrats Talk About Diversity, But Practice Only Obstruction
> >>
> >> President Bush named two of the nation's top jurists to the
federal
> courts
> >>of appeals, when he announced the nominations of D.C. attorney
Miguel
Estrada
> >>and Texas Supreme Court Justice Priscilla Owen nearly two years ago.
> >>Unfortunately, however, both nominees still await confirmation by
the
United
> >>States Senate.
> >>
> >> Amazingly, Senate Democrats, who repeatedly claimed the mantle
of
> >diversity
> >>when President Clinton was in the White House, have seen fit to
obstruct
both
> >>nominees. They have done so even though, if confirmed, Estrada
would be
the
> >>first Hispanic ever to serve on the D.C. Circuit, while Owen would
increase
> the

> >>diversity on the Fifth Circuit, which represents Texas, Mississippi
and
> >>Louisiana.
> >>
> >> The reason for the Democrats' apparent reversal is simple, if
> disturbingly
> >>crass and partisan. As the Dallas Morning News recently noted,
"Democrats
> >don't
> >>relish giving President Bush one more thing to brag about when he
goes
into
> >>Hispanic neighborhoods during his re-election campaign next year."
Nor
do
> >>Democrats want to give President Bush credit for placing his second
woman
on
> >the
> >>Fifth Circuit.
> >>
> >> Owen's confirmation would give that court four female judges -
all
of
> whom
> >>happen to be Republican or appointed by Republican Presidents.
[FYI:
King, a
> >>Republican, was appointed by Carter.] By contrast, President
Clinton,
who
> >>appointed four judges to the Fifth Circuit, didn't nominate a single
woman
to
> >>that court - a notable record for a party that claims to emphasize
diversity.
> >>
> >> In light of this record, Democrats simply cannot afford to see
President
> >>Bush succeed in confirming Estrada and Owen, for that would
significantly
> >>discredit their claims that the Democratic Party is for some reason
the
party
> >of
> >>women and minorities.
> >>
> >> Of course, Senate Democrats do not, and cannot, admit that this
is
their
> >>real reason for objecting to Estrada and Owen. Yet they have no
real
grounds
> >on
> >>which to object to either candidate. Both are exceptionally
talented and
> >>deserving of confirmation. Indeed, the ABA unanimously rated both
candidates
> >>well-qualified, its highest rating, and what some Senate Democrats
used
to
> call
> >>the "gold standard."
> >>
> >> Thus, instead of arguing the merits of either nominee,
Democrats
have
> >>concocted reasons to object to their confirmation. With respect to

Estrada,
> >for
> >>example, Democrats complain that Estrada has no prior judicial
experience,
> even
> >>though that describes a majority of the current court for which he
has
been
> >>nominated.
> >>
> >> The invented charge against Owen is similarly groundless. Some
Democrats
> >>claim that confirming Owen would somehow threaten a woman's right to
choose an
> >>abortion. As a fervently pro-choice woman who has studied the law
and
Owen's
> >>nine-year record on the Texas Supreme Court, I find the claim
patently
absurd.
> >>
> >> First of all, it is widely understood accepted by legal
scholars
across
> >the
> >>board that Roe v. Wade and its progeny are the settled law of the
land.
> >>Moreover, federal courts of appeals, which are inferior to the
Supreme
Court,
> >>have no power to overturn Supreme Court precedents like Roe v. Wade.
That's
> >why
> >>the Democrat-controlled Senate last year confirmed Professor Michael
McConnell
> >>to the federal court of appeals with unanimous consent, even though
McConnell
> >>(unlike either Owen or Estrada, and like numerous liberal law
professors
and
> >>commentators) has publicly stated that Roe v. Wade was incorrectly
decided.
> >>
> >> Second of all, there is no evidence that Owen is in fact
opposed to
Roe
> v.
> >>Wade. Quite the contrary, she has cited and applied Roe v. Wade and
its
> >progeny
> >>on a number of occasions as a sitting justice of the Texas Supreme
Court.
> >>
> >> The only thing that Owen's opponents have been able to cite, in
their
> >>reckless crusade to transform Justice Owen from a scholarly and
dispassionate
> >>jurist to a lawless, pro-life zealot, are a series of Texas Supreme
Court
> >>decisions involving that state's parental notification statute. But
here
is
> >the
> >>truth about that statute and those rulings:
> >>
> >>
> >>
> >

> >
>

> ---
> Attachment:

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Ashley Snee/WHO/EOP@Exchange@EOP [WHO] <Ashley Snee>;David G. Leitch/WHO /EOP@Exchange@EOP [WHO] <David G. Leitch>;Wendy J. Grubbs/WHO /EOP@Exchange@EOP [WHO] <Wendy J. Grubbs>;Tim Goeglein/WHO/EOP@EOP [WHO] <Tim Goeglein>;Alberto R. Gonzales/WHO/EOP@Exchange@EOP [WHO] <Alberto R. Gonzales>
Sent: 6/5/2003 1:55:10 PM
Subject: : SCt -- interest groups intel

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 5-JUN-2003 17:55:10.00
SUBJECT:: SCt -- interest groups intel
TO:Ashley Snee (CN=Ashley Snee/OU=WHO/O=EOP@Exchange@EOP [WHO])
READ:UNKNOWN
TO:David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@Exchange@EOP [WHO])
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TO:Wendy J. Grubbs (CN=Wendy J. Grubbs/OU=WHO/O=EOP@Exchange@EOP [WHO])
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interesting Ledeen email . . .

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 06/05/2003 05:50 PM ----------

"Ledeen, Barbara (Republican-Conf)" <Barbara_Ledeen@src.senate.gov>
06/05/2003 05:49:08 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, "Matt Schlapp (E-mail)" <mschlapp@georgewbush.com>, "Rodgers, Mark (Republican-Conf)" <Mark_Rodgers@src.senate.gov>
cc:
Subject: spying

I have a friend who is a mole for us on the left. "It" just called to tell me the following news: The Group of 9 (called the G9) which is composed of 9 prochoice groups (Planned Parenthood and NARAL among them) just formed the Joint Emergency Campaign Fund which is solely for the Supreme Court battle. They have put an initial $ THREE MILLION into it which is to be used just for media.

This is separate from the TWENTY MILLION DOLLARS just given Planned Parenthood anonymously-- but it is from Warren Buffet-- for the multiple things but a big chunk of which is for Judges.

They just had a meeting with the Dem staff of the Judiciary Committee and my friend is reporting that neither the democratic judiciary staff nor the groups have done any research the likely presumed nominees.

Therefore, it is important to note that IF we have a nominee, we need to ZIP THAT PERSON RIGHT THROUGH THE PROCESS.....WE CANNOT BEAT 20 MILLION DOLLARS.

Barbara Ledeen

Director of Coalitions
Senate Republican Conference
202-224-2763