S. HRG. 109–435

CONFIRMATION HEARING ON THE NOMINATION OF BRETT KAVANAUGH TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MAY 9, 2006

Serial No. J–109–73

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

27–916 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ARLEN SPECTER, Pennsylvania, *Chairman*

ORRIN G. HATCH, Utah
CHARLES E. GRASSLEY, Iowa
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
SAM BROWNBACK, Kansas
TOM COBURN, Oklahoma

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois

MICHAEL O'NEILL, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Coburn, Hon. Tom, a U.S. Senator from the State of Oklahoma	28
Cornyn, Hon. John, a U.S. Senator from the State of Texas	39
prepared statement	93
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	37
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah, prepared statement	24
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts, prepared statement	98
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	101
Schumer, Hon. Charles E., a U.S. Senator from the State of New York	3
Sessions, Hon. Jeff, a U.S. Senator from the State of Alabama	35
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	1

PRESENTERS

Kozinski, Alex, Judge, U.S. Court of Appeals for the Ninth Circuit, Pasadena, California, presenting Brett Kavanuagh, Nominee to be Circuit Judge for the District of Columbia	8
Stapleton, Walter K., Judge, U.S. Court of Appeals for the Third Circuit, Wilmington, Delaware, presenting Brett Kavanaugh, Nominee to be Circuit Judge for the District of Columbia	7

STATEMENT OF THE NOMINEE

Kavanaugh, Brett, of Maryland, Nominee to be Circuit Judge for the District of Columbia Circuit	10
Questionnaire	13

QUESTIONS AND ANSWERS

Responses of Brett Kavanaugh to questions submitted by Senator Feingold	74

SUBMISSION FOR THE RECORD

American Bar Association, Stephen L. Tober, Chair, Standing Committee on Federal Judiciary, Washington, D.C., statement and attachment	80

NOMINATION OF BRETT KAVANAUGH, OF MARYLAND, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

TUESDAY, MAY 9, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:01 p.m., in room 226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Kyl, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good afternoon, ladies and gentlemen. It is two o'clock and the Judiciary Committee will proceed with the nomination of Brett Kavanaugh to be a judge for the Court of Appeals for the District of Columbia Circuit.

At the outset, we welcome Judge Walter Stapleton, Court of Appeals for the Third Circuit, and Judge Alex Kozinski, Court of Appeals for the Ninth Circuit. We appreciate your coming in today.

Mr. Kavanaugh is in an unusual circumstance of not having Senators to introduce him. He is a D.C.-Marylander, and as of this moment the Senators from his home State of Maryland are not available to make the introductions, and the Committee has asked Judge Stapleton and Judge Kozinski to do that since they have special knowledge of the nominee because he clerked for them. They have special insights into his background.

Just a few words by way of introduction. Mr. Kavanaugh will take the witness stand and will be sworn, and will speak for himself, but I think it appropriate to make a few comments about his record and about my analysis of these proceedings.

I have been surprised to see Mr. Kavanaugh characterized as not up to the job of judge for the Court of Appeals for the District of Columbia Circuit. I have taken a look at his record in some detail, and I had a long session with Mr. Kavanaugh, and have asked him all of the questions which have been posed on his nomination. The issue of the NSA surveillance program, a program that I have raised serious questions about, asked him about what, if anything, he had to do with it, and he will speak for himself in responding to that.

I asked him about the issue of allegations of mistreatment of people on interrogation on the overlay of torture or rendition, and again, he will have an opportunity to speak for himself on that subject.

At our Executive Committee session last week, the question was raised about Mr. Abramoff. He will have an opportunity to speak for himself about that question.

In reviewing his record, I note that he was Yale College for his bachelor's degree, cum laude, and he was Yale Law School, where he was on the Yale Law Journal. Now, that takes some substantial academic qualification, something I know about, because I was there. And the only difference between Mr. Kavanaugh's tenure on the Yale Law Journal and being a high academic graduate from Yale Law School from my record is that when he was there, the competition was tougher. He is slightly younger than I am, and as the years have passed, Yale Law School has been more difficult to attain academic achievement, but that is something I know of firsthand.

Then his record beyond law school was to clerk for Judge Stapleton, to clerk for Judge Kozinski, and they will speak for themselves.

Then he was in the Office of Solicitor General, where he argued one case before the Supreme Court of the United States, and if he were on the Judiciary Committee, it would put him in second place, not too bad a place to be on the Judiciary Committee on Supreme Court arguments. Then he has had a number of arguments on the Court of Appeals and a number of arguments before District Courts on legal issues.

Then he served in the Office of Independent Counsel, and that was a highly controversial office, beyond any question. And Mr. Kavanaugh will describe his activities there, but he was not counsel, he was not deputy counsel. He was one of a tier below, where there were 10 associate or assistant counsels there. I know he will be asked about what his participation was there, and we will hear from Mr. Kavanaugh himself of that.

He has written two distinguished legal pieces published in the journals, one on the Independent Counsel and suggesting changes, hardly the mark of an ideologue who works as Independent Counsel that has tunnel vision as to what they did, but has expressed ways to improve the operation of Independent Counsel, by showing an open mind and showing some progressive thinking as to utilizing his experience.

Then he wrote an article on the issue of peremptory challenges for African Americans and has a—very difficult to use the words "liberal" or "conservative" or "progressive" around here—but he is on the right side of that issue, an issue that I understand well. When I became District Attorney of Philadelphia, I did not need to have the Federal Courts tell me not to have peremptory challenge for blacks. I issued an instruction to my assistants that they could not ask for it, and finally the courts caught up with it. And Mr. Kavanaugh will speak to his views on that subject, but hardly the views of a cramped conservative, but he will describe his views on all of these matters.

Then he went to Kirkland and Ellis, which is a very distinguished law firm. I do not how many people from the Judiciary Committee could be employed by Kirkland and Ellis today, let alone out of law school. Tough row to hoe. And he was taken in as a partner, not an equity partner—it is all complicated now with law firms—a non-equity partner, but that is an unusual call for a firm like Kirkland and Ellis or for any big firm of their nature because of how they evaluated his background and his experience.

He has been Associate Counsel to the President, and now he is Staff Secretary to the President. And if he reflects the views consistent with the President, that is entirely consistent with having the President nominate judges. That is our system. That is decided by an election. But he will speak for himself as to where he stands in the spectrum as to being in the mainstream.

Just a word about the American Bar Association rating. Early he was rated well qualified in the majority, and qualified with the minority camp. And then they reevaluated him 2 years later, and they took some additional interviews, and not surprisingly, the interviews varied. And now he has been rated in the majority, qualified and the minority, well qualified. So you have him moving from well qualified to qualified, qualified to well qualified, and not a tinker's bit of difference really in terms of our evaluation, because at minimal he is qualified, and a great many people think he is well qualified.

Senator Schumer.

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

Senator SCHUMER. Thank you, Mr. Chairman. First let me thank you for holding this hearing, which many of us had requested, and we very much appreciate it.

And second, I want to thank Mr. Kavanaugh for being back here. When we had our private meeting I asked him if he had any objections to come back to, what you good-naturedly referred to as the arena at our last hearing, and you said no, and very much appreciate that. I realize while this is not always the most pleasant exercise for a nominee, I think we can all agree it is a very important one, because we are talking about nothing less momentous than a lifetime appointment to what is generally regarded as the second-most important court in the land, a court of great importance to those of us who sit in the Senate or the House, because it has such jurisdiction over governmental issues, and years after this nomination, this court is going to influence a great deal what this Congress and future Congresses have done.

Now, Mr. Chairman, you know how many of us have deep concerns about this nominee. Just yesterday they were given further voice in the form of the American Bar Association's followup report, which was made public yesterday, which explained why six members of the ABA Committee felt compelled to downgrade their rating.

My concerns are twofold. First, although Mr. Kavanaugh has held several important and influential positions in Government, they have been almost exclusively political. There is no doubt that, Mr. Kavanaugh, you are a highly successful young attorney and

your academic credentials, as certainly outlined by the Chairman, are top notch. But your experience has been most notable, not so much for your blue chip credentials, but for the undeniably political nature of so many of your assignments. For much of your career your considerable talents have been enlisted in partisan and polarizing issues. In short, you have been the "go to" guy among young Republican lawyers appearing at the epicenter of so many high-profile controversial issues in your short career, and it is only natural that such a record would give many Senators pause, particularly those of us on this side of the aisle.

From the notorious Starr report, to the Florida recount, to the President's secrecy and privilege claims to post-9/11 legislative battles including the Victims Compensation Fund, to ideological judicial nomination fights, if there has been a partisan political fight that needed a very bright legal foot soldier in the last decade, Brett Kavanaugh was probably there. That kind of record is not dispositive, to be sure, but it feeds an impression of partisanship that is, to put it mildly, not ideal for a nominee to a critically important lifetime post as a neutral judge.

Now, for those who question the good faith of these concerns, who suggest that some of us are reflexively or unalterably opposed to any Republican involved in the impeachment of President Clinton or other political causes, let me mention two names, Tom Griffith and Paul McNulty. Mr. Griffith, whom I voted to confirm to a seat on the very court to which Mr. Kavanaugh aspires, was Senate legal counsel during impeachment; and Paul McNulty, who I voted to confirm—many of us, I think all of us—voted to confirm to be the No. 2 official at the Department of Justice, was Chief Counsel and spokesman for the House Judiciary Committee Republicans during impeachment.

Despite their blue-chip Republican credentials and participation in hot-button political issues, I was convinced that both of these men had substantial experience in professional and nonpartisan work, so that any concerns about inexperience, cronyism, and partisanship was, for me at least—and I think for most of us on this side of the aisle—laid to rest.

So, Mr. Chairman, we are all operating in good faith here, and we have demonstrated ourselves to be open-minded on the President's nominees to top judicial and executive posts. At last count, we have confirmed 240 of President Bush's nominees, and Democrats have voted for the vast majority of them.

Then there is a second and related concern. Although Mr. Kavanaugh is extremely well credentialed, he is younger than and has had less relevant experience than almost everyone who has joined the D.C. Circuit in modern times. We would have fewer concerns if the President had nominated a mainstream conservative with a record of independence from partisan politics, who has demonstrated a history of nonpartisan service with a proven record of commitment to the rule of law, and who we could reasonably trust will serve justice, not political patrons or ideology if confirmed to this powerful lifetime post. Both Stephen Breyer and Ruth Bader Ginsberg, whose biographies are often cited at these proceedings, had substantial nonpolitical experience before they were nominated to appellate courts. Mr. Kavanaugh, if confirmed, I believe would

be the youngest person on the D.C. Circuit since his mentor, Ken Starr. And if you go through the preconfirmation accomplishments of the active judges who currently sit on the D.C. Circuit, Mr. Kavanaugh's achievements, though impressive, are not on the same scale.

Judge Sentelle, for example, had extensive practice as a prosecutor and trial lawyer, and experience as a State judge and as a Federal district court judge. Judge Randolph spent 22 years with Federal and State Attorneys General offices, including service as Deputy Solicitor General of the United States and a law firm partnership. Judge Rogers had 30 years of service in both Federal and State Governments, including a stint as the Corporation Counsel for the District of Columbia, and several years on D.C.'s equivalent of a State supreme court.

Like Mr. Kavanaugh, many of the 9 active judges on this court held prestigious clerkships, including clerkships on the Supreme Court and involvement at the high levels of Government, that no doubt involved some partisan work. But they all had significant additional experience, nonpartisan experience, to help persuade this Committee that they merited confirmation.

Now, of course, these concerns are echoed in a new report from the American Bar Association. They cannot be dismissed, as some of my colleagues suggest, as merely intemperate rants by Democrats on the Committee, and predictably, of course, some are already launching a campaign to denigrate the ABA, despite boasting of Mr. Kavanaugh's original rating 2 years ago, and attack the character of one of the ABA Committee members, and I hope we would refrain from doing that.

According to the ABA report released yesterday, one judge who saw your oral presentation in court, Mr. Kavanaugh, said, "You were less than adequate," that you had been sanctimonious, and that you had demonstrated experience on the level of an associate. A lawyer in a different proceeding had this to say: "Mr. Kavanaugh did not handle the case well as an advocate and dissembled." That is a pretty serious statement. According to the report, other lawyers—and note the plural—expressed similar concerns, repeating in substance that the nominee was young and inexperienced in the practice of law. Still others—again note the plural—characterized Mr. Kavanaugh as, "insulated," and one in particular questioned Mr. Kavanaugh's ability "to be balanced and fair should he assume a Federal judgeship." And yet another individual said this. He said that Mr. Kavanaugh is "immovable and very stubborn and frustrating to deal with on some issues."

These new concerns, apparently based on some 36 additional interviews, were so serious that six members of the ABA Committee changed their vote. On the phone call yesterday I asked Mr. Tober, the head of the Committee, was it rare for people to change their vote? And he said no. And I said, was it usual? And he said no. So it happens, but it does not happen all that often.

We have other reasons for concern. I must say that I was disturbed by some of the answers I got from you, Mr. Kavanaugh, the first time around. On the issue of the role of ideology and judicial philosophy in the picking of judges by this administration, for example, you repeatedly insisted, totally implausibly, that such con-

siderations played no role. That was simply not believable, and, frankly, put your credibility at issue. You began to clarify your statements in our meeting last week—and I hope we can have further dialog—but to say that an ideology had no effect, well, show me some nominees to high offices, high judicial offices who were Democrats, who were moderates, who were maybe strongly pro-choice—

Chairman SPECTER. Senator Schumer, you are past 10 minutes. How much longer will you be?

Senator SCHUMER. I just have another minute and a half, Mr. Chairman. Thank you.

It was not believable, that is the bottom line. And in addition, Senators will want to ask you, among other things, about your role in setting of policy relating to executive power and the separation of powers. You admitted to me, for example, that in your job as Staff Secretary, you had input on the controversial issue of Presidential signing statements. There will be questions about that. I expect you will also get questions about your involvement, if any, in this administration's detention policies, torture policies and rendition policies. These issues, among many others, deserve further scrutiny, and given the scant record we have, I hope no one will question the good faith we have in asking them.

So, Mr. Chairman, I would say that many of my colleagues and I have a sincere and good faith concern about this nominee. We feel that the nominee is not apolitical enough, not seasoned enough, not independent enough, and has not been forthcoming enough. Maybe this hearing will remove those concerns, but it is certainly necessary.

Last week, Mr. Kavanaugh, I asked you to think of ways to alleviate these concerns, and I look forward to hearing your testimony.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Senator SCHUMER. I just want to say Ranking Member Leahy could not be here at the beginning of this hearing, but will be here in about an hour.

Chairman SPECTER. Thank you, Senator Schumer.

One addendum to my comments. Mr. Kavanaugh also clerked for Supreme Court Justice Anthony Kennedy.

Judge Stapleton and Judge Kozinski, it is our practice to ask our witnesses to be sworn at nomination proceedings, as we had a number of circuit judges sworn during the confirmation of Justice Alito. So with your consent, would you rise and take the oath?

Do you solemnly swear that the testimony you will give before the Judiciary Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge Stapleton. I do.

Judge Kozinski. I do.

Chairman SPECTER. Let the record show both witnesses answered in the affirmative.

Judge Stapleton, you are the first circuit judge for whom Mr. Kavanaugh clerked, so we will begin with you.

PRESENTATION OF BRETT KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY WALTER K. STAPLETON, JUDGE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, WILMINGTON, DELAWARE

Judge STAPLETON. Thank you. Mr. Chairman and members of the Committee, I appreciate the invitation to introduce Brett Kavanaugh. That is not because I think he needs any introduction to this Committee, but rather because I believe I am in a position to share information that is quite probative with respect to the important issue that is before you.

I have been a Federal judge for over 35 years, the last 20 of those years as a member of the Court of Appeals for the Third Circuit, and based on that experience, I believe I understand well what it takes to be able to serve well as a United States Circuit Judge.

I have known Mr. Kavanaugh well for over 15 years. I first met him in March 1989 when I interviewed him for a clerkship. He had one of the most impressive resumes I have ever seen, and believe me, I have seen a lot of resumes. Among other things, as you noted, Mr. Chairman, he was editor of the Yale Law Journal, and at the point in time I met him, he had received an honors grade in every course he had taken at Yale Law School save one. Best of all, the professors who knew him well, assured me that—and I quote—"His work is uniformly of very high quality, thoughtful, independent-minded, yet very balanced, and always clearly written."

I have recently resurrected the notes I made after our lengthy personal interview, and they say, "extremely talented, mature, confident yet modest, good sense of humor." Now, in other words, a judge's dream of a law clerk, and I didn't have to ponder the decision about hiring him for very long. And he certainly did not disappoint, and I will always treasure the time that we shared.

We worked very hard and we were asked to resolve many intractable controversies. Facing challenges like that together promotes a bonding process in which the participants get to know each other awfully well, and we talked at length, not only about the law, and about the challenges we faced, but about his hopes and aspirations for the future.

Toward the end of the clerkship I urged him to consider the judiciary as a career if he should ever have that opportunity, and I did that because I believed he had the makings of my kind of judge. There was no trace of arrogance and no agenda. He applied his legal acuity and common sense judgment with equal diligence to every case, large or small, undertaking his evaluation of each without predilection. His ultimate recommendations were based on careful case-by-case analyses of the facts of each case, and objective application of the relevant precedents. It was clear to me that he understood the crucial role of precedent in a society that's committed to the rule of law.

Brett thanked me for my advice, but in characteristically modest fashion, said he doubted that he would get the opportunity to so serve.

Now, Mr. Kavanaugh, of course, has had a variety of opportunities since that time, as I knew he would. Anyone with his talents

would have many opportunities. As a result, in addition to his impressive legal skills, I believe Mr. Kavanaugh has the sophistication, the insight and maturity that comes from having served in a variety of professional positions, noteworthy not only because of their variety but also because of the awesome responsibilities that each carried.

While I believe all of his professional experience would serve him well as a judge, a substantial portion of that experience renders Mr. Kavanaugh, I believe, exceptionally well qualified in terms of experience. I refer, of course, to the fact that in addition to his exposure to private practice and his service to the President, Mr. Kavanaugh has had substantial litigation experience on both sides of the bench. As you're aware, and as the Chairman has mentioned, he's worked with a one-and-one relationship not only with the two Court of Appeals Judges that are here this afternoon, but also with a Justice of the United States of the Supreme Court and a Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearance before all levels of our Federal courts.

Now, I have stayed in touch with Mr. Kavanaugh, and have followed his career with interest since he left my chambers. I have heard nothing from, and I've heard nothing about Mr. Kavanaugh in the intervening years that has caused me to question in any way my original judgment about the kind of judge he would be if he could have that opportunity. His responsibilities, it's true, from time to time, have called upon him to make—to take positions on issues which reasonable minds could differ about. That's part of being a lawyer. But I believe he has consistently served his client well, and in a thoroughly professional manner.

In sum, members of the Committee, I believe Mr. Kavanaugh's intelligence, his common sense judgment, his temperament, and his dedication to the rule of law, make him a superb candidate for the position of United States Circuit Judge, and I can commend him to you without reservation.

Thank you for this opportunity to address the Committee.

Chairman SPECTER. Thank you very much, Judge Stapleton.

Judge Kozinski.

PRESENTATION OF BRETT KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY ALEX KOZINSKI, JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, PASADENA, CALIFORNIA

Judge KOZINSKI. Good afternoon, Mr. Chairman, members of the Committee. It's a great pleasure and honor for me to be back. Thank you for inviting me to introduce my good friend, my former law clerk, Brett Kavanaugh.

I probably do not need to take my full 5 minutes, because I can just say "me too" to everything that Judge Stapleton said, but let me just take a few minutes, a couple minutes, if I can, to give my own personal view.

I'm glad, Mr. Chairman, that you mentioned that Brett Kavanaugh went to Yale and you and he had that in common. We have that in common too. He went to Yale and I have a son named Yale.

[Laughter.]

Judge KOZINSKI. I tried to get in, but I wasn't as fortunate. I got rejected.

But I have had a number of clerks from Yale and Harvard and many other fine law schools, and among them, Brett Kavanaugh was one of the finest. I met him about the same time that Judge Stapleton met him, in March '89. We both interviewed him for a job for clerkship right out of law school, but Judge Stapleton was just faster making an offer. So I had to pick him up the following year, because he accepted a clerkship with Judge Stapleton first.

I must tell you that in the time that I had Brett clerk for me, I found him to be a positive delight to have in the office. He's really bright and he's really accomplished and he's really an excellent lawyer. But most, virtually all, folks who qualify for a clerkship with a circuit judge these days have those qualities.

But Brett brought something more to the table. He first of all brought what I thought was a breadth of mind and a breadth of vision. He didn't look at a case from just one perspective. Like a good lawyer, like—Mr. Chairman, you were a prosecutor, you know this very well—you have to look at a case from different perspectives, not just one, and not early in the case take one perspective and then stick with it. Brett was very good in changing perspectives. Sometimes I'd take one position and he'd take the opposite, and sometimes we'd switch places. He was very good and very flexible that way.

I never sensed any ideology or any agenda. His job was to serve me and to serve the court and serve the people of the United States in achieving the correct result at the court. And he always did it with a sense of humor and a sense of sort of gentle self-deprecation. He was always—my staff, my secretaries, his co-clerks all enjoyed having him and all enjoyed particularly the fact that he was not in any way pompous or in any way stuck on himself, but was always ready to help others or was ready to be friendly with others.

And I think that's a very important quality in a judge. This may seem trivial and maybe seem like I'm mentioning things here that ought not to be mentioned in a committee, but part of what makes the job of judging different from other jobs is that it is not a mechanical process. It is ultimately a human process. You have to understand something about how people think, something about how people live, something about how people feel. And what I think Brett Kavanaugh brings to the table, what he brought to the table when he was my law clerk, is a sense of humanity and a sense of understanding.

I will not speak to the question of confirmation or nonconfirmation. This obviously is something that is up to the committee. I can only say that I give Brett Kavanaugh my highest recommendation. I gave him my high recommendation when he applied to Justice Kennedy, my own mentor, and I continue to give him the highest recommendations.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Judge Kozinski.

I have just one question for each of you. Judge Kozinski, how old were you when you were appointed to the Ninth Circuit?

Judge KOZINSKI. I was 35 years old, Mr. Chairman.

Chairman SPECTER. Judge Stapleton, how old were you when you were appointed to the Federal bench, first to the district court?

Judge STAPLETON. Thirty-five years old.

Chairman SPECTER. And may the record show that Justice Kennedy was appointed to the Ninth Circuit when he was 38 years old.

Anybody have any questions for the judges? Senator Schumer?

Senator SCHUMER. Just one question for both. Since Mr. Kavanaugh clerked for each of you right after, a year after law school, have either of you had occasion to have him appear before you in your court as a lawyer.

Judge STAPLETON. I have not.

Judge KOZINSKI. Nor have I.

Chairman SPECTER. Thank you very much, Judge Stapleton. Thank you very much, Judge Kozinski. Appreciate your being here.

Judge KOZINSKI. My pleasure.

Judge STAPLETON. Thank you.

Chairman SPECTER. Mr. Kavanaugh, would you step forward for the oath?

If you would raise your right hand. Do you swear that the testimony you will give before the Judiciary Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KAVANAUGH. I do.

Chairman SPECTER. Before beginning your testimony, Mr. Kavanaugh, I note an infant in the audience and what appears to be a mother, and both appear to be wife and child, and perhaps other family. Would you introduce them, please?

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

Mr. KAVANAUGH. Yes.

Thank you very much, Mr. Chairman, for the opportunity to appear here before the Committee. I'm grateful to the President for nominating me to this important—

Chairman SPECTER. Mr. Kavanaugh, there is a question pending, and the question was would you introduce your family.

Mr. KAVANAUGH. Yes.

[Laughter.]

Mr. KAVANAUGH. And I thank my family for being here. Since I last appeared before the Committee, there have been two major changes in my record, and they're both sitting behind me. My wife, Ashley Estes Kavanaugh, and my 8-month-old daughter, Margaret Murphy Kavanaugh. She's watched a little C–SPAN in her day. This is her first live Senate hearing, however. I'm not sure—as you've probably already noticed, Mr. Chairman, I'm not sure she's going to make it very long, but she wanted to be here for the start.

My uncle, Mark Murphy, is here. And my brother-in-law, J.D. Estes, is here. My mom and dad are here, Martha and Ed Kavanaugh. They are, and have been, an inspiration to me. They've been married for 43 years, and I am their only child. I'm just very proud that they're behind me today.

My mom in particular, in terms of career path, has had a profound influence on my career choices. Throughout her life she's been dedicated to public service. When she was in her 20's, she taught public high school in the District of Columbia, at McKinley

and H.D. Woodson high schools. She then decided to go back to law school in the 1970's and became a State prosecutor out in Rockville, Maryland. She was later appointed to the State trial bench by Governor Schaefer and then by Governor Glendening, in Maryland. She's instilled in me a commitment to public service and a respect for the rule of law that I've tried to follow throughout my career.

Mr. Chairman, I'm a product of my parents; I'm also a product of my experiences, and I'd like to take a few minutes to share a few of those experiences and how I think they might shape how I would come to the bench as a judge.

I attended Yale Law School in the late 1980's. It was a challenging yet collegial environment. It was a place that instilled a desire to make a difference. It was a place that encouraged public service. And while I was at Yale Law School I decided, as you know, to seek a judicial clerkship after my time there.

I clerked for Judge Walter Stapleton on the Third Circuit. Judge Stapleton is a gentleman and a scholar. He's an experienced judge, and he's a great friend. If I am confirmed to be a judge, I will do everything in my power to bring to the bench the decency and the good judgment and the collegial manner of Walter Stapleton. And I thank him for being here today.

After I clerked for Judge Stapleton, I clerked for Judge Alex Kozinski on the Ninth Circuit. Judge Kozinski, as many of you know, has a passion for the law. When we started as law clerks, he told us we work for the people and we should consider ourselves on the job 24 hours a day, 7 days a week, 365 days a year. And I can say from personal experience that Judge Kozinski lived up to that promise. We worked very hard, he was very thorough. I thank him for all he's done for me in my career and for coming here today from California. If I am confirmed to be a judge, I would seek to bring to the bench the thoroughness and the thoughtfulness and the dedication to the rule of law that Judge Kozinski has demonstrated on the bench for more than 2 decades.

After I finished those two clerkships, I worked in the Solicitor General's Office at the Department of Justice. I experienced the ethic of that office, that the United States wins its point when justice is done. In that office I had the opportunity for the first time to argue a case in court before the Fifth Circuit Court of Appeals. I was able to stand up for the first time and say Brett Kavanaugh for the United States, a moment that was very proud for me and remains so.

In the October 1993 term of the Supreme Court, I clerked for Justice Anthony Kennedy. Justice Kennedy is a student of history, he's a student of the Supreme Court. He talks often about the compact between generations that the Constitution represents. And he conveyed to his clerks, and certainly conveyed to me—to use one of his favorite phrases—the essential neutrality of the law. I'm forever grateful to Justice Kennedy for the opportunity to clerk for him.

After I finished that clerkship, I worked for Judge Starr in the Independent Counsel's Office. It was a difficult, it was a tough job, it was an often thankless job. In that capacity, I had the opportunity to argue cases before the Supreme Court of the United States and the D.C. Circuit Court of Appeals. I learned some les-

sons in that office. I had some thoughts about how it all operated and, as the Chairman has noted, I tried to make a contribution, the improvement of the public legal system, by writing an article in the Georgetown Law Journal that identified better ways, in my judgment, to conduct investigations of high-level executive branch officials.

I then went to Kirkland & Ellis, where I became a partner, represented institutional clients of the firm, and also did pro bono work for several years.

In 2001, I joined the White House Counsel's Office under Judge Al Gonzales. In that office I did some of the standard work of the office—ethics issues, separation of powers issues. I also worked with many members of the staff of this Committee and other Members of Congress on civil justice issues, such as class action reform, medical liability reform, and the very important terrorism insurance legislation in 2002.

I also worked on judges, on the nomination of judges, and I had the opportunity to help recommend judges to the President of the United States for him to nominate to the Federal courts. In that capacity, on the district court level I worked closely with many members of the Senate and their staffs in the States that I was assigned, including some members of this Committee.

In July of 2003, I became staff secretary to President Bush. This is what I call an honest broker for the President, someone who tries to ensure that the range of policy views on various subjects in the administration are presented to the President in a fair and even-handed way.

I've worked closely with the President and with the senior staff at the White House and other members of the administration for nearly 3 years. I think I've earned the trust of the President, I've earned the trust of the senior staff, that I'm fair and even-handed. This kind of high-level experience in the executive branch has been common for past judicial nominees, especially on the D.C. Circuit, which handles so many important and complicated administrative and constitutional issues.

Mr. Chairman, I have dedicated my career to public service. I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy.

Mr. Chairman, I will be happy to answer any questions. Thank you.

[The biographical information can be found in Senate Hearing No. 108–878, Serial No. 108–69, hearing date: April 14, 2004.]

[The updated biographical information of Mr. Kavanaugh follows:]

February 17, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter:

I have reviewed the Senate questionnaire I completed in connection with my July 2003 nomination to the U.S. Court of Appeals for the D.C. Circuit. I have no updates to any of my answers except to the net worth form. I am updating it to reflect my marriage in July 2004 to Ashley Jean Estes (now Ashley Estes Kavanaugh) and our current net worth.

Sincerely,

Brett M. Kavanaugh

Brett M. Kavanaugh

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks	10k			Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule				Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property	~~40k~~			Credit Cards	25K		
Cash value-life insurance							
Other assets itemize:							
TSP account	70K						
Wife's retirement plan	1K						
				Total liabilities	25K		
				Net Worth	96K		
Total Assets	121K			Total liabilities and net worth			
CONTINGENT LIABILITIES	No			GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No		

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

AO-10 (WP)
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2004

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting *(Last name, first, middle initial)* KAVANAUGH, BRETT M.	2. Court or Organization NOMINEE TO U.S. COURT OF APPEALS FOR D.C. CIRCUIT	3. Date of Report 2-17-05
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)* CIRCUIT JUDGE - NOMINEE	5. Report Type (check appropriate type) ✓ Nomination, Date 2-14-05 ___Initial ___ Annual ___Final	6. Reporting Period 1-1-2004
7. Chambers or Office Address STAFF SECRETARY THE WHITE HOUSE WASHINGTON, DC 20502	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

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

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	ALUMNI BOARD OF GOVERNORS	GEORGETOWN PREPARATORY SCHOOL
2		ALUMNI ASSOCIATION
3		

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

☒ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		
2		

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

A. Filer's Non-Investment Income

☒ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME
1			$
2			$
3			$

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)

☒ NONE (No reportable non-investment income.)

1		
2		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report

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

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

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

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

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

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	NONE (No reportable liabilities.)		
1	FIRST USA/BANK ONE VISA	CREDIT CARD	K
2			
3			
4			
5			

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

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report

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

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
Place "XX" after each asset exempt from prior disclosure	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,									
1 Wife's retirement fund	A		J						
2 from sole employment in Texas									
3									
4 Bank of America Savings	A	Int.	J						
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1 Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	F=$50,001-$100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000	
2 Value Codes (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	
	N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	
	P3=$25,000,001-$50,000,000		P4=More than $50,000,000		
3 Value Method Codes: (See Col. C2)	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	
	U=Book value	V=Other	W=Estimated		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report

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

IX. CERTIFICATION.

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

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

Signature Brett M. Kavanaugh Date 2-17-05

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to

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

Chairman SPECTER. Thank you very much, Mr. Kavanaugh.

We now turn to 5-minute rounds for each Senator.

Mr. Kavanaugh, I begin with the question as to what assurances can you give this Committee and the Senate and the American people about your independence from the President and the White House. I look at a long list of nominees who have voted against their Presidential nominator on many, many celebrated matters. Just a few: Justice Douglas dissented on the *Korematsu* case, the Japanese internment case, against President Roosevelt's policy. Famous decision by Justice Tom Clark turning against Truman on the Steel Seizure case not long after he was nominated. Justice Kennedy, Justice O'Connor disagreeing on a woman's right to choose from President Reagan. Justice Souter disagreeing with President Bush the elder. Famous disagreements that President Eisenhower expressed about Chief Justice Warren. Perhaps the most famous case, Salmon Chase had advocated policies as the Secretary of the Treasury, and then, after being appointed to the Supreme Court, declared unconstitutional the monetary policy he had implemented as President Lincoln's treasurer.

What positive assurances can you give of your independence?

Mr. KAVANAUGH. Mr. Chairman, if confirmed to be a D.C. Circuit judge, I will call them as I see them, regardless of who the litigants may be. I know that independence of the judiciary, as I said in my opening, is a key part of our constitutional system. I would not hesitate in any case to rule the way I saw the case, regardless of who the parties were, regardless of whether the President was involved.

Chairman SPECTER. Would you consider yourself independent in the tradition of the judges, justices whom I've just named?

Mr. KAVANAUGH. Absolutely, Mr. Chairman. I know that there's a long history in our constitutional system of judges being drawn from the executive branch, and I would—

Chairman SPECTER. Mr. Kavanaugh, let me interrupt you. There's a great deal to cover and I only have 5 minutes.

Did you have anything to do with the issues of interrogation of prisoners relating to the allegations of torture in the so-called Bybee memorandum?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Did you have anything to do with the questions of rendition?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Did you have anything to do with the questions relating to detention of inmates at Guantanamo?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Did you have anything to do with Mr. Abramoff and the many visits which he apparently made to the White House?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Do you have anything to do with the President's policy on so-called signing statements?

Mr. KAVANAUGH. Mr. Chairman, signing statements come through the Staff Secretary's Office, and I help ensure that relevant members of the administration have provided input on the signing statements. In the first instance they're drafted in the Jus-

tice Department, but I do help clear those before the President sees them.

Chairman SPECTER. That poses a very difficult and contentious issue which this Committee is going to have hearings on. And I can understand that in your role as coordinator you would have the responsibility for coalescing materials. Did you take any position as to the constitutional authority for the President to limit the substance of legislation by expressing limitations in the signing statements?

Mr. KAVANAUGH. Mr. Chairman, it is common for signing statements, this President and previous Presidents, to identify potential constitutional issues like Appointments Clause issues, Presentment Clause issues, or issues relating to *INS* v. *Chaddha*, for example, the line item veto case. On those matters, I make sure that they have been properly staffed to other members of the White House staff. They come up in the first instance from the Justice Department and the Office of Management and Budget.

Chairman SPECTER. Were you called upon to give the President any advice as to the constitutional implications of the signing statements?

Mr. KAVANAUGH. Well, Mr. Chairman, I think, without discussing internal matters, I think it's common to explain the general parameters of signing statements, for example, that there's been a history of them, and identifying potential constitutional issues in legislation, particularly Appointments Clause, Presentment Clause, and the other issues identified.

Chairman SPECTER. Mr. Kavanaugh, you wrote an article on peremptory challenges, where there had been a practice among prosecutors to issue what are called peremptory challenges—which, for those who do not know, means that a prospective juror can be disqualified without stating any reason, where blacks were eliminated. My time is up and I will quit, but you can answer.

Mr. KAVANAUGH. Mr. Chairman, I think one of the great Supreme Court decisions ever decided was *Batson* v. *Kentucky*. It overruled *Swain* v. *Alabama*, and held that a prosecutor's use of race in striking potential jurors from the jury box was unconstitutional under the Equal Protection Clause of the 14th Amendment.

One of the concerns I had—that was decided in 1986; I was in law school from 1987 to 1990—one of the concerns I had was what procedures will be used to help guarantee that right to be free of racial discrimination in the jury selection procedure. And I wrote a note that advocated certain procedures that help ferret out potential racial bias in the jury selection process.

Chairman SPECTER. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

Just when Senator Specter went over all of the issues, he mentioned torture in connection with the Bybee memo. Were you involved in any way in the Counsel's Office in opining about the proper use of torture?

Mr. KAVANAUGH. No, Senator. The first time I learned of that memo, I believe, was—

Senator SCHUMER. I did not ask about the memo. I asked just in general.

Mr. KAVANAUGH. No, Senator.

Senator SCHUMER. Thank you. OK, I would like to ask you a few questions that you did not answer. These were submitted in writing or orally at the last hearing. I will tell you all of them.

First, Senator Leahy asked you whether Karl Rove was involved in the judicial selection process at any point while you were there. I asked you how you would have voted on the impeachment of President Clinton. Senator Kennedy asked you whether you agreed with Judge Pryor, who called *Roe* v. *Wade* an abomination. And Senator Durbin asked you if you consider yourself in the mold of Scalia and Thomas, which is the mold that the President has said he is going to choose judges in.

First, Rove. Was Karl Rove involved in any of the selection of judges while you were there?

Mr. KAVANAUGH. Mr. Chairman, I think that is a question that the Counsel to the President should answer in the first instance. I don't think as a judicial nominee here I should talk about who was involved. The Counsel to the President chairs the judicial selection committee, and if there is a question about who is involved in recommending judges—

Senator SCHUMER. What we are trying to determine, in the previous time you were here, you said that no ideology was involved in the selection of judges. I do not see why you cannot answer that question. What is improper about answering that question?

Mr. KAVANAUGH. Senator, I will check whether I can answer that question. And if I can, I will provide the answer.

Senator SCHUMER. What would come to mind which would prevent you from answering that question?

Mr. KAVANAUGH. Senator, I just want to be careful that I check with the Counsel on something like that and be sure that there is not an issue before I disclose something in the context—

Mr. KAVANAUGH. Is there any privilege that would prevent you that you can see, that would come to mind right now?

Mr. KAVANAUGH. I can check with the Counsel on that, Senator.

Senator SCHUMER. Do you have knowledge of the answer?

Mr. KAVANAUGH. Well, I was involved in the judicial selection process.

Senator SCHUMER. So you would know yes or no, you just choose not to answer?

Mr. KAVANAUGH. And I would be happy to provide the answer. I just want to check first.

Senator SCHUMER. OK.

Next, how would you have voted—I know you were involved in the impeachment of President Clinton—how would you have voted if you were a Senator?

Mr. KAVANAUGH. Senator, I don't think it's appropriate for the office that submitted the report to comment on whether the House made the proper decision to impeach or whether the Senate made the proper decision not to—

Senator SCHUMER. When lawyers argue cases, all the time they say they are disappointed in the verdict, they are happy with the verdict. That is not a violation of anything, as far as I know, except your desire not to answer the question.

Mr. KAVANAUGH. I guess this gets to an ethic I've learned about prosecutors offices when I worked in the Solicitor General's Office,

that it's not appropriate to comment on a jury verdict. And I don't think it's appropriate in this instance for me, as a member of the Independent Counsel's Office, to comment on whether the House decision was correct or whether the Senate decision was correct.

Senator SCHUMER. In an op-ed in the Washington Post in 1999, you wrote a defense of Ken Starr, where you said "Starr uncovered a massive effort by the President to lie under oath and obstruct justice." You also wrote that, "The word that ordinarily describes such behavior is not 'trapped' but 'guilty.'" You were pretty clear to state your views in 1999, but you do not want to state them now?

Mr. KAVANAUGH. I think that was based on Judge Wright's finding of contempt, and there was also a censure resolution introduced in the Senate that used some more language. So I think the language there, it was a joint op-ed.

Chairman SPECTER. But you just said you did not think it was appropriate to answer. And you felt it very appropriate, in a similar role, to answer, to make some very strong statements then.

Mr. KAVANAUGH. I think this goes to a key point, Senator, which is impeachment and then conviction take into account more than just the facts. As you know from participating on the House side at the time and the Senators know from participating on the Senate side, there were—

Senator SCHUMER. I participated in votes.

Chairman SPECTER. Now, let him finish his answer, please.

Senator SCHUMER [continuing]. On both sides.

Mr. KAVANAUGH. On both sides, that's right, Senator. And I think, as many of the Senators and House members discussed at the time, it wasn't just a simple question of whether there was a violation of law committed, but there were broader considerations for the country. And that's where it really gets, really gets, I think, improper for someone in the Independent Counsel's Office to say whether they think the President should have been impeached.

Senator SCHUMER. I fail to see the distinction. Let me ask you to answer, since my time is ending here, the two other questions. Do you consider *Roe* v. *Wade* to be an abomination? And do you consider yourself to be a judicial nominee, like the President said he was going to nominate people, in the mold of Scalia and Thomas?

Mr. KAVANAUGH. Senator, on the question of *Roe* v. *Wade*, if confirmed to the D.C. Circuit, I would follow *Roe* v. *Wade* faithfully and fully. That would be binding precedent of the Court. It's been decided by the Supreme Court—

Senator SCHUMER. I asked you your own opinion.

Mr. KAVANAUGH. And I'm saying if I were confirmed to the D.C. Circuit, Senator, I would follow it. It's been reaffirmed many times, including in *Planned Parenthood* v. *Casey*.

Senator SCHUMER. I understand. But what is your opinion? You're not on the bench yet. You've talked about these issues in the past to other people, I'm sure.

Mr. KAVANAUGH. The Supreme Court has held repeatedly, Senator, and I don't think it would be appropriate for me to give a personal view of that case.

Senator SCHUMER. OK, you are not going to answer the question. How about being in the mold of Scalia and Thomas?

Mr. KAVANAUGH. I don't want to talk about current members of the Court, but I do think I can describe some of the justices or judges in the past that I think I would try, that have been role models to me, including Justice White, Justice Jackson, and for a couple of reasons. They were people who took an active part in our Government system, which is some—

Senator SCHUMER. I understand. Just explain to me why it is appropriate for the President to say that he will appoint nominees in a particular mold, but you cannot answer whether you would be part of that.

Mr. KAVANAUGH. As a potential inferior court judge, Senator, on the D.C. Circuit if confirmed, I just don't want to talk about currently sitting members of the Supreme Court. I'm happy to talk about Justice Jackson and Justice White, if you'd like.

Senator SCHUMER. OK. I wish I could say it, but I do not think you have clarified any of these answers that we asked you the first time.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Hatch.

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

Senator HATCH. Well, thank you, Mr. Chairman.

Welcome again to the Committee. You are one of the few who have had this great experience of being brought back here twice. Let me just take a—

Mr. Chairman, I would like to take most of my time to make just a few comments rather than to ask questions at this time.

I think that during his first hearing 2 years ago in 2004 and his written submissions afterwards, Mr. Kavanaugh more than adequately answered all the questions that had been posed to him. The Committee already has a 159-page hearing record before it on this nominee. And I am confident in Mr. Kavanaugh's abilities and capacities in both the understanding and knowledge of the law. I suspect that he will continue to show his intellect, sound judgment, and judicial temperament.

I have no doubt that Mr. Kavanaugh fully appreciates the proper role and limitations placed on Federal appellate judges in our constitutional system. And while I am not pleased with all the circumstances that have resulted in holding this unusual if not unprecedented second hearing, I take solace in the fact that Chief Justice Roberts, whom many in the public and a super-majority of Senators found to be an extremely capable individual after his confirmation hearings last September, was also subject to two confirmation hearings before he was able to sit on the D.C. Circuit. I hope that Brett Kavanaugh's confirmation will not be delayed as long as now-Chief Justice Roberts's was. He was delayed for 11 solid years, between the time that the first President Bush nominated him and the time that the second President Bush, our current President, renominated him.

Now, while today's hearing will and should concentrate and focus on qualifications of Brett Kavanaugh to serve on the D.C. Circuit

Court of Appeals, when you see nominees with the backgrounds of John Roberts and Brett Kavanaugh having been held up for so many years for so little reason, sometimes you have to ask yourself if there may be motivations at play that have nothing at all to do with the nominee's actual fitness to sit on the bench. To date it has been almost 3 years since Mr. Kavanaugh was first nominated. I think it is time to vote on his nomination, and frankly it is past time for the Senate to vote on Mr. Kavanaugh's nomination.

So at this point, I would like to welcome you, Mr. Kavanaugh, your wife and baby and of course your family. Since the last time before this Committee, you have become a husband and father, and I join in welcoming Mrs. Kavanaugh here and your 8-month-old daughter Margaret to the Committee.

I also want to acknowledge the presence of Mr. Kavanaugh's parents. I have known them for a long time. Ed Kavanaugh for many years, he headed up the major trade association, the Cosmetic, Toiletries, and Fragrance Association, and he is deservedly admired by many in this town. And his mother served with distinction as a State court judge in Maryland for many, many years.

Sometimes in these confirmation hearings, in the rush to get to more controversial matters, there is a tendency to skip over too quickly on the qualities and attributes that led the President to nominate the individual—and in this case, Mr. Kavanaugh—in the first place. And I think Senator Specter has already given us an overview of the nominee's impressive educational and employment background. We have also heard the testimony of two excellent Federal court judges for whom he clerked, both of whom I know—Judge Kozinski of the Ninth Circuit and of course Judge Stapleton of the Third Circuit Court of Appeals. I think we should weigh their words very carefully. These are people of impeccable reputations and ability on the bench.

Not only did you distinguish yourself as a clerk on two appellate courts, but you also served as a clerk on the Supreme Court. You had an academic career that was pretty impressive as well, at Yale. You've had a series of impressive and highly responsible jobs in both the executive branch and in the private sector. And you're a talented appellate advocate as well before the Supreme Court.

Now, let me just say—my time is running out, but in addition to your three judicial clerkships, as you have mentioned, you worked in the Solicitor General's Office, in the Department of Justice, with Ken Starr, and of course with the Office of Special Counsel. And of course nobody should judge you as an attorney for having worked in something that was as unpleasant as that. Attorneys work on unpleasant matters in many ways, and you would be a pretty doggone poor attorney if you were not willing to work with distinction and with fairness when called upon to do so. And I think knowing you and knowing what happened in the Clinton matter, you served with distinction and fairness.

My time is about up so I just—I will make some more comments if we have another round, but I just want to congratulate you for standing in there and being willing to serve on the circuit court of appeals. I know you could make a fortune on the outside, but you have made public service your life and I do not see how we can find a better person to serve and give public service than you. So I just

want to personally express my fondness for you, my high admiration for you, and the fact that you will have my support in every step of this process.

Chairman SPECTER. Thank you, Senator Hatch.

Under the early bird rule, on the side for the Democrats are Senator Feinstein, Senator Durbin, Senator Kennedy, Senator Feingold, and on the Republican side are Senator Coburn, Senator Graham, Senator Sessions, and Senator Kyl. So under the early bird rule we now turn to Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Kavanaugh, thank you for returning. In 2003, Jay Bybee was confirmed to a seat on the Ninth Circuit. A year and a half later, we learned he had authored the infamous torture memo when he headed the Justice Department's Office of Legal Counsel. In the memo he claimed the President has the right to ignore the law that makes torture a crime and narrowly defined torture as abuse that causes pain equivalent to organ failure or death.

The torture memo was requested by, addressed to the then-White House Counsel, Alberto Gonzales. So clearly the White House Counsel's Office knew that Mr. Bybee had authored the torture memo at the time of his nomination. Did you know that Mr. Bybee authored the torture memo or similar memos at the time of his nomination?

Mr. KAVANAUGH. No, Senator, I think you're referring to the August 1, 2002, memo. I was not aware of that memo until there was public disclosure of it in the news media, I think in the summer of 2004.

Senator DURBIN. The administration has now repudiated the memo. In retrospect, should the fact that Mr. Bybee authored the torture memo have disqualified him from consideration as a nominee?

Mr. KAVANAUGH. Senator, I don't think, sitting here as a prospective judge, as a nominee to a court of appeals, I should talk about another sitting judge and whether that person should or should not have been nominated. I just don't think that's a proper role for me.

Senator DURBIN. But you see that is what we are struggling with here. We do not have a number of cases that you have argued before a court, because you haven't. We do not have trials that you have taken to a jury verdict, because there are none. We have to rely on what you have done with your life and where you have been to try to determine what your values are. Senator Schumer asked you a series of questions related to the work of your life, which you did not feel were appropriate to answer. And now I am trying to plumb that same type of well to find out what you really believe and who you are. And every time we get close, you say sorry, I can't answer. That is a problem for a person seeking a seat on the second-highest court in the land. I do not know where to go in questioning you. You do not want to talk about what you have done that might have any political implication. And frankly, when it comes to legal work, there is not much to turn to. Do you see the problem we are facing?

Mr. KAVANAUGH. Senator, on that memo, I can say that the administration has repealed that memo. I agree with that decision. I do not believe the analysis in that memo was correct. I think that

memo did not serve the presidency or this President well. And I am willing to talk about the memo itself.

Senator DURBIN. Well, let me ask you. You were in charge of judicial nominations, or at least involved in judicial nominations with the White House. And that is why we are going into this. Let's go to another nominee and see if you might respond to this.

In September 2003, the President nominated William Haynes to be a judge on the Fourth Circuit. As General Counsel to the Department of Defense, Mr. Haynes had been the architect of the administration's discredited detention and interrogation policies. For example, Mr. Haynes recommended that Secretary Rumsfeld approve the use of abusive interrogation techniques, like threatening detainees with dogs, forced nudity, and for forcing detainees into painful stress positions. During the 108th Congress, Mr. Haynes's nomination stalled after his involvement in this scandal came to light. Just this February, the President decided to renominate him.

What was your role in the original Haynes nomination and decision to renominate him? And at the time of the nomination, what did you know about Mr. Haynes's role in crafting the administration's detention and interrogation policies?

Mr. KAVANAUGH. Senator, I did not—I was not involved and am not involved in the questions about the rules governing detention of combatants or—and so I do not have the involvement with that. And with respect to Mr. Haynes's nomination, I've—I know Jim Haynes, but it was not one of the nominations that I handled. I handled a number of nominations in the Counsel's Office. That was not one of the ones that I handled.

Senator DURBIN. So let me try this approach and see if we can learn a little more. Manny Miranda was an employee of the Senate Judiciary Committee on the Republican staff and then on the Senate Majority Leader's staff. He hacked into the computers of the members and staff of this Committee, stealing thousands of documents and memoranda which were then shared with others. Did you know Manny Miranda, or do you know him today?

Mr. KAVANAUGH. I knew Manny Miranda because he was a member of Senator Hatch's staff and then Senator Frist's staff working on judicial nominations.

Senator DURBIN. Did you ever work with him in terms of judicial nominations?

Mr. KAVANAUGH. He was part of a group of Senate staffers that did work on judicial nominations with people at the Department of Justice and the White House Counsel's Office. We talked about this last time. I did not know about any memos from the Democratic side. I did not suspect that. Had I known or suspected that, I would have immediately told Judge Gonzales, who I'm sure would have immediately talked to Chairman Hatch about it. Did not know about it, did not suspect it. He was part, however, of the staff, of course, that worked on judicial nominations, including with—on both sides.

Senator DURBIN. My time is up. But I think one of the problems you had with the American Bar Association when they downgraded your rating was they thought you were dismissive of this, that you did not take this as a serious problem, that a Republican staffer had broken into the computers of Democratic Senators and their

staff, were stealing documents and sharing them with those who were plotting the strategy for the White House. Would you like to respond as to whether or not you think this was a serious matter, perhaps criminal?

Mr. KAVANAUGH. Senator, I don't know what the American Bar Association said about that, but I know what I told them and what I've told the Committee. Had I known or suspected anything like that, I would have immediately told Judge Gonzales, who I'm sure would have immediately called Chairman Hatch. I know the matter has been under investigation in the Senate. I know the matter has been under investigation by a special prosecutor. That is a serious matter. And that is what I said to the American Bar Association and that's what I'm saying to this Committee.

So that's my view on the matter.

Senator DURBIN. Thank you.

Chairman SPECTER. Thank you very much, Senator Durbin.

Senator Coburn.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Thank you, Mr. Chairman.

I just want to put a few points into the record. Of the 12 members of the D.C. Circuit and the two seniors, none have as broad experience in terms of measurement points as our nominee here today. Only five have clerked on the Federal appeals court out of the 14; only four have clerked on the Supreme Court; only six have argued before the court of appeals; only five have argued before the Supreme Court; only seven have had editorial positions on law review; only four have had previous judicial experience. Of everybody that is on there now, only four have had previous judicial experience and only four had any legislative branch experience.

Again, I want to address the issues out in the open. I think what is happening here today I am somewhat embarrassed about. We have somebody who is obviously qualified. The ABA says he is qualified. He is not downgraded, he is recognized as qualified. He is extremely well qualified and well qualified. This time he is well qualified, with a minority extremely well qualified—or qualified and well qualified.

But what it requires is "qualified." And if you look at the ABA's position of what "qualified" is—and let me read it for you, should we have any questions regarding that—let me find it. It means that the nominee meets the committee's very—this is "qualified."—means that the nominee meets the committee's very high standards with respect to integrity, professional competence, judicial temperament, and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a Federal judge.

Everybody on that ABA says you are qualified. And I just read what it means. The idea that we are fishing around because we do not like something the Bush administration has done, or we are going to imply and impugn the integrity of somebody who has been in a position of responsibility and has offered his good services to fulfill the requirements of the executive branch, and anything you do not like about the executive branch you are going to try to tie

to this gentleman, is improper. It also is dismissive of our open form of Government. And is exactly, again—I will say again—exactly what the American people are sick of, partisan sniping that is not about the issues but trying to score a point and trying to undermine somebody's integrity who has absolute integrity on these issues.

They have answered the questions. We are here—we are here—to give a second look at somebody who has already answered the questions. And there is precedent to not give answers to questions about certain privileged communications within the White House. That does not mean that those are necessarily devious or wrong. It means you protect the Office of the Presidency. That is an appropriate role. There is nothing wrong with that.

I will have one question for you. Why do you want to be a Federal judge?

Mr. KAVANAUGH. Senator, I want to be a Federal judge because I know from experience and through my upbringing the role of the courts in protecting the rights and liberties of the people. I know how essential the rule of law is to our country. I know how the independence of our Federal judiciary is central to our constitutional form of Government. I think, based on my experience and my background, I can make a contribution to the administration of justice. I think I can be a good judge. And it's part of my commitment to public service that I've carried out for most of the 16 years since I graduated from law school.

Senator COBURN. Do you think it makes any difference on your ability to be an appellate judge in this country which side of the issue you were on the impeachment or which side of the issue you were on any of these issues that have been raised? Your personal opinion, when you have testified that you are not going to allow a personal opinion to interfere in your interpretation of the law and the independence of the judiciary, does that have a bearing?

Mr. KAVANAUGH. Senator, I absolutely believe in the idea that judges are neutral and impartial and that whatever activities may have occurred in someone's past life in terms of Government activities, those are good experience to have to become a good judge. But it also is true, once you put on the black robe, you're impartial and you represent the law. As Justice Kennedy used to tell us, the essential neutrality of the law. And I think that is a principle that I would seek to follow were I to be confirmed to the D.C. Circuit Court of Appeals. I think it's essential to our entire system of Government. There's no such thing on the courts as a Republican judge or a Democratic judge. Once you're on the court, all the judges are there representing the justice system, representing the idea of justice.

Senator COBURN. Thank you. My time has expired.

Chairman SPECTER. Thank you, Senator Coburn.

Senator Feinstein.

Senator FEINSTEIN. I am happy to yield to Senator Kennedy. My understanding is you wanted to go next?

Senator KENNEDY. I appreciate that. We have this health legislation on the floor now which we are trying to work through. If it is convenient for the Senator from California, I would just take the time. I thank the Chair.

Congratulations to you, Mr. Kavanaugh, for gaining the President's confidence. The Circuit Court, as you know, has such special jurisdiction in terms of so many different areas of legislation that we pass—National Labor Relations Board, the relationship of workers and what happens to workers, discrimination against workers in the workplace, environmental kinds of issues they are working through. And their judgments on so many of these end up being the law, and so few go on to the Supreme Court. And we have seen very interesting trends that have taken place in the District court. So this has a special relevancy and importance. So that is at least why we spend as much time as we do on this particular nomination.

Just on the—I want to just really focus in on this issue, again, of torture and rendition, your role there. I am on the Armed Services Committee and we have spent a lot of time. We have had 10 investigations of torture, and none of them have revealed what we are constantly seeing revealed now with newer reports that have come on up in the newspapers and exposed by Freedom of Information reports. So it is something that is—And we have a policy of rendition which is of enormous concern to many of us.

And we also know that Mr. Gonzales was in touch with Mr. Bybee when he was over at OLC. I mean, we have gone through all of this. This was all through the Gonzales—when Mr. Gonzales was up for Attorney General. And we also know that Haynes was in touch with the White House at that time, good chance that he was in touch with OLC.

So this is the background. Have you ever previously—as you well know, that Bybee memorandum effectively said that if you go on out, you are in the military service or under contract and you go out and torture someone, it does not make any difference how badly you torture or what pain you inflict, as long as your purpose is to get information rather than to hurt an individual, you are going to be vindicated in terms of any kind of protections. I mean, effectively. That also was included in the Bybee.

And Mr. Gonzales repudiated it when he came up before the Committee to be Attorney General. Is this the first time you have every made a comment on the Bybee memorandum? You responded to Senator Durbin and said that, in sort of a followup question, that you did not agree with the reasoning or the rationale for it. Is this the first time that you have ever said anything about the Bybee?

Mr. KAVANAUGH. I believe it is. It is possible I have said something to people I work with, but this is the first time, certainly, I have been questioned about it.

Senator KENNEDY. But you have not, prior to this time, ever made a comment or statement to others indicating that you found it particularly offensive. Because it has been a major issue, an issue in question out there. Please.

Mr. KAVANAUGH. Senator, I know that Judge Gonzales in the summer of 2004 had a press conference where the memo was repealed and talked about this issue. I think also at his confirmation hearing in 2005, he said he disagreed, I believe, with the legal analysis in there, that the legal analysis in there was incorrect.

And so I know members of the administration have repudiated that memorandum, or at least the legal analysis in that memorandum.

Senator KENNEDY. And your testimony is that you had nothing with the promotion of Bybee to the Ninth Circuit. Is that correct?

Mr. KAVANAUGH. That was not one of the nominations I worked on, and I knew he was, of course, being nominated but I didn't know some of the issues that you're talking about today.

Senator KENNEDY. Well, then you are saying that you did not know he wrote what we know is the Bybee memorandum at the time that he was being considered for the circuit?

Mr. KAVANAUGH. I first learned of the existence of that memo, I think, when there was a Washington Post story in the summer of 2004. I think that is the first—I'm pretty sure that's the first time I learned anything about the August 1 memo.

Senator KENNEDY. And for Mr. Haynes, have you expressed an opinion in terms of the legal counsel for the Defense Department, for promotion? I understand you have not handled the Haynes nomination?

Mr. KAVANAUGH. That's correct, Senator. And in terms of my portfolio in the Counsel's office, it involved a lot of civil justice issues—worked on nominations, some ethics issues, separation of powers issues. It did not involve the kinds of issues you're raising in your questions.

Senator KENNEDY. Well, are not most of those—I mean, the—most of those issues, class actions, insurance reform, are not most of those handled in the various departments, or were they—are those not sort of policy issues handled in the departments? Those are the issues that you were working on?

Mr. KAVANAUGH. I worked, I would say, primarily on judicial nominations. In the wake of September 11th, there were a number of civil justice issues that I worked on, including the terrorism insurance litigation.

Senator KENNEDY. OK. Just finally, on the documents that were taken here from the Committee and that you have the familiarity—and you have indicated that you, in reviewing them, had no understanding or awareness that they had been taken, been stolen. Have you ever gone back, now that you are aware of it, and seen what decisions you may or might not have taken on the basis of documents that were illegally taken? To see whether you may have made some judgments or decisions to reach certain conclusions, now that you know that they were not properly taken? Have you ever thought, well, I ought to go back, I might have made some judgments or decisions when I was working for the President and I ought to take a look at this, since you know that these documents now were taken? Have you ever thought about that?

Mr. KAVANAUGH. Senator, there's a very important premise in your question that I think is incorrect, which is I didn't know about the memos or see the memos that I think you're describing. So I think—

Senator KENNEDY. Oh, you never saw any of those?

Mr. KAVANAUGH. No, Senator, that's correct. I'm not aware of the memos, I never saw such memos that I think you're referring to. I mean, I don't know what the universe of memos might be, but I do know that I never received any memos and was not aware of

any such memos. So I just want to correct that premise that I think was in your question.

Senator KENNEDY. OK. My time is up, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

On the Republican side, we have, in sequence, Senator Graham, Senator Sessions, Senator Cornyn, and Senator Kyl. And on the Democratic side, we have, who has not questioned, Senator Feinstein and Senator Feingold. I had Senator Feinstein ahead of Senator Kennedy on the list.

Senator FEINSTEIN. Yes, I yielded to Senator Kennedy.

Chairman SPECTER. OK, I just wanted to be sure that the list is correct. It is sometimes judgmental. Senator Feinstein was here first, but she left for awhile. Senator Kennedy came. But at any rate, Senator Feinstein yielded. But I wanted it known that that was the list that I had. And now Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. I want to congratulate you for having the hearing, because I think it is appropriate. It is a lifetime appointment, that people be able to ask questions and he be able to answer within his ability to do so without compromising what he believes to be his ethics or any proper role he may have played as a lawyer.

Do you believe you were treated fairly by the ABA?

Mr. KAVANAUGH. Senator, the American Bar Association has rated me three times. I'm going to get directly to the question, but I'm going to give you some background, if I could. I've been rated three times by the American Bar Association. And each time, there were 14 individual reviews conducted by members of the Committee. So there have been a total of 42 separate reviews conducted of me based on interviews with lots of people and review of lots of record.

All 42 have found that I'm well qualified or qualified to serve on the D.C. Circuit Court of Appeals. So I'm pleased with that and I'm proud of that. And to the extent—and none of the 42 has found that I'm not qualified, and I think the Chair of the Committee yesterday said that there's not been a breath of anyone saying that I'm not qualified. So I'm proud and pleased with the 42 of 42.

Senator GRAHAM. So do you think you were fairly treated?

Mr. KAVANAUGH. Senator, I think, sitting here as a nominee, I would prefer not to talk about my—you know, about the American Bar Association other than to say that I'm pleased and proud to have 42 of 42 rating me well qualified or qualified.

Senator GRAHAM. Based on your going through that experience, would you recommend that we continue to consult the ABA when it comes to judges?

[Laughter.]

Mr. KAVANAUGH. Senator, again, I'm pleased and proud of the ratings. Their—in the future, maybe, will look back and have some observations, but right now I don't think I have any observations to offer the Committee about the American Bar Association.

Senator GRAHAM. Your time at the White House, you dealt with, I think you described your job. One of these constitutional questions that we are trying to wrestle with here is the inherent authority of the President in a time of war versus any designated role of the judiciary or the Congress in general. Do you agree with Jus-

tice Jackson's evaluation in the *Youngstown Steel* case that the President or the executive branch is at their strongest maximum power when they have concurrence of the legislative body?

Mr. KAVANAUGH. I agree completely with that, Senator.

Senator GRAHAM. Very specific question. Do you believe that at a time of war, the Congress has the ability to amend, pass the Uniform Code of Military Justice and not infringe on the President's inherent authority as commander in chief?

Mr. KAVANAUGH. Senator, that sounds like a specific hypothetical that could come before the court, so I'd hesitate to give an answer. In terms of Justice Jackson's framework, that of course for a half century has been the guiding framework. I think it's a work of genius, that opinion, in terms of setting out the different categories of Presidential power and Congressional power in times of war and otherwise, in terms of, as you say, category I, when the President and the Congress work together, that's when the power is at the strongest. And category II, that's what they call the twilight zone in the opinion. And then in category III, where a President acts against the express or implied will of Congress, that's where the President's power is at its lowest ebb and raises some very serious constitutional questions, according to Justice Jackson. I think that's an exceptional opinion that has guided American law, the relationship between Congress and the executive for about a half-century, and it's really been the foundation of these kinds of issues that I know you and the Committee have been working on.

Senator GRAHAM. Finally, and if you don't want to answer it, you don't have to, but are you a Republican? If so, why?

Mr. KAVANAUGH. Senator, I am a registered Republican. As I said before to Senator Coburn, I believe very much that it's good to have judges who've participated in Government. That's been part of our experience in the past, to have judges on the D.C. Circuit who've participated in the executive branch, who've worked in the executive branch; judges on the Supreme Court.

Specifically, to answer your question, when I was first registering to vote, President Reagan was President and I agreed with him on some issues and registered Republican in the first election in—I guess 1984 was the first one I voted in.

Chairman SPECTER. Thank you very much, Senator Graham.

Senator Feinstein.

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

Let me just say this. This is a difficult nomination. First of all, you're very young, which is, I think, a blessing for you. But in terms of an appellate judge, I think it is a detriment. Obviously, you've had a good education, you have done well. You have spent a lot of your life in at least a semi-political capacity. The question comes up, how can you assure us that you will be fair? Would you recuse yourself from any judgment that concerned this administration?

Without a record either as a trial lawyer or as a judge, it's very difficult for some of us to know what kind of a judge you would be and whether you can move away from the partisanship and into that arena of objectivity and fairness.

Mr. KAVANAUGH. Senator, thank you for the question. I think in the past, on the D.C. Circuit and on the Supreme Court and on

other courts of appeals other than the D.C. Circuit, prior Government experience in the legislative branch or the executive branch has been seen as a very valuable asset, whether it was Judge Abner Mikva or Judge Patricia Wald, Judge John Roberts on the D.C. Circuit, Judge Merrick Garland, who President Clinton appointed to the D.C. Circuit. That kind of experience has been seen as very valuable experience and valuable background.

And of course the question—I think only four of the last 21 judges on the D.C. Circuit have actually had prior judicial experience, so the norm on the D.C. Circuit, in fact the overwhelming norm, is for the judges on the D.C., Circuit since 1977, not to have had prior judicial experience. What they've had usually is Government experience in the legislative branches or the executive branches.

And your question really goes to how do you assess someone's record. And I think that's done through an assessment of going back, in my case 16 years in my career, and looking at the things I've done. In the Staff Secretary's Office now, where I'm an honest broker, where I have to be fair and even-handed in the kind of role I perform for the President, some of the work I've done in the Counsel's Office on judges, I've worked with your office and Senator Boxer's office in the past on judges I know and worked closely on that. When I was in private practices, working on not just institutional clients, but pro bono cases. One of my proudest cases is I worked on a pro bono case for a synagogue in my home county that was seeking to build in a new location. Some of the neighbors didn't want it there. I represented them. They won in Federal district court.

And the Independent Counsel's Office, I know, Senator, that that's controversial and that's raised some questions. And I think in that office, my record shows that I was fair and conducted myself responsibly. I've written an article about some reforms that I think would help avoid some of the problems that I think were systemic in the Independent Counsel's—

Senator FEINSTEIN. I am running out of time. Answer the recusal question?

Mr. KAVANAUGH. On the recusal question, I know that there will be issues of recusal that I will face. There are standards in place under 28 U.S.C. 455, and I will analyze those closely were I to be confirmed to be a judge. There will be some difficult questions. I do not want to prejudge how I would rule on any recusal motion or how I would handle any particular case, but I do know, Senator, that it will be an issue in certain cases. I pledge to you that I'll take that seriously, that I'll study the precedents of people like myself who've come to the bench, that I will talk to my colleagues, were I to be confirmed, and that I'll make the judgment responsibly. I pledge that to you.

Senator FEINSTEIN. As you look back at the Kenneth Starr investigation today—I just read the op-ed you wrote in 1999—what are your thoughts? What do you think?

Mr. KAVANAUGH. On the Independent Counsel Office investigation in general, I think a couple things, Senator. First of all, I think it was, in retrospect, probably a mistake for Judge Starr to be assigned additional investigations after the initial Whitewater

and Madison investigations. So he got new jurisdiction over a Travel Office matter, an FBI files matter, and eventually the Lewinsky matter. I think it would have been better in retrospect for Judge Starr to have handled what he was initially assigned and, if there was a new Special Counsel needed in these other matters, for new people to be appointed. By adding to the jurisdiction, it created the impression that Judge Starr was somehow the permanent special investigator of the administration. He was assigned a very specific matter.

So that's one thing in retrospect. And frankly, even at the time that I thought it was a concern, I think the way the report was released was a real problem. I thought that at the time. And I think the way that was released did not serve anyone well. And I've written in my law journal article about the problems with prosecutorial reports, the way people's reputations are damaged. So I've proposed some real reforms there.

I also know that it was a very serious matter in terms of the underlying issue in 1998 in terms of the things that members of this body weighed and members of the House of Representatives weighed and that Judge Wright dealt with in terms of the contempt motion that she dealt with. So there was a serious underlying matter there; I believe that. I believe that there was—that Judge Starr tried to do it thoroughly. But again, to go back to the core problem, I think there was too much jurisdiction added to Judge Starr that created a mistaken public impression that harmed the credibility of the investigation.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feinstein.

The next questioner on the Republican side is Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Mr. Kavanaugh, thank you for your thoughts on Senator Feinstein's question about the Starr investigation. I think you have provided some good insight and I think that probably is a reason why your reputation as a member of that prosecutorial team was very high, and people had a clear impression that you were a cool head and a wise member of that team. And that is the reputation I have heard, and I can see why you had that.

I would note that Ken Starr was a former Solicitor General of the United States, a man of impeccable integrity, extraordinary legal skill, and anyone would have been proud to answer his call to serve him.

Looking at the ABA evaluation, I think, first of all, you did extremely well, extraordinarily well to be rated well qualified by them, in the sense that you were relatively young and were working in the Bush administration. You were given the highest possible rating by them. And you have been there now in a less legal capacity and a few new members decided to give you the qualified rating instead of well qualified rating, but I do not think that is a big issue.

In fact, I would quote Mr. Tober, Stephen Tober, the Chairman of the Committee on the Judiciary. This is what he said to me in a telephone conversation. He said this: "Let me underscore, we did

not find him unqualified. There's not a breath in that report or any earlier report. We found him qualified; minority, well qualified. What I said at the end is what in fact many people said, that he has a solid reputation for integrity, intellectual capacity—a lot of people refer to him as brilliant—and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There's no question about that."

You wouldn't object to them saying that about you, would you?

Mr. KAVANAUGH. As I said, Senator—

Senator SESSIONS. We will pass over that.

Then he went on to say this: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components. He has those skills that will serve him well, certainly on a Federal court."

And then he goes on to say: "It is true"—I think maybe to Senator Hatch's question—"it is true there's not a single not-qualified vote in the picture."

So I think the ABA rating, whether it is as high as it could be, and all of them did not vote you well qualified, the highest possible rating, but they did rate you qualified and the Chairman of the Committee gave some very interesting insights, I think.

I would just like to note on the age question that you are 6 years older, I believe, than Judge Stapleton when he was appointed to the bench, the court of appeals, and 6 years older than Judge Kozinski when he was appointed to the bench, both of whom you clerked for. I think the Chairman made that earlier. And Justice Kennedy was appointed to the Ninth Circuit 3 years younger than you are today. I think those are qualities that—I think other qualities are at stake here.

Let me just say this about my thinking of how you evaluate a nominee, that is, you consider the entire breadth of the gifts and graces they bring to the job. And if a person has less—I like a person who has been in private practice. I think that is fine. But if a person does not have private practice or a lot of—you were a partner in one of the country's best law firms; that ought to be some private practice experience. But whether you had a great deal of that experience or not, other factors are considered in here. You were editor of the Yale Law Journal, one of the editors of that. You clerked for two circuit judges, both of whom have testified for you. The first one said you should be a judge, he saw that in you when you first clerked for him and advised you of that as a career path.

So you worked for two court of appeals judges. You sat at the right hand of two judges who hold the very position you will be holding today. And then you were given the rare honor of clerking for a justice on the U.S. Supreme Court, Justice Kennedy, a judge who is considered a moderate, middle-of-the-road judge, I guess. You served under his leadership. So those are things that I think are extraordinarily important.

And you served in the Solicitor General's Office of the United States. That is the greatest law office in the world, where you represent the United States before the Federal appellate courts in the country arguing cases before the very court that you would sit upon, as well as arguing cases before the U.S. Supreme Court, an honor very few lawyers have.

So I think it is a good experience and extraordinary academic record, Mr. Chairman, and I believe he should be confirmed.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Feingold arrived earlier but has departed. Senator Leahy arrived later and is ranking, and Senator Leahy has agreed he will yield to Senator Feingold.

Senator LEAHY. Go ahead. After these tough, tough questions that Senator Sessions has been asking, where the nominee just sits there and is canonized, I am overwhelmed by that. So I yield to Senator Feingold.

Chairman SPECTER. You should have been here earlier to hear Senator Hatch's tough questions.

[Laughter.]

Chairman SPECTER. Senator Feingold?

Senator LEAHY. He only asks tough questions of Democrats. He coordinates the others.

Senator SESSIONS. Well, this is the second time around.

STTEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. I thank both the Chairman and the Ranking Member. And I thank you, Mr. Chairman, for holding this hearing. It was obviously the right thing to do, given that it has been nearly 2 years since the first hearing and, frankly, in light of Mr. Kavanaugh's incomplete responses to written questions, even though he delayed providing those responses for 7 months.

Among those written questions were several questions that I submitted concerning ethical issues that came up in connection with the nominations of three judges who I believe Mr. Kavanaugh assisted as part of his duties in the White House: Charles Pickering, who received a recess appointment and subsequently retired; and D. Brooke Smith and Ron Clark, who are currently on the bench.

In his November 2004 responses, Mr. Kavanaugh essentially refused to answer my questions. I wrote him a letter on Friday explaining why I believe these questions are appropriate and asking him to supplement his responses. Late yesterday I received a response, not from Mr. Kavanaugh but from Mr. Moschella at the Justice Department, that said the following: "As you know, Chairman Specter has scheduled a hearing on Mr. Kavanaugh's nomination on May 9, 2006. At that time, Mr. Kavanaugh will be available to respond to questions from all Senators on the Committee."

Mr. Chairman, first, I would like to put in the record a copy of my letter and Mr. Moschella's response.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator FEINGOLD. Thank you, Mr. Chairman.

Now, Mr. Kavanaugh, I assume you were consulted and approved of Mr. Moschella's response. I hope that you will now respond to my questions. Here is the first one for which I sought an additional response.

During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later

became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Professor Stephen Gillars of NYU Law School has written, "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

So, sir, my first question is this. Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? And if not, when did you become aware that Judge Pickering had solicited these letters of support?

Mr. KAVANAUGH. The answer to the first question, Senator, is no. This was not one of the judicial nominees that I was primarily handling. I became aware of suggestions of this sort, I assume, at some time during the proceedings, probably when it was raised. I don't know if it was raised in the media or raised by the Senate in the first instance. Without commenting on the facts and circumstances of that matter, because I really don't know the facts and circumstances, when a judge asks a lawyer who's got a case before him or her to do something, that does put the lawyer in a very awkward position and makes it difficult for the lawyer to say no. So just in terms of a hypothetical situation, there is a situation there. Again, I don't know the facts and circumstances of what was going on there. I only heard about it, really, from either the media or from when the members of this Committee were talking about that issue.

Senator FEINGOLD. Well, I would like to know if you think that Judge Pickering's conduct was consistent with the ethical obligations of a Federal judge.

Mr. KAVANAUGH. Senator, I don't know if there's been fact finding on what his conduct was. In terms of the hypothetical situation of a judge asking a lawyer who has a case before him or her to do something, I know that raises some questions. Again, I don't know the facts and circumstances of what Judge Pickering did. I've given you my general principle.

Senator FEINGOLD. Well, it's a good general principle, but the facts are pretty clear. I don't think he denied that he solicited these letters and that these were individuals that appeared before him. There was some debate about the significance of it, but— Am I off track in suggesting that it looks like at least those set of facts, whether you think they occurred in this case, would be a violation of the Code of Ethics?

Mr. KAVANAUGH. I hesitate to comment on another judicial nominee. Again, Senator, I'm happy to state a general principle that I believe in. Again—

Senator FEINGOLD. Let's go with the general principle, then. If a judge is up for nomination and he solicits letters from lawyers who have cases before him, is it not the general principle that that would be a violation of the Code of Ethics?

Mr. KAVANAUGH. I think that raises some questions that warrant some further questions to find out what happened.

Senator FEINGOLD. Mr. Kavanaugh, I—my time is up. Thank you.

Chairman SPECTER. Thank you very much, Senator Feingold. The next questioner is Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman.

Welcome back, Mr. Kavanaugh.

Mr. KAVANAUGH. Thank you, Senator.

Senator CORNYN. This is the second hearing 2 years, roughly, after your first hearing, and we have learned a lot has changed in your personal life.

Mr. KAVANAUGH. Yes, sir.

Senator CORNYN. But I do not think a lot has changed in terms of your professional record as it would relate to your qualifications to serve on the D.C. Circuit.

Mr. Chairman, I have a statement that I would like to make part of the record, without objection.

Senator HATCH. [Presiding.] Without objection.

Senator CORNYN. Thank you.

I want to ask a little bit about some of the questions that you have been asked here today. The rationale given for a second hearing that was requested is that there might be some new information that would be revealed that might change the minds of some of those who have previously expressed some skepticism as to whether you should be confirmed or not. But I think—this is my observation, not yours, but I think what we have seen is part of what has become a fairly common practice in the course of these hearings, and that is to ask you questions, the nominee questions that they cannot or should not ethically answer. And that, coupled frequently with demanding documents which are not in your possession and which you cannot produce because they are the subject of a privilege. And then of course there is, of course, then the claim that you are somehow too extreme, out of the mainstream.

Unfortunately, I do not think those are the kinds of questions or the kind of approach that is designed really to reveal very much in the way of information that is helpful to us to make decisions, but rather part of a plan to try to damage your nomination and to justify a No vote, or perhaps even a filibuster of your nomination on the Senate floor. You have been asked about everything from the Clinton impeachment to torture to rendition policy to Judge Pickering. It strikes me that, rather than finding out about your experience and background and your qualifications as an individual, that there has been some attempt to associate you with other issues with which you have no knowledge and perhaps, as you say, have not had any contact.

So I know that Chairman Specter had agreed to do this second hearing based on the representation that there might be some bona fide attempt to elicit information that would actually change some votes and attitudes, but unfortunately I do not see that happening in the course of this hearing so far. I guess one can always hope.

Of course, as you know, I met you a number of years ago when I was Attorney General of Texas and had the honor to represent my State in an argument before the U.S. Supreme Court. That was *Santa Fe Independent School District* v. *Doe*, which involved a

question of whether school children could voluntarily offer a prayer or an inspirational saying before school football games in Texas. And as you know, the Court ultimately ruled against that voluntary student prayer in the case. Chief Justice Rehnquist, in dissent, said that the Court's ruling exhibited hostility to all things religious in public life. And I am very concerned about that because I do believe that the Founders thought that the posture of the Government with regard to religious expression should be one of neutrality, not hostility.

I realize as a lower court judge you are going to be bound by the Supreme Court's precedents, but I wonder if you would address the issue of religious liberty and religious speech insofar as how you believe in your position as a circuit court judge, how you would approach those issues.

Mr. KAVANAUGH. Senator, if I were confirmed to be a D.C. Circuit judge, I would of course follow the precedent of the *Santa Fe* case. That case addressed a question that had been left open in the *Lee* v. *Weisman* case in 1992. In that case, there was a school-sponsored prayer at a graduation ceremony where the Government was actually involved, and one of the questions that was left open was what happens if a student or a private speaker participates in a school event as a private speaker. And in the *Santa Fe* case, I think the Court concluded, based on the facts and circumstances of the case, that it could be attributed to the school and so was a violation of the Establishment Clause.

I think the overall area represents a tension the Supreme Court has attempted to resolve throughout the years in terms of facilitating the free exercise of religion without crossing the Establishment Clause lines that the Court has set out for many years now. I know that the Court in recent years has made clear in a number of cases that private religious speech, religious people, religious organizations cannot be, or should not be, discriminated against and that treating religious speech, religious people, religious organizations equally—in other words, on a level playing field with nonreligious organizations—is not a violation of the Establishment Clause. In past years there had been some suggestion that treating religious organizations the same way in the public square as nonreligious organizations could sometimes be a violation of the Establishment Clause. I think the Court's really gone to a principle of equality of treatment does not ordinarily violate the Establishment Clause—again, equality of treatment of religious speech, religious people, religious organizations; equality in the public square. That's been something we've seen over the last, I'd say, decade or a little more.

The *Santa Fe* case, again, the issue there was that although it was a private speaker, the Court found, based on all the facts and circumstances, that it was attributed to the school and therefore fell within the prohibition in *Lee* v. *Weisman*.

Chairman SPECTER. Thank you, Senator Cornyn.

Mr. Kavanaugh, we are almost to the 2-hour mark. Would you care to take a break?

Mr. KAVANAUGH. I'm OK, Mr. Chairman.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. Mr. Chairman, I have an opening statement, which I will not make, but I would like to put in the record.

Chairman SPECTER. Without objection, your opening statement will be made a part of the record.

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

Senator LEAHY. I would also note for the record, in that, I realize we have—the President wants to move forward Judge Terrence Boyle, and I have suggested, in fact, call on the President to withdraw Terrence Boyle's name. The North Carolina Police Benevolent Association, North Carolina Troopers Association, Police Benevolent Associations, South Carolina, Virginia, the National Association of Police Organizations, many other civil rights groups and others have opposed it. I can think of an awful lot of reasons why he should withdraw it. That is not in the province of what Mr. Kavanaugh has to worry about, but I would hope, rather than go through a needless exercise, that Terrence Boyle's name be withdrawn, especially in light of the recent allegations of unethical conduct.

Mr. Kavanaugh, you are aware of the somewhat unique—we originally understood there would be ABA to testify here today. That had been agreed to, but apparently that was done by a phone call Monday while most of us were out of town. Are you aware of what transpired in that phone call?

Mr. KAVANAUGH. Senator, I'm—

Senator LEAHY. You have seen the transcript?

Mr. KAVANAUGH. I have not read the whole transcript. I have seen some excerpts of the transcript that were reported in news articles, as well as other excerpts that I've seen.

Senator LEAHY. I'd ask that the transcript be made part of the record if it's not already.

Chairman SPECTER. Without objection, it will be made part of the record.

Senator LEAHY. They spoke of you as not having handled a case to verdict; is that right; you never tried a case to verdict, or have you?

Mr. KAVANAUGH. That is correct, Senator. I have not been a trial lawyer. I think I'm in the same boat there with people like Chief Justice Roberts and Justice Breyer.

Senator LEAHY. I am asking about you. We had a hearing on Chief Justice Roberts. I voted for him for Chief Justice, and I voted for him for the D.C. Circuit. I know Chief Justice Roberts. You are not Chief Justice Roberts. You have your own qualities, so let's just talk about you, if that is all right, if you do not mind.

Mr. KAVANAUGH. Senator, I have not tried a case to verdict. I have been an appellate lawyer.

Senator LEAHY. That was my question. They also said your litigation experiences over the years was in the company of senior counsel; is that correct?

Mr. KAVANAUGH. I've argued many cases on my own, Senator Leahy. I've argued in the Supreme Court of the United States. I've argued in the Fifth Circuit. I've argued twice in the D.C. Circuit Court of Appeals.

Senator LEAHY. Did you do those as the sole person arguing?

Mr. KAVANAUGH. Yes, Senator.

Senator LEAHY. Thank you.

Mr. KAVANAUGH. Senator, let me just add one thing. In one D.C. Circuit case there were two counsel that argued on our side, so I just want to be clear on that, but I also—I argued for myself on—it was a Government attorney client privilege case.

Senator LEAHY. I was going to ask you about that, but you clarified it. Thank you.

Why did you take 7 months to answer the written questions you were given after your hearing last time?

Mr. KAVANAUGH. Senator, I take responsibility for that, and I'm happy to answer any additional questions.

Senator LEAHY. Why did you take 7 months?

Mr. KAVANAUGH. Senator, again, I take responsibility for that, and—

Senator LEAHY. Of course you take responsibility for it. Obviously, they are your answers. But why 7 months?

Mr. KAVANAUGH. Senator, if there was—I take responsibility for that. I think I had a misunderstanding, which is my responsibility. I'm happy to answer additional questions today that you may have, or other members of the Committee may have. Again, I take—

Senator LEAHY. What was the misunderstanding?

Mr. KAVANAUGH. Senator, I take responsibility for that.

Senator LEAHY. Mr. Kavanaugh, we are not playing games. I am just asking you a question.

Mr. KAVANAUGH. Yes, Senator.

Senator LEAHY. One of the—I will not go into one of the ways one judge described your conduct in court. I began to think that perhaps he was right. But I take responsibility, fine. That is kind of a catch-all. Everybody says that. I just asked you why? I mean is it that difficult?

Mr. KAVANAUGH. Senator, my understanding was that the timeline for the questions was to make sure they were in before the end of the Congressional session because there was going to be no further action on my nomination in the Committee. I met that timeline. From a later letter that members of the Committee, that you signed, it appears that I had a misunderstanding of that, and I take responsibility for that, and I'm happy to answer any questions you have.

Senator LEAHY. What was your reaction—as Staff Secretary, you see virtually every piece of paper that goes to the President; is that correct?

Mr. KAVANAUGH. On many issues, yes, Senator. Not everything, but on many issues.

Senator LEAHY. Did you see documents relating to the President's NSA warrantless wiretapping program?

Mr. KAVANAUGH. Senator, I learned of that program when there was a New York Times story—reports of that program when there was a New York Times story that came over the wire, I think on a Thursday night in mid December of last year.

Senator LEAHY. You had not seen anything, or had you heard anything about it prior to the New York Times article?

Mr. KAVANAUGH. No.

Senator LEAHY. Nothing at all?

Mr. KAVANAUGH. Nothing at all.

Senator LEAHY. What about the documents relating to the administration's policies and practice on torture; did you see anything about that, or did you first hear about that when you read about it in the paper?

Mr. KAVANAUGH. I think with respect to the legal justifications or the policies relating to the treatment of detainees, I was not aware of any issues on that or the legal memos that subsequently came out until the summer, sometime in 2004 when there started to be news reports on that. This was not part of my docket, either in the Counsel's Office or as Staff Secretary.

Senator LEAHY. I have more questions. My time is up, and I will save them for the next round.

Mr. KAVANAUGH. Thank you.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Just on that last point, I gather that in the briefings to the President by the CIA and other members of the intelligence agency, there were a lot of things that did not come across your desk, that they were given directly to the President; is that correct?

Mr. KAVANAUGH. That's correct.

Senator KYL. I was not here, unfortunately, to hear the introduction of you, but I was impressed by what was said. It was written down for me, and I am very impressed that these judges for whom you clerked would have such a high opinion of you. Judge Kozinski, who is one of the finest judges that I know, said that you were one of the finest clerks he has had, and a breadth of mind and breadth of vision, and a great sense of humanity. And I think Judge Stapleton, a judge's dream as a law clerk, and that you understand the rule of precedent, exceptionally well qualified in terms of experience, superb candidate, and so on.

I think those are important because they represent the opinion of someone for whom we have a great deal of regard, as sitting appellate judges, of you, and I think that is an important qualification.

There have been a couple of questions raised about this matter of qualification, one, the ABA rating, and two, your relative age. I just want to talk about a couple of those here. As I understand it from Mr. Stephen Tober's statement, that this entire difference between qualified and well qualified boils down—and I will quote it from his statement, page 7, "It is, at its most basic, the difference between the highest standard and a very high standard." And so it seems to me that for us to try to make some distinction, and somehow deem you not qualified based upon that very fine distinction, is to establish a standard that we have never applied in this Committee in the past.

May I just ask you, how many of the people that rated you were there again who either rated you qualified or well qualified, and was there anyone who dissented from either of those two rankings?

Mr. KAVANAUGH. Senator, from the ABA ratings, there were 42 individual reviews conducted over the course of 3 years, and all 42 found me well qualified or qualified to sit on the D.C. Circuit.

Senator KYL. So this seems to me, in terms of making a decision on this Committee, a distinction without a difference. I will just quote from page 9 and then move on to the next point. After talking about your breadth of experience, consistently praiseworthy statements, and so on, here is what Mr. Tober said: "The nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." And it seems to me that that pretty well answers that point.

Now, this matter of age is something that perhaps we should take a look at. As was noted, several important nominees—Justice Kennedy, appointed to the Ninth Circuit when he was 38; Judge Kozinski, 35; Judge Stapleton, 35. I also note the current chief of the Ninth Circuit, my circuit, Marie Schroeder, 38 when she was appointed. Judge Sam Alito, age 40, all younger than you are. But it seems to me that we could actually take some solace from your age based upon the experience in this Committee, Mr. Chairman. We have to look no further than the distinguished Ranking Member of the Committee and the senior Senator from Massachusetts and the second-ranking member of this Committee to note that in all three cases of Senator Biden, Senator Kennedy, and Senator Leahy—

Senator LEAHY. We were elected.

Senator KYL. Elected at the age of 30, 30, and 34. And look what great things each of them accomplished from those early beginnings.

[Laughter.]

Senator SCHUMER. May I interrupt? Each of them has almost a lifetime appointment.

[Laughter.]

Senator KYL. Well, we did not have any say in that.

Senator LEAHY. My Republican State did.

Senator KYL. And it certainly makes the point that at the constitutional age, that is, the age at which the Constitution says one must be qualified, we have elected to the U.S. Senate and confirmed to the courts of appeals and even the U.S. Supreme Court some incredibly qualified individuals who have acquitted themselves very well, and I count all of the colleagues whom I have mentioned here in that category. And, therefore, it seems to me that if that is any precedent, we have nothing but the greatest expectations for your service on the court of appeals, and I am very proud to add my voice to those who are in support of that nomination.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Brownback?

Senator BROWNBACK. Thanks, Mr. Chairman, and welcome, Mr. Kavanaugh. I appreciate your meeting with me. I think I am only one of two people on the Committee now that were not on the Committee when you previously—or the first time you came in front of the Committee, and I appreciated your time that you spent with me answering my questions. I appreciate the information you provided to my staff, and that has been very helpful in my decision-making process with you.

I want to ask a couple of questions that I find important. You may have answered them in other types of settings, but I wanted to look at—and they are general, but I think they are the sort of thing that we on the legislative side need to get out in the open for our decisionmaking—your view of the Constitution and the issue of judicial restraint. These were key items on Judge Roberts's and Judge Alito's hearings. They are important going to a circuit court.

Just if you would—and you have probably answered this already, and I apologize if you have and I have not heard it. But just give me your view of the Constitution as a document itself. Can you put yourself in a category? Do you have a view that it is established as a living document, as a strict constructionist of the Constitution itself?

Mr. KAVANAUGH. Senator, I believe very much in interpreting text as it is written and not seeking to impose one's own personal policy preferences into the text of the document. I believe very much in judicial restraint, recognizing the primary policymaking role of the legislative branch in our constitutional democracy.

I believe very much, as a prospective inferior court judge, were I to be confirmed, in following the Supreme Court precedent strictly and absolutely. Once as a lower court judge, I think that is very important for the stability of our three-level system for lower courts to faithfully follow Supreme Court precedent, and so that is something that I think is very important.

In terms of the independence of the judiciary, I think that is something that is the hallmark of our judiciary, the hallmark of our system that judges are independent from the legislative branch and independent from the executive branch. I think that is central to my understanding of the proper judicial role.

So in terms of text, precedent, restraint, independence, those are the kinds of principles that I think would inform my approach to judicial decisionmaking were I to be confirmed.

Senator BROWNBACK. Let me go specifically to the issue of judicial restraint, if I could, on that particular area. I believe it was Judge Roberts who noted that that is the—where a number of us are concerned about areas that the court has gotten involved in in recent years, and that that has really led to the public's concern about the judiciary in general because it keeps getting into more and more areas that many of us thought were the proper purview of the legislative process rather than the judicial branch. And so the judicial activism charge then gets put forward.

Several have said, well, the key restraint on the judiciary is the judiciary itself. And yet if the judiciary does not show restraint on what cases that it brings up or what cases that it takes, you know, the Congress is left to try to act on limiting review by the courts to try to amend the Constitution, to change the court interpretation, all of which are difficult things to do.

There was a case recently—we just held the flag-burning amendment that passed through the Subcommittee that I chair, and that is in response to the Court saying that you can burn the flag as a statement of free speech. And it was as a response to a court that overturned a prior court opinion saying you could not do it.

It is those sorts of things that I think really frustrate the public, and then the issue of marriage that is coming up that has been a longstanding issue for legislative process, coming now, working through the court system.

Do you have a viewpoint on issues, say, as marriage and the determination of the definition of that? Is that something that the court should establish or is it left to the legislative bodies?

Mr. KAVANAUGH. Well, Senator, that is the kind of question that, were I to be confirmed, could come before me, so I would hesitate to talk about the specific issue.

In terms of your general principle about judicial activism, I do think that some of the worst moments in the Supreme Court's history have been moments of judicial activism, like the Dred Scott case, like the Lochner case, where the Court went outside its proper bounds, in my judgment, in interpreting clauses of the Constitution to impose its own policy views and to supplant the proper role of the legislative branch.

So I think in terms of judicial activism, that is something that all judges have to guard against. That is something that the Supreme Court has to guard against. And throughout our history, we have seen that some of the worst moments in the Supreme Court history have been moments of judicial activism where courts have imposed their own policy preferences.

Senator BROWNBACK. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Brownback.

Let me make an assessment here as to a potential second round. Senator Leahy, do you care for a second round?

Senator LEAHY. I do.

Chairman SPECTER. Senator Schumer?

Senator SCHUMER. Yes.

Chairman SPECTER. I infer that all those absent do not.

Senator LEAHY. I would not infer. We will ask them on this side.

Chairman SPECTER. Could you find out?

Senator LEAHY. We are doing that right now.

Chairman SPECTER. Senator Hatch?

Senator HATCH. Frankly, I will pass for now.

Chairman SPECTER. Senator Cornyn?

Senator CORNYN. Mr. Chairman, my intention would be to pass, but if questions come up during the questioning, if you would give me an opportunity to followup on that. Otherwise, I will pass.

Chairman SPECTER. That is a qualified pass. All right.

Senator HATCH. Same here. Qualified pass.

Chairman SPECTER. Qualified pass for Senator Hatch.

Well, we will proceed with the second round. I think we will finish before 5 o'clock, as it appears to me, Mr. Kavanaugh. You declined a break 20 minutes ago. You may reconsider that without petition at any time you choose, if you would like a break.

Mr. KAVANAUGH. Thank you, Mr. Chairman. I am OK.

Chairman SPECTER. You are OK. OK, then you have established a number of qualities without further comment.

[Laughter.]

Chairman SPECTER. Mr. Kavanaugh, on the second round, which we begin now, I have noticed a reticence on your part to criticize

people, not necessarily a bad habit. You did not want to criticize Karl Rove. You did not want to say how you would vote on impeachment to criticize President Clinton. You did not want to criticize Judge Pryor on Roe being an abomination. You did not want to criticize Judge Bybee on the Bybee memo. You did not want to criticize Mr. Manny Miranda. You did not want to criticize Judge Pickering. You did not even want to criticize the American Bar Association.

Now, I do not consider that—and you did not want to criticize Justice Scalia or Justice Thomas. I do not consider that necessarily a bad quality. Senators sometimes criticize people. In fact, it is seldom when we do not. That seems to be a stock in trade by the United States Senators, and perhaps most people in public office. Maybe that is our calling really in connection with our oversight responsibilities.

But let's take up the values behind your declination to criticize. As to what Judge Pickering is alleged to have done—never mind the hypothetical—would you ask lawyers to write letters for you? If you were a judge sitting on their cases, and you were under consideration for a higher court, would you do that?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. When you were asked about Mr. Manny Miranda, the investigation is still ongoing, but there has been considerable information about his having invaded the Democrats' computer system and downloaded and used it for partisan political purposes. Now, without characterizing it as larceny, would you engage in that kind of a practice?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Would you sanction or participate in torture?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Would you accept the principle that you could inflict any amount of pain in order to get information, as long as you were seeking information, no limit as to the amount of pain you would inflict?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Would you engage in rendition, send a suspect to a foreign country where torture was a practice, in order to get information where you would not have to commit the torture on U.S. soil?

Mr. KAVANAUGH. No, Mr. Chairman. I do not want to—no, Mr. Chairman. I think that is an issue I have not been involved in. I do not know the facts and circumstances—

Chairman SPECTER. I know you have not been involved in it, but now we are trying to find out your values.

Mr. KAVANAUGH. Right, and I—

Chairman SPECTER. You have not criticized certain people, and somebody may say you have not answered the question, so let's go beyond the hypothetical or let's go beyond the criticism, and let's take up the values, which is what I am asking you now.

Now, you did not want to criticize Justice Scalia or Justice Thomas, but when you were asked the question would you consider yourself in their mold, you selected Justice Byron White and Justice Robert Jackson.

Now, Mr. Kavanaugh, there may be some implicit criticism there, but we will move beyond that. Why do you choose Justice White? What are his qualities distinguished from Justice Scalia or Justice Thomas that you choose Justice White?

Mr. KAVANAUGH. I do not want to comment on currently sitting Justices. The reason I chose Justice White is for several reasons: He was a rock of integrity. His work as Deputy Attorney General in the Department of Justice enforcing the civil rights laws in the early 1960's I think was heroic. I think his approach to judging, judicial restraint, in terms of recognizing the primary policy—

Chairman SPECTER. OK. That is enough. Why did you choose Justice Jackson?

Mr. KAVANAUGH. I chose Justice Jackson—

Chairman SPECTER. You are not permitted to filibuster, Mr. Kavanaugh.

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. Why did you choose Jackson?

Mr. KAVANAUGH. I chose Justice Jackson because of, again, his leading role in the Department of Justice, being involved in the public—

Chairman SPECTER. That is enough, Mr. Kavanaugh.

Now, on independent counsel, you have some criticism of the structure of independent counsel on the operation you had with Judge Starr, and that is why you made some recommendations for changes, right?

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

Chairman SPECTER. And you have a value not to exclude blacks, African Americans, on peremptory challenges. That is your value.

Mr. KAVANAUGH. Yes, Mr. Chairman, and I believe in proper procedures to make sure that racial bias does not occur in the courtroom in the jury selection process.

Chairman SPECTER. OK. My red light went on on round two. I will yield now to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

You know, the reason I kept asking about your taking 7 months to answer the questions and why I found your answer inadequate, you did spend years vetting judicial nominees up here and telling them what they were supposed to do and everything else. And it is difficult to understand, having told them how they are supposed to answer, that you did not understand yourself.

Be that as it may, tomorrow the White House is finally going to release its logs of visitors to the White House, having been forced by a Federal judge to do so, something they did not want to do. So I ask you this: Do you know Mr. Abramoff?

Mr. KAVANAUGH. I do not.

Senator LEAHY. Have you ever met him or seen him at the White House?

Mr. KAVANAUGH. No.

Senator LEAHY. Have you ever met Susan Ralston, who is Karl Rove's personal assistant at the White House, formerly worked as Mr. Abramoff's secretary?

Mr. KAVANAUGH. She works in the Deputy Chief of Staff's office today.

Senator LEAHY. You know her.

Mr. KAVANAUGH. I do know her, yes, sir.

Senator LEAHY. Thank you. Have you ever met David Safavian?

Mr. KAVANAUGH. No.

Senator LEAHY. When did you learn that he was being investigated for receiving illegal payments?

Mr. KAVANAUGH. Senator, on that matter, I think whatever I learned, I learned reading the newspapers.

Senator LEAHY. So prior to the time it became public that he was being charged, you did not know about it prior to that time?

Mr. KAVANAUGH. That's correct, Senator.

Senator LEAHY. Have you ever met Michael Scanlon?

Mr. KAVANAUGH. No.

Senator LEAHY. When did you learn that he was being investigated for criminal activities? These are all people from the White House. That is why I am asking.

Mr. KAVANAUGH. I don't think Michael Scanlon worked at the White House. I could be wrong about that.

Senator LEAHY. He was connected—well, go ahead. When did you first learn of his—

Mr. KAVANAUGH. Again, reading the newspapers is all I know about that matter.

Senator LEAHY. And what about the disclosure of the identity of Valerie Plame?

Mr. KAVANAUGH. I do not know anything about the facts and circumstances of that matter.

Senator LEAHY. So you did not do anything about it or were not required to do anything about it? You did not do anything about it?

Mr. KAVANAUGH. I didn't know anything about the facts and circumstances of that matter. I know it's under investigation, of course, and it's not part of my responsibilities nor have I learned about it.

Senator LEAHY. So what you would know about it would be what you have gotten from news sources, public sources?

Mr. KAVANAUGH. What I've read in the newspapers, that's correct. I do not know the facts and circumstances of that matter. It is under investigation, of course.

Senator LEAHY. Did you see documents of the President relating to the NSA's warrantless wiretapping program?

Mr. KAVANAUGH. No.

Senator LEAHY. What about documents related to the administration's policies and practice on torture? Did you see any documents on that whatsoever, according to the President?

Mr. KAVANAUGH. No. The only time I have learned of the legal memos and have read some of them was after there was public disclosure of some of those memos in the summer of 2004, and I think in late 2004 or early 2005 I might have read some of those memos. Of course, they had already been publicly released at that point.

Senator LEAHY. What about the Presidential signing statements that indicated reservation on the part of the President regarding provisions in law passed by the Congress? You have seen those signing statements, have you not?

Mr. KAVANAUGH. Signing statements come through the staff secretary's office and also when I was in the counsel's office before

that, the counsel's office sometimes has a role in signing statements. So signing statements traditionally for past Presidents and this President identified potential constitutional issues such as Appointments Clause, Presentment Clause, or record—

Senator LEAHY. These signing statements reserving the President's rights of whether to follow or not follow some parts of the law that he is signing, there have been more—you said this has been done by past Presidents, but there have been more done by this President than all past Presidents put together. So let me ask you this: There was a great deal of publicity here on the Hill and at the White House when the President signed the so-called McCain amendment against torture or inhuman treatment of detainees and prisoners, far less fanfare a couple days later there was a signing statement to basically reserve—the President reserved the right to determine who is going to have to follow the law. Did you see that signing statement?

Mr. KAVANAUGH. I did see that signing statement, Senator.

Senator LEAHY. What was your reaction to it?

Mr. KAVANAUGH. Senator, the President has made clear that the United States and this Government does not torture or condone—

Senator LEAHY. That is not my question. Do you believe that the President had a right to reserve the exercise of parts of that law that he might not like or to reserve its application to certain people?

Mr. KAVANAUGH. My understanding of that signing statement, which is what the President's spokesman said a few days after it was issued, and questions like the one you are raising were raised to him, is that the President intends to follow that law as written. He shook hands with Senator McCain in the Oval Office about that. He has made clear and the President's spokesman made clear that the administration will follow that law as written, as I understand it.

Senator LEAHY. Then why the—I mean, you saw the signing statement. It passed through your hands. Why have a signing statement then that basically reserves the President's right not to follow the law if he does not want to? Why do that? Do you have any qualms about these kind of signing statements?

Mr. KAVANAUGH. Senator, that signing statement, as I recall it, identified a number of issues other than the one you are talking about. On the specific sentence that relates to the question you are raising, I believe the signing statement identified that this fell into something that the President has authority on, to go back to Justice Jackson's Youngstown concurrence that I—

Senator LEAHY. Well, that also makes it very clear if there is a law that the President's ability to act, as Justice Jackson pointed out, is at its absolute minimum.

Let me ask you this: Does the President, if he is claiming a Commander-in-Chief override or anything else, does he have the authority to authorize or excuse the use of torture in interrogations of enemy prisoners despite domestic and international laws prohibiting the practice?

Mr. KAVANAUGH. Senator, the President under Article II of the Constitution has the constitutional responsibility to follow the Con-

stitution and the laws passed by the Congress of the United States. That is part of his responsibility, including—

Senator LEAHY. In treaties we—

Chairman SPECTER. Let him finish his answer.

Senator LEAHY. I want to make—

Chairman SPECTER. No, no. Let him finish his answer. He is in the middle of an answer.

Senator LEAHY. Go ahead.

Mr. KAVANAUGH. Including the laws against torture reflected in 18 U.S.C. 2340 and related provisions, including other statutes passed by this body. That is part of his Article II responsibility.

Senator LEAHY. Including treaties that this country has entered into, which have become the law of the land once we have entered into them.

Mr. KAVANAUGH. When the treaty is the law of the land, the President has the constitutional responsibility to follow the Constitution of the United States and the laws of the United States.

Senator LEAHY. So is your answer—and I do not want to interrupt you from answering. Does the President have the authority to authorize or excuse the use of torture in interrogation of enemy prisoners when there are domestic or international laws that we have entered into prohibiting the practice?

Mr. KAVANAUGH. Senator, the President has said that the administration follows the law, that the United States does not torture, that the United States does not condone torture, the United States does not participate in torture. The President has said that many times. He said he met with Senator McCain in the Oval Office on one statute. The President's spokesman clarified a question you raised and said that the President intends to follow that law as written.

Senator LEAHY. You know, it is funny, but I would think differently after Abu Ghraib and after the rendition by Americans under the authority of the Commander-in-Chief, renditioning of people to countries knowing they would be tortured.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch, anything further?

Senator HATCH. Let me take just a few seconds. You know, I do not know why we needed this second hearing. In fact, I know we did not. Everybody had a shot at the first hearing and, frankly, I do not see any reason—and especially when I read through this transcript of the ABA. Here is what they say: "This nominee"—I am just reading a few of the accolades toward you. And, by the way, I read the ABA description of each member on the Standing Committee. A number of them are Democrats, have very strongly supported Democratic Senators and others, but found you not only qualified but well qualified.

Here is what they say: "This nominee enjoys a solid reputation of integrity, intellectual capacity, and writing and analytical ability. The concern has been and remains focused on the breadth of his professional experience and the most recent supplemental evaluation has enhanced that concern. Taken in combination with the additional concern of whether this nominee is so insulated that he should be unable to judge fairly in the future and placed alongside

the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context."

And then he said, when he was asked by Mr. Jensen whether—you know, you provided a few negative quotes about Mr. Kavanaugh in your written statement. He said, "Let me underscore, Pete, that we did not find him not qualified. There is not a breath of bad in this report or the earlier report. We found him qualified, minority well qualified. What I said at the end is that, in fact, many people said he has a solid reputation for integrity, intellectual capacity. A lot of people refer to him as brilliant and an excellent writing and analytical ability. These are great skills to bring to the court of appeals."

Now, these are just a few of the comments. Let me just give a couple others.

Mr. Tober again for the Bar Association: "The positive factors haven't changed a whole lot. He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components. And I have said this before, but I think you were probably doing better things. He has those skills that will serve him well certainly on a Federal court."

Well, I asked him, I said, "I just wanted to mention that I am correct in looking at the record that he has had some 24 people evaluate him, and not one has found him not qualified." Mr. Tober of the Bar Association: "I don't know the number to be 24. I would take your word on that. But it is true there is not a single 'not qualified' vote in the picture."

I wonder what all the fuss is about. Frankly, to force a second hearing—now, I acknowledge our colleagues have a right to do that, but the fact of the matter is I have not heard anything here today that would cause anybody to vote against you who is fair. I have just got to say, you know, I came here expecting to hear some bombastic things that might show that they think you might not be qualified to sit on the court. My gosh, your experience is virtually, other than the law firm experience where you were a partner in Kirkland and Ellis, one of the greatest law firms in the country, your experience has been an experience of service. And everybody with whom you have worked has felt the same way.

I want to put in the record, Mr. Chairman, a whole list of letters from former Attorneys General, former Solicitors General, your classmates, bipartisan, both Democrats and Republicans, all of whom support you wholly and without reservation.

Again, I just say, you know, I do not want to question my colleagues. They have a right to ask these questions, and I suspect they had a right to call for this second meeting. But I have not heard anything here today that justifies having had the second meeting.

Now, all I can say is that I am proud to support you because I believe that the Bar Association is right here.

Thanks, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Schumer?

Senator SCHUMER. Thank you, and I would say to my good friend from Utah, hope springs eternal. Many of us had hoped that maybe

Mr. Kavanaugh would answer some of the questions he did not answer in the first hearing in the writings, but he has not, in general.

In your written responses to Senator Durbin, you said—well, let me first—you said you were not involved in the nomination process either of Mr. Haynes or of Judge Bybee. Is that right? You said that in reference to questions asked before?

Mr. KAVANAUGH. I did not have primary responsibility—

Senator SCHUMER. I did not ask that. Were you involved?

Mr. KAVANAUGH. There is a Committee that meets to discuss prospective judicial nominees.

Senator SCHUMER. Were you involved in those discussions? Did you voice opinions about Haynes and Bybee at that committee?

Mr. KAVANAUGH. Senator, I don't remember the timing of that, but if it was when I was in the counsel's office, it would have come through the Judicial Selection Committee when I was part of it, and it would have been part of the committee's—

Senator SCHUMER. Can you give me a yes or no answer? Were you involved in discussions involving the nominations of Haynes or Bybee?

Mr. KAVANAUGH. Senator, I believe those were when I was still in the counsel's office, so the answer would be yes.

Senator SCHUMER. Thank you. I think before you—

Mr. KAVANAUGH. I want to—

Senator SCHUMER. I would just like—I do not have the record in front of me, but I would like to look at what you said in reference to other people's questions there.

Here is what you said in your written questions in response. You said, "It is fair to say that all of the attorneys in the White House Counsel's Office who worked on judges, usually ten lawyers, participated in discussions and meetings concerning all of the President's judicial nominees."

Do you remember, were you supportive of the nominations of Haynes and Bybee at the time?

Mr. KAVANAUGH. I don't remember talking about them, but they were members of the administration who people had worked with and knew. So I don't—

Senator SCHUMER. You don't remember talking—

Chairman SPECTER. Let him finish his answer.

Mr. KAVANAUGH. I assume it would have come up at a Judicial Selection Committee meeting, and maybe I should explain how that works, Senator.

Senator SCHUMER. I don't have that kind—unless I can have a little extra time, and I would be happy to let him explain.

Chairman SPECTER. Well, that is part of the answer to the question, Senator Schumer.

Senator SCHUMER. OK. Then I will—I will not—

Chairman SPECTER. You can have an extra 2 minutes. Go ahead.

Senator SCHUMER. Well, that is very kind of you. Thanks, Mr. Chairman. Go ahead.

Mr. KAVANAUGH. Judge Gonzales, when he was counsel, set up a Committee which included members of the White House Counsel's Office as well as Justice Department officials. Within the White House Counsel's Office, one of the associate counsel—there

were eight of us—would ordinarily be assigned to particular States, particular circuit seats, so—

Senator SCHUMER. I understand that. I am just asking a—

Chairman SPECTER. Senator Schumer, let him finish his answer.

Senator SCHUMER. Mr. Chairman, please, we have limited—all right. Then I will ask for a third round, because there is limited time here, and we know the general structure. It is described in the writings. I am asking a specific question. I am asking whether Mr. Kavanaugh can recall whether he was supportive in those discussions. He said here, it is fair to say, all of the attorneys participated in the discussions concerning all of the President's judicial nominations. He is brilliant. He went to every law school—or the best law schools—Haynes and Bybee, no, he cannot. OK. I am now on that. He said so he probably did.

I am asking if he remembers being supportive of either of those nominees, not—you were not in charge of those nominees. We have established that three times over. Were you supportive in those general discussions, which you say all of the attorneys participated in?

Mr. KAVANAUGH. If both of them were nominated before July 2003, then the answer is yes.

Senator SCHUMER. Were you supportive?

Chairman SPECTER. Now he is right in the middle of an answer, Senator Schumer. Let him finish.

Senator SCHUMER. That was not my question.

Mr. KAVANAUGH. Then the answer would have been yes, because it would have come before the Judicial Selection Committee.

Senator SCHUMER. Thank you. Now, let me ask you this.

Mr. KAVANAUGH. Senator, if I may—

Senator SCHUMER. Please.

Mr. KAVANAUGH. What question—the answer is yes, that they would have been discussed at the Judicial Selection Committee.

Senator SCHUMER. I thought you were answering—so, please, answer my question, not the general procedure. Were you supportive of the nominations of Haynes and Bybee when they came before that committee? Did you dissent? Did you say nothing? Were you supportive?

Mr. KAVANAUGH. With respect to—this is a line that I think Judge Gonzales has maintained—with respect to individual deliberations about prospective judicial nominees, that's something that it's not appropriate for me to disclose in this context.

Senator SCHUMER. And why is that?

Mr. KAVANAUGH. Because the President benefits from having candid and full discussions of his prospective judicial nominees, and for those to be candid, there has to be a guarantee of confidentiality there.

Senator SCHUMER. Let me ask you this. Do you ever recall having dissented when a name was brought before this Committee in the general discussions? Did you ever—to any of them, do you ever recall having dissented and saying, "I don't think this person should be put forward?"

Mr. KAVANAUGH. Senator, in all the deliberations that we've had on judges and other issues, I've never been a shrinking violet. I've always been—put forward my views, and you can assume I put for-

ward my views strongly. Once Judge Gonzales or the President makes a decision, I also adhere to that decision.

Senator SCHUMER. I understand. I am asking you did you dissent about potential nominees before—when the Committee discussed it before the President made a decision? You were the Committee that was vetting these people.

Mr. KAVANAUGH. And I'm giving you an answer that says there were a lot of deliberations. A lot of people would debate the merits of nominations, and you can assume that various people would disagree about particular nominees.

Senator SCHUMER. Did you disagree?

Mr. KAVANAUGH. Senator, I don't want—

Senator SCHUMER. To any of these nominees, any of these potential nominees when it came before the committee? You said you are a person of strong opinion, which you are. I know that, or my colleague, the Chairman, said you did not criticize this list of people, but I have a long list of people you were free to criticize, who happen to be at a different political viewpoint. But that is not what I am asking here. I am asking you, did you object and say, "I don't think this person or that person should be nominated," when you were in this committee?

Mr. KAVANAUGH. Senator, I do not think it's appropriate—

Senator SCHUMER. I am not asking about a specific person.

Mr. KAVANAUGH. I do not think it's appropriate for members of the President's staff to disclose whether they agreed or disagreed with recommendations on particular judicial nominees.

Senator SCHUMER. Why is it not appropriate? There is no privilege, I presume?

Mr. KAVANAUGH. Because that would chill the candid discussion that the President benefits from in hearing advice about prospective—

Senator SCHUMER. You mean not to mention a specific name, but to simply ask someone whether they dissented on any would chill discussion? That if you admitted you dissented on some, then people would be chilled from saying that? I did not ask a particular name.

Mr. KAVANAUGH. I'm saying that there were candid deliberations in the judicial selection process.

Senator SCHUMER. We know that.

Mr. KAVANAUGH. That there would be particular people that would come up for consideration, and there would be debate about them.

Senator SCHUMER. Did you dissent? Did you ever say in the meetings, "I don't think this particular person belongs on the bench?" That is not a question that should chill anybody. That, in fact, I would argue, sir, is your obligation to answer us. We do not have much of a record here. My colleagues here, justifiably, have said you have had a lot of Government service and that is what justifies you. We try to find out anything about that Government service, and we do not get an answer. Now, what is the harm to future deliberations of future counsels, deputy counsels, by your saying I did or I did not dissent and say certain people should not be on the bench, other than you just do not want to answer the question for us, and we cannot compel you, particularly when ev-

eryone on the other side is going to vote for you no matter what you say.

Mr. KAVANAUGH. Senator, let me try it this way. On a previous question you had, I said I needed to check with the counsel. I went back. Karl Rove does participate in the White House Judicial Selection Committee.

Senator SCHUMER. Thank you.

Mr. KAVANAUGH. On this question I would like also to go back to the counsel, if I could, and I'll try to provide you a timely answer in the same way.

Senator SCHUMER. But I have some followup questions I would then ask you to answer as well. What was the basis of your dissent? I do not want to ask about specific people. I would like to. I think it is relevant, but there you might have an argument. I would also like you then, if the counsel says that it is OK to answer, that you tell us the basis for the dissent. Was it temperament? Was it ideology? Was it this? Was it that?

Chairman SPECTER. Senator Schumer, you are 2 minutes over the extended time. That means you are 9 minutes plus into this questioning. How much longer would you like?

Senator SCHUMER. I would like another few minutes. I think it is important. I cannot tell you. It depends where the questions go, but I will not take a half hour. I will not take much time.

Chairman SPECTER. Well, we are going to go—

Senator SCHUMER. I think this is—

Chairman SPECTER. You are almost up to 10 minutes. We are going to go to this side for a minute or two, and we will come back to you for another round.

Senator SCHUMER. Thank you. That is just fine. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Schumer, I do not want you to be cut short.

When you say that everybody on this side is going to vote in favor of Mr. Kavanaugh, if that raises any suggestion that everybody on this side is not going to vote against him, that might draw some raised eyebrows.

Senator SCHUMER. Mr. Chairman—

Chairman SPECTER. Now wait a minute. It is my 5 minutes. Start the clock. I am on round 3, because Senator Schumer is going to have round 3. And I will come back to you too, Senator Coburn.

I have listened to your testimony very carefully, Mr. Kavanaugh, but, frankly, it has been hard because there have been so many interruptions. But let me plow this ground again to see if I understand what you have said.

You have said that when you had a certain job up till 2003, it was your responsibility to sit on a panel, a group of people evaluating judges; is that right?

Mr. KAVANAUGH. That's correct, Senator.

Chairman SPECTER. And then when you changed jobs, it was no longer your responsibility to sit on a panel evaluating judges?

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

Chairman SPECTER. And what date is that?

Mr. KAVANAUGH. That would be early July 2003.

Chairman SPECTER. And that is when you changed from being an Assistant White House Counsel to being Staff Secretary?

Mr. KAVANAUGH. That's correct.

Chairman SPECTER. Now, you said that you are no shrinking violet and you disagreed when you thought that there was somebody up whom you disagreed with as to their qualifications. Isn't that what you said?

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. And you would not specify which individuals you disagreed on?

Mr. KAVANAUGH. No.

Chairman SPECTER. You are not going to specify which individuals you disagree on because you think that is part of the deliberative process and it would unfairly impinge on freedom of discussion there, or a chilling effect. Is that what you have testified to, the Senator Schumer?

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

Chairman SPECTER. Now, you also testified, as I could de-garble it through the interruptions, that you do not remember which people you disagreed on, or do you remember which people you disagreed on? I am not asking you which ones they were, but do you recall the specific individuals whom you thought should not be submitted for a judgeship?

Mr. KAVANAUGH. I think the question here is because there can be multiple candidates for a particular judgeship that would come up, and you may rank them differently from how the ultimate decision comes out. That doesn't mean that the final selection is a bad decision.

Chairman SPECTER. Are you saying then that you never said as to any, "I think they're unqualified," but only that you ranked them?

Mr. KAVANAUGH. Well, Mr. Chairman, I don't think I should talk about that issue, at least without checking.

Chairman SPECTER. Well, let's explore that for just a minute. We are talking about generalized procedures, and you sit on a panel. This is while you are Assistant White House Counsel. And you are asked about a number of possible nominees for a judgeship. That is the procedure. Do you feel comfortable answering that?

Mr. KAVANAUGH. Yes. Yes, Mr. Chairman, that's the procedure.

Chairman SPECTER. You have said that you are not a shrinking violet and you speak your mind. So at some point you either disagreed with the qualification of an individual, or thought that they fell behind some others in terms of a ranking system. Is that a fair inference or conclusion from your testimony?

Mr. KAVANAUGH. I think it is, Mr. Chairman. The one thing I want to be careful about is talking about the qualifications of an individual as opposed to ranking individuals. And that's, in terms of the qualifications of an individual, some people are more qualified than others. You may rank them differently from how some other members of the committee, and you may disagree with the ultimate selection. I'm sure that happens all the time in any process like that.

Chairman SPECTER. I am sure it does too. That is what you are testifying about. How many individuals were you considering, many, many, many, were you not?

Mr. KAVANAUGH. There have been hundreds, Senator, that have been confirmed, and that means that there are many hundreds more, because you assume for each one of those spots—

Chairman SPECTER. OK, so we are in the hundreds.

Mr. KAVANAUGH. It could be over a thousand.

Chairman SPECTER. I am not asking you whom you disagreed with or whom you ranked where. Do you remember among those hundreds you confirmed and hundreds more you considered, among those hundreds and hundreds of people, can you recall specific individuals and rankings at this time, some 3 years after the fact?

Mr. KAVANAUGH. I certainly, Mr. Chairman, do not recall the specific deliberations. I do recall some, of course, and that is natural. It is also natural for there to be debate and discussion on judicial nominations by the Judicial Selection Committee. That's what we want so that the President gets the best advice, the best recommendations of the staff.

Chairman SPECTER. OK. There are some that you recollect because they stand out for one reason or another, right? Correct?

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

Chairman SPECTER. And you are not prepared to identify those individuals because you believe that would restrict the candid discussion. We have been through this on Chief Justice Roberts, on the Solicitor General's Office. We have been through it on a lot of decisionmaking processes, and I do not want to get into the question about limited privilege here today. I just want to understand your thinking as to why, among those whom you remember, you will not identify. And as I think you have testified in response to Senator Schumer, but I am not sure because of the garbled nature with the interruptions, that you will not be specific even as to those whom you remember because you do not want to impinge upon that deliberative process. Is that right?

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

Chairman SPECTER. Senator Schumer, you have five more minutes, and then we are going to wrap up your side.

Senator LEAHY. I just wanted to respond to something that you said, Mr. Chairman, this idea of a closed mind. I spent 17 months as Chairman of this Committee.

Chairman SPECTER. Let's start the clock if Senator Leahy is speaking.

Senator LEAHY. I spent 17 months as Chairman of this Committee during President Bush's term. We moved 100 judges. We have had two Republican chairmen since. Both are friends of mine. Neither one of them have moved President Bush's nominees through as fast as I did. So let's not talk about closed minds or the partisanship. And we did this notwithstanding the fact that the Republicans had pocket-filibustered 64 of President Clinton's nominees in the few years leading up to that. We Democrats moved 100 of President Bush's nominees through in 17 months, an all-time record.

Now, what I want to know is how do you approach recusal? You have been a key member of the Bush-Cheney administration. We

have a President making sweeping claims, nearly unchecked executive power. A number of these matters, issues are going to come before the D.C. Circuit, assuming we have any check and balances. The Congress has not done much in the way—with some few notable exceptions, has not done much in the way of checks and balances. The rest of America waits for the courts to do that. How do you determine what you are going to recuse yourself from? What about if it is a challenge to the administration's practice of rendition, of sending people to other countries to be tortured? What if it is about the administration's interrogation practices in detention? What about their wiretapping of Americans without warrants through NSA? Where do you recuse yourself?

Mr. KAVANAUGH. Senator, if I am confirmed to the D.C. Circuit, I will do the analysis under 28 U.S.C. 455. There are some specific recusal obligations in Section 455(b), which I would of course follow. There's also a more general recusal prescription in Section 455(a), which talks about when a judge's impartiality reasonably might be questioned. I would do the analysis of that by looking at the precedents. There have been other people who have gone from the executive branch to the judicial branch, of course. I would do it by consulting with my colleagues, and do it by looking at the facts and circumstances of each particular case.

I think it's hard to make a recusal determination in the abstract here—

Senator LEAHY. Would you think if a question came up about the administration's practice, the Bush-Cheney administration's practice of rendition of people to other countries, would that at least raise a red flag in your mind?

Mr. KAVANAUGH. Senator, on recusal questions generally, I don't think I can—because I haven't done the work necessary—identify specific cases, and we don't know what those cases might be where I might recuse. I can pledge to you a serious process. I understand there could be issues. I would follow the precedents, look at the precedents, consult with my colleagues.

Senator LEAHY. What if it is questioning a policy or practice with which you were involved at the White House, either forming the policy or making the decisions; would that be a pretty easy one?

Mr. KAVANAUGH. Well, I think without knowing exactly where you're saying, on 28 U.S.C. 455(b), there's a specific prohibition that applies to Government lawyers who have worked on certain matters, and depending on the hypothetical, if that fell within that, I would have no hesitation about recusing. And just generally, Senator, I would have no hesitation about recusing. I just want to do the work and know the facts and circumstances before I make any determination.

Senator LEAHY. These are not dissimilar to questions I asked Judge Roberts both when he was up for D.C. Circuit, and the Supreme Court. In his case, I was satisfied with his answer, and I voted for him, in his case.

I understand, Mr. Chairman, Senator Feingold is not able to return for another round. He has written a followup letter to Mr. Kavanaugh. I ask that that letter be made part of the record.

Chairman SPECTER. Without objection it can be made part of the record, but he is not seeking followup answers from the witness, is he?

Senator LEAHY. I think that this is—yes, there is a specific one to which the nominee has expressed a willingness to respond, so that is very specific. Mr. Kavanaugh has been handed this. He has not seen it yet. The staff has—

Chairman SPECTER. I want all the questions for Mr. Kavanaugh to be asked because as stated during our Executive last week, it is the intention to vote on him on Thursday, and he is going to stay here long enough within reason to answer the questions.

Senator LEAHY. Well, I would hope that he would look at this, and I would hope that he might be prepared to answer. I think it can be done fairly quickly.

Chairman SPECTER. Let me take a look at it first, and give him a copy, and I will pass it on to him, and meanwhile we will go on to Senator Coburn for a round of questions.

Senator COBURN. Thank you, Mr. Chairman.

Mr. Kavanaugh, does the president have—

Chairman SPECTER. But we are coming back to you, Senator Schumer.

Senator COBURN [continuing]. An obligation to try to preserve Presidential powers through signing statements? Is that not the purpose for them?

Mr. KAVANAUGH. Presidential signing statements have been used throughout our history, Senator, and particularly in the last four Presidents that I'm aware of, to identify specific constitutional issues that can arise in provisions of statutes. They're usually focused on things like the Appointments Clause. Suppose there's a new board or commission and there's an Appointments Clause issue. The Recommendations Clause, when reports are required that might be inconsistent with the Recommendations Clause. This is part of the conversation, the dialog, that the executive and the legislative branch have on issues like this through the years.

Senator COBURN. But it is an important function of the president to elicit those areas of potential conflict on a constitutional basis, and to put a statement from the sitting President in regards to those. Is that not correct?

Mr. KAVANAUGH. That is correct, Senator, and Presidents have been doing that throughout our history.

Senator COBURN. So a reasonable man could believe somebody would not necessarily believe in torture, but might put something into the record on a signing statement that might be related to preserve Presidential powers or appointments or some other area, and not necessarily believing in torture, but be castigated that they do believe in torture because they happened to put that in, not for the purpose of torture, but for the purpose of protecting and enhancing or—not enhancing—protecting and securing what was there before in terms of Presidential powers. Is that not—a reasonable man could not think that?

Mr. KAVANAUGH. Senator, Presidential signing statements, I think, the Counsel's Office in particular in the Department of Justice, seek to rely on the precedents of the executive branch and legislative branch interaction, where there have been issues identified,

and when new legislation comes up, say an Appointments Clause issue, a Presentment Clause issue, or Recommendations Clause issue, to identify that kind of issue.

That's been done throughout our history, and I think it's very traditional.

Senator COBURN. Would you think much of a President, who if they just ignored not doing that, they just decided, well, that is not important, I am not going to do that?

Mr. KAVANAUGH. Senator, I think all the Presidents, at least in modern times, have identified issues when they come up. And again, it's part of the conversation, part of the healthy back and forth between the executive and the legislative when these kinds of issues come up.

Senator COBURN. But it is also done to preserve a point of view, so that when it is looked at in the future, somebody can understand what the debate was at that time; is that not correct?

Mr. KAVANAUGH. Exactly, Senator. Puts it on the record. People know. It's an open process. Then there can be discussion about issues that might be, for example, an Appointments Clause problem with a new board or commission, then there can be discussion back and forth. If there is a problem, it can be fixed in a subsequent statute, for example.

Senator COBURN. Do you believe President Bush's statements on torture?

Mr. KAVANAUGH. President Bush has said the United States does not torture, condone torture—

Senator COBURN. I know what he said. I am asking you do you believe him?

Mr. KAVANAUGH. Absolutely, Senator.

Senator COBURN. So you do not have any heartburn over his signing statements in regard to anything if they are consistent with what he said and what he believes?

Mr. KAVANAUGH. That's absolutely correct, Senator. He has stated that the United States will not torture, does not condone torture, follows the laws against torture. He's made that clear.

Senator COBURN. Thank you.

I yield back, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Coburn.

Senator Schumer, you had a little over 10 minutes on an opening statement, 6½ minutes on your first round, a little over 10 minutes on the last round. I want to conclude by five o'clock. You have five more minutes.

Senator SCHUMER. Mr. Chairman, it is a lifetime appointment, and I think we should be allowed to ask questions. You put people in a box. If he goes on, I do not get a chance to ask all my questions. If I try to get to my answer by cutting him short, you take some umbrage. I do not think that is a fair way to proceed. OK?

Chairman SPECTER. Well, I do not cut short. I asked you not to cut him short.

Senator SCHUMER. Well, then just give me the time that I need instead of telling me we must end at five o'clock for a lifetime appointment.

Chairman SPECTER. Well, your questions may exceed the tenure of his appointment, Senator Schumer.

Senator SCHUMER. No. My questions are fair questions for somebody who is going to have tremendous power. I think they are relevant.

Chairman SPECTER. Let's put the clock back to 5 minutes, and start in, and see how we do.

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate it. And I just make a couple of quick comments here.

First, I did not ask you, Mr. Kavanaugh, although Senator Specter interpreted it that way, to name specific judges. I asked you did you ever dissent—and I was explicit—not on specific judges. And you said to me you would not be able to answer that question until you checked with counsel. Is that correct?

Mr. KAVANAUGH. That's correct, Senator.

Senator SCHUMER. Did you then answer Senator Specter saying you did dissent? Did you change that answer? That is what I am trying to figure out here.

Mr. KAVANAUGH. I think it goes, Senator, to whether there was a different rank order in particular discussions, or whether you thought someone was unqualified for the—

Senator SCHUMER. I never asked about a rank order. I asked you—

Mr. KAVANAUGH. It just came up.

Senator SCHUMER. Yes, Senator Specter did, but he was saying what I asked you, and he was not interpreting what I asked you. I asked you explicitly, was there ever a nominee—you don't have to name him, and I was explicit—that you thought should not go forward and you said that? Not where you ranked him, but that you said should not go forward and you ranked him. Now, you said to me, as I recall—we can check the transcript—that you were not sure you could answer that question, although I expressed befuddlement as to why because we were not asking a specific name. Are you willing to say that you blocked certain—not blocked—that you urged that certain potential nominees not go forward, or do you want to go to counsel and see if you can answer that question?

Mr. KAVANAUGH. Senator, I'm sure I, in the course of 2½ years of debate over judges, I'm sure that all of us had preferences that weren't reflected in the final decision. Is that your question?

Senator SCHUMER. My question is did you, do you recall having ever stated that you do not think X potential nominee should move forward for whatever reason?

Mr. KAVANAUGH. I'm confident, Senator, that on occasion, I would have rank ordered them differently from how the—so that the final decision was different from what my recommendation would have been.

Senator SCHUMER. I did not ask that. I asked you did you ever express, at these meetings of the 10 counsel, this person should not be nominated? Do you want to go back and check your recollection and answer in writing before tomorrow?

Mr. KAVANAUGH. Can I just ask a followup?

Senator SCHUMER. Please.

Mr. KAVANAUGH. Which is, do you mean should not go forward, period, regardless of who else was in the mix? Is that the—

Senator SCHUMER. I mean, yes, that a person, regardless of who is in the mix, there might be certain people who you did not think deserved to be on the bench, whether someone else was in the mix or not?

Mr. KAVANAUGH. I think that kind of question goes to the heart of the deliberative process that the President relies on for picking judges, to talk about whether you disagreed with the final selection, really, that's something the President—

Senator SCHUMER. OK. I am not asking an explicit name. I am just asking whether that happened. And you cannot recall, you cannot give me a yes or no answer to that?

Mr. KAVANAUGH. Senator, again, I think that would go to the heart of the deliberative process. As I understand it, it's important to protect the deliberative process so that the President gets the best advice. When the President makes a decision to nominate someone, it defeats the process for members of the staff subsequently to go out and say, "Well, I disagreed with the President on that," or even if you don't name names, to say, "I disagreed with some of his selections," that's—

Senator SCHUMER. I think that is—

Mr. KAVANAUGH [continuing]. Inconsistent with—

Senator SCHUMER. Is—

Chairman SPECTER. Let him finish, Senator Schumer.

Senator SCHUMER. I have 1:27 left here. Are you going to let me ask a few more questions if I might?

Chairman SPECTER. How many?

Senator SCHUMER. I do not know. A few.

Chairman SPECTER. Finish your answer, Mr. Kavanaugh, if you can remember where you were.

Mr. KAVANAUGH. I think that's inconsistent with the deliberative process that the President needs to rely on to pick the best judges for the Federal judiciary.

Senator SCHUMER. I fail to see any reason. I think people are put on the Committee to make that very decision, and I have a lot of questions. It puts questions in my mind why you refuse to answer that question. But let's move on.

You did say you would check with counsel earlier, and then you came back to me about Karl Rove, and you said he was involved in the process. OK. In what capacity was he involved? How often did he consult with you and the other counsels about prospective nominees?

Mr. KAVANAUGH. Again, Senator, he's part of the committee. The Committee meets weekly. I'm not sure how often he attended. I know he participated though.

Senator SCHUMER. Was it more than once?

Mr. KAVANAUGH. He was a regular participant.

Senator SCHUMER. A regular participant in the Committee of 10?

Mr. KAVANAUGH. Well, it's actually much bigger than 10. The committee—

Senator SCHUMER. But he was a regular participant in the decisions?

Mr. KAVANAUGH. In the committee process there's many more than 10. I'd say it's about—

Senator SCHUMER. And what do you recall—

Chairman SPECTER. He is right in the middle of an answer, Senator Schumer.

Senator SCHUMER. Go ahead.

Mr. KAVANAUGH. I just want to be careful to make sure you understood that the committee, at least when I was on it—I don't—haven't gone since 2003—but included all the people in the White House Counsel's Office plus several Justice Department lawyers, plus people from other White House offices like the Legislative Office on occasion it would attend. So it's many more than 10. I don't know the exact number though.

Senator SCHUMER. And did he ever discuss politics relevant to why this judge should go forward or that one should not, like it is am important State to us, it is an important reason, so-and-so wants him? Did that ever come up?

Mr. KAVANAUGH. Senator, I think it's important not to disclose the internal deliberations that might occur. Of course we worked very closely with the Senators in each State. We've worked closely in New York with you and Senator Clinton on judicial nominations, and Judge Raggi, and many district court nominations. We've worked well together with you, and so that's of course part of the process, is, OK, the Senators in this home State are suggesting so-and-so. Is that person the best person? And then a back and forth of the home State Senators. That's part of the process, and those discussions would often occur at the—those kinds of discussions would often occur. And so I think that's—

Senator SCHUMER. And Karl Rove was involved in those?

Mr. KAVANAUGH. Karl Rove participated in the process.

Senator SCHUMER. OK. Let me ask you this. Who else was on that—you said Karl Rove was a regular participant. Who else who was not in the Counsel's Office was a regular participant?

Mr. KAVANAUGH. Senator, I would think the Counsel's Office, if the Counsel thought this was appropriate, could provide you a list, if she thought it was appropriate, and I don't know the answer to that question.

Senator SCHUMER. But you said you consulted her and it was OK to mention that Karl Rove was part of the process?

Chairman SPECTER. Mr. Kavanaugh, answer the questions within the scope of your recollection, not referencing anybody else who can provide a list. I do not want to have any strings outstanding. You are here today to answer questions.

Senator SCHUMER. I thank you, Mr. Chairman.

Chairman SPECTER. You answer the questions as to what you know.

Mr. KAVANAUGH. Mr. Chairman, Senator Schumer, I don't know that it's appropriate for me to list everyone who's on the committee. I can tell you the offices that are in it, the White House Counsel's Office, the Department of Justice, offices that work closely with the committee, Office of Legal Policy on Judges, Karl Rove was involved. Chief of Staff's Office on occasion. I think those are the people—if I'm leaving anyone out, Senator Schumer, I'll make sure to—

Senator SCHUMER. Was there ever anyone outside of Government who participated in these groups?

Mr. KAVANAUGH. No.

Senator SCHUMER. And if you told us that Karl Rove participated, is there any legal, imaginable, legal reason that you couldn't tell us who else participated by name, not by their offices?

Mr. KAVANAUGH. Senator Schumer, I think I was saying that I could tell you the offices. I don't know that I could remember all the names, sitting here, of who was at the particular meetings, but I told you the offices.

Senator SCHUMER. Anyone from outside those three offices that you mentioned, the White House Counsel, the Office of Legal Council, the Justice Department, anyone else from—Rove was not part of those—anyone else from outside of those offices?

Mr. KAVANAUGH. Office of Legal Policy. Again, going back, it was Office of Legal Policy at Justice, just to be clear.

Senator SCHUMER. Right, thank you.

Mr. KAVANAUGH. Going back to my own time, from 2001 to 2003, and keeping in mind what the Chairman told me to testify what I remember—

Senator SCHUMER. Well, the Chairman is trying to move your nomination forward as quickly as possible. That is why he did that.

Chairman SPECTER. Senator Schumer and I finally found an agreeable point.

[Laughter.]

Senator SCHUMER. There are more than you think, but not on judges.

Mr. KAVANAUGH. If I'm leaving anyone out, I'll send it in later, but Legislative Affairs, of course, on occasion because we deal with the Senate staffs; the Chief of Staff's Office on occasion—

Chairman SPECTER. When you send it in later, Mr. Kavanaugh, anything you are going to send in later has got to be in by tomorrow.

Mr. KAVANAUGH. It will be in this evening, Mr. Chairman.

Chairman SPECTER. OK.

Mr. KAVANAUGH. I just want to make sure I'm not leaving anyone out, so the offices that I've mentioned, Deputy Chief of Staff's Office on occasion would participate.

Senator SCHUMER. OK. Just one final line of questioning, Mr. Chairman.

And this involves what you said last time, which is that you testified that what the President is looking for is nominees who have respect for the law and who understand the legal system, and the role as a judge is different from one's personal views. Do you believe that Justice Ginsburg and Justice Breyer have a respect for the law?

Mr. KAVANAUGH. Absolutely, Senator.

Senator SCHUMER. Why then do you believe the President keeps talking about judges in the mold of Scalia and Thomas, if the methodology, the rationale is respect for the law?

Mr. KAVANAUGH. Senator, I think the President has talked about a general judicial philosophy that he's looking for in prospective judicial nominees.

Senator SCHUMER. But you indicated to me in the first hearing that you did not think ideology played a role at all in the selection of nominees, which I found incredulous.

Mr. KAVANAUGH. Senator, in the first hearing, there was—I don't think I explained clearly what ideology could entail. To my mind, the President considers, of course, one's judicial approach, whether someone believes in interpreting the law and not imposing their own policy views. We do not ask your views on specific cases or issues.

Senator SCHUMER. Understood.

Mr. KAVANAUGH. Do not ask your views on policy issues that might exist. The President looks and wants his staff to look for people who share the kind of judicial approach he's outlined, and of course, with this President, as with past Presidents, most judicial nominees are of the same party—

Senator SCHUMER. So let me ask you this. If you believe that Justice Ginsburg and Justice Breyer have a respect for the law, as well as Justice Scalia and Justice Thomas, why are there so few nominees who seem to have the judicial philosophy of Justice Ginsburg and Justice Breyer, and many, many, many, who have the judicial philosophy of Justice Scalia and Thomas if ideology does not play a role in the selection? I am not saying it is wrong that it does, and I am not saying that it—but I was surprised that you, at your initial hearing, said it did not. If respect for the law is the judicial philosophy, that is what the President is looking for, then theoretically, the panoply of nominees should be much broader in terms of all kinds of things, their political affiliation, their judicial philosophy, their views on a variety of issues, and you are saying it did not play any role when you were there or others were there. I find that hard to believe, given who the President has sent before us.

And one other point I would make just parenthetically. The reason I mentioned I sort of had an idea that that side of the Committee would vote one way, was because they voted yes on every single nominee the President has sent forward thus far. There has not been one single dissent of the 240 nominees, where on our side there have been a lot of yeses and a lot of noes. So it would be harder, at least by past experience, to judge that. That is why I said that.

But anyway, go ahead.

Mr. KAVANAUGH. Senator, I want to be very clear that the President has said that one's judicial philosophy does play a role, does in fact play a role in the types of judges he's looking for. Your approach to judging, whether you're someone who believes in interpreting the law and not legislating from the bench. He's made it very clear that does matter. What doesn't matter is your view on—and what we do not ask—

Senator SCHUMER. I understand. You have said that, and I accept that, that you do not ask about specific issues like are you pro-choice or pro-life.

Mr. KAVANAUGH. Correct.

Senator SCHUMER. But still, do you think that, for instance, Justice Breyer and Justice Ginsburg have any less respect for the law or are less likely to try to interpret the law than say Justice Thomas or Justice Scalia?

Mr. KAVANAUGH. Well, Senator, as a nominee for an inferior court, I don't think I should be talking about the Supreme Court

Justices and trying to assess them. What I will say is the President has—

Senator SCHUMER. How about between—

Chairman SPECTER. What he will say is? Let him finish his answer.

Senator SCHUMER. He did not answer my question. That is why I am trying to get an answer.

Chairman SPECTER. Well, that is his answer.

Senator SCHUMER. Go ahead. As long as we have time.

Chairman SPECTER. And you may have a followup question.

Senator SCHUMER. Thank you.

Mr. KAVANAUGH. What I will say is the President has made it very clear that he does believe in appointing judges who will interpret the law as written, who will not legislate from the bench, who will not seek to impose their own policy views. He's made that very clear. So judicial philosophy is a part of the judicial selection process. He said that many times, and I just want to be clear on that.

Senator SCHUMER. Do you think that former Justice, the last Justice Thurgood Marshall, and say, Robert Bork, have a different view of what interpreting the law is, as opposed to imposing their own views, or do you think they each do it the same way?

Mr. KAVANAUGH. I think Judge Bork has made clear that he has a different interpretive approach than say, Justice Marshall. For example, both in his testimony before this Committee, and in books he's written since, Judge Bork made clear he had a different type of approach than Justice Marshall.

Senator SCHUMER. Even though both have a respect for the law and understand the legal system?

Mr. KAVANAUGH. Senator, I think—

Senator SCHUMER. Those were your words.

Mr. KAVANAUGH. Respect for the law is a necessary qualification, of course, but it does not encompass judicial philosophy. That's a separate issue to look at in terms—

Senator SCHUMER. The reason I ask you this is we rarely get an opportunity to question somebody who has sat on the Committee in this administration who does this. But it is obvious to me in what you say that clearly judicial philosophy and ideology make a difference here, and you have more or less said that. Nothing wrong with it. Democratic Presidents might do it too. But that is clearly happening. Would you disagree with that?

Mr. KAVANAUGH. Judicial philosophy is part of what the President looks at because he's made clear he wants to appoint judges who interpret the law.

Senator SCHUMER. How is that different than the word "ideology" which I used to you at the first hearing?

Mr. KAVANAUGH. Because I think "ideology" can encompass four different things, and we need to be very clear what we're talking about so there's no confusion. Ideology could encompass political affiliation. It could encompass your general approach to judging. It could encompass your specific view on particular cases, and it could encompass your policy views. The first two are the factors that are looked at in the final—

Senator SCHUMER. But if what you mean by ideology is differing judicial philosophies, then clearly the President—if you mean that—then clearly ideology enters into the selection process, right?

Mr. KAVANAUGH. Judicial philosophy matters, and if that's how you're defining it, then judicial philosophy matters.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Mr. Kavanaugh, I do not want the record to be incomplete in any way. Senator Feingold, rather, Senator Leahy handed to me a letter that Senator Feingold purportedly wrote to you, dated yesterday, marked "hand delivery," relating to answers to questions 3 through 7, which he had asked you before. Did you get this letter? Aside from what was just handed to you, Mr. Kavanaugh—look at me—did you get this letter?

Mr. KAVANAUGH. Yes, sir.

Chairman SPECTER. Hand him the letter, would you, please?

Mr. KAVANAUGH. I think this is a copy, sir. I was told about this letter and that—

Chairman SPECTER. Now, never mind what you were told about. Just answer my question. Did you get this letter?

Mr. KAVANAUGH. I don't believe I got this letter, Senator. I'm just making sure.

Chairman SPECTER. OK. Well, it is dated yesterday. Senator Feingold was here. He could have handed you the letter, or he could have asked you these questions. But he says he did not ask you questions 3 through 7, so I am going to take his part and ask his questions, although he should have. I do not want any loose threads hanging out of this hearing. I will ask them as best I can because his questions are not, with all due respect, self-explanatory. The staff has marked up the record on his written questions, saying that he had asked you all of the parts of question 3.

Mr. KAVANAUGH. That's correct.

Chairman SPECTER. And moving on to question 4, he asked you about Judge D. Brook Smith's not resigning from a club which he promised during a Senate hearing he would resign from. If you promised to resign from a club, Mr. Kavanaugh, would you keep that promise and resign from the club?

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. On to question 5. This also refers to Judge Smith, but the relevant question is your values. And you probably already covered this in connection with other questions, but I will ask it to be sure that everything Judge Feingold wants asked is asked. Would you conform to the Judicial Disqualification Statute, 28 U.S.C. Section 455, and recuse yourself if it is called for by that statute?

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. On to Number 6. There was a question about whether Judge Smith complied with Advisory Opinion No. 67, which sets forth the standards for free trips to educational seminars sponsored by, as he put it, ideological organizations, such as the Montana-based Foundation, et cetera. Will you comply with the requisite ruling with respect to acceptance of free trips?

Mr. KAVANAUGH. Yes, Mr. Chairman, I certainly will.

Chairman SPECTER. Would you go further, and decline to go on free trips? There are quite a few of us around here who decline to go on free trips because of the conflicts question involved and the reporting. I made a speech at NYU several years ago on a legal issue, took the train up and back, and read about it in the newspaper forever. Would you consider declining going on free trips?

Mr. KAVANAUGH. That's my intention, Mr. Chairman, for the reason you identify, that I would not go on any trips, and, you know, basically would go by a pay my own way philosophy. That's my intention.

Chairman SPECTER. Senator Feingold's last question, No. 7, was related to a district judge, after confirmed by the Senate to a district judgeship in Texas, he told the New York Times that despite his confirmation, right now he is running for State representative. If you are confirmed, will you run for any other office?

[Laughter.]

Chairman SPECTER. Would that articulate a value that you would avoid?

Mr. KAVANAUGH. I will not run for any other office, Mr. Chairman.

Chairman SPECTER. Wise answer. Now, back to a revisit on dissenting and ranking. We played a tennis game here with Senator Schumer questioning you and my trying to clarify it, and Senator Schumer going back and asking some more questions, some might say not clarifying it, but Senator Schumer would not agree with that, so I will not press it. But let me review the bidding here very briefly.

You engaged in a system where you ranked prospective nominees where there were a number of people for a single judgeship, correct?

Mr. KAVANAUGH. That's correct, Mr. Chairman, through a process. It may not be as formal as you're describing, but, yes, basically.

Chairman SPECTER. In that process, were you ever called upon to dissent, in Senator Schumer's terms, that is to say, "Candidate X is unqualified as far as I am concerned," or did you pursue the ranking, which you have already testified to?

Mr. KAVANAUGH. Well, certainly with respect to candidates, of course there would be certain candidates you'd say, "I don't think this person is suitable for the bench," when you're talking about candidates. I think Senator Schumer was talking about whether ultimate nominees, if there was dissent on ultimate nominees.

Senator SCHUMER. If I might, Mr. Chairman?

Chairman SPECTER. I will yield to you, Senator Schumer.

Senator SCHUMER. Thank you.

Chairman SPECTER. For one question.

Senator SCHUMER. I was asking about potential nominees. Were there potential nominees that you said, as it came before this committee—not the ranking system, I have said it three times. I think it is clear as a bell, even if my colleague does not want to say that is true.

Chairman SPECTER. Are you saying who came before the committee?

Senator SCHUMER. Who were discussed at this committee, who you said—I am not asking names—who said, "This person does not belong on the bench, and I don't think we should recommend to the President that that person be nominated." It is a very simple, clear question that I have asked three or four times.

Chairman SPECTER. I do not—

Senator SCHUMER. Can I—

Chairman SPECTER. Go ahead.

Senator SCHUMER. And at one point you said to me that you would have to ask counsel if you could answer that question, and at another point I believed you said that you did not think it was appropriate to answer that question, and now, in reference to Senator Specter's question—maybe you did not know it was potential nominees—you said—well, why don't you answer it?

Mr. KAVANAUGH. If it's talking about—

Chairman SPECTER. If you understand that question, go ahead. [Laughter.]

Mr. KAVANAUGH. If we're talking about—

Senator SCHUMER. I think everybody understands that question.

Mr. KAVANAUGH. If we're talking about the general—

Chairman SPECTER. I do not care about everybody. I care about him. Do you understand that question?

Mr. KAVANAUGH. I now do. I think there might have been some confusion. Of course, when there's a list of candidates that come before the committee, you might say someone's not qualified, of course, before the Judicial Selection Committee. Some people just are not suitable for the bench. They might be recommended by someone. For example, they get on a list of recommended people that come from a Senator, from a Governor, from a Member of Congress, and you might assess that person's record and say, "You know what? That person is just not suitable for the Federal bench." Of course that happens.

Senator SCHUMER. Then may I ask a followup question, Mr. Chairman?

Chairman SPECTER. Yes.

Senator SCHUMER. Give us some of the reasons. Did you ever invoke the notion that their judicial philosophy was not appropriate for a judge?

Mr. KAVANAUGH. The President's made clear that judicial philosophy matters, so if someone did not share the judicial philosophy that the President has articulated, of course, that would be a reason, yeah. Also—

Senator SCHUMER. And you would say that? You would say, "I don't think Mr. X or Ms. X shares the President's judicial philosophy?"

Mr. KAVANAUGH. I think the President's made clear that he will not appoint judges who seek to use the bench to impose their own personal—

Senator SCHUMER. I understand. So you would say that on occasion when a nominee came before the committee?

Mr. KAVANAUGH. Well, that's what the President wanted, so we work for the President.

Chairman SPECTER. Can you give him a simple yes?

Mr. KAVANAUGH. Yes.

Senator SCHUMER. Thank you. Thank you, Mr. Chairman. I think the question was pretty clear.

And do you recall—and again, I do not need the name of the nominee—an example of why this person was not appropriate in terms of judicial philosophy?

Mr. KAVANAUGH. If someone in our judgment or the assessment of the committee or the assessment of the interviewers, concluded that this person, in either direction, had policy views that they couldn't separate from their judicial views, who didn't seem to understand the difference that I think I've articulated today between the judicial role and the legislative role—and there are such people who sometimes get interviewed—if someone doesn't understand that role, then that person would be—could be deemed not suitable for—

Senator SCHUMER. And how often did that happen? And I do not need an exact number or anything like it.

Mr. KAVANAUGH. I think most of the candidates that members of the Senate recommend, that Governors recommend, usually come with the proper appreciation of the judicial role, but there are occasions where people share a different philosophy, or where people simply do not—someone might be interviewed who simply does not seem to recognize the distinction, which is critical in my judgment, between the policymaking role and the judicial role, but that—

Senator SCHUMER. But you would never use the words, too liberal or too conservative, or would you?

Mr. KAVANAUGH. Well, I think too activist.

Senator SCHUMER. Would you? You would say too activist?

Mr. KAVANAUGH. If someone doesn't understand the judicial role and you would say that person believes in judicial activism and not judicial restraint, and the President's made clear to us and made clear to the American people, that he's looking for people who believe in judicial restraint to be judges. And, of course, that person wouldn't fit what the President told us to look for.

Senator SCHUMER. So you would occasionally say somebody would be too activist, in your opinion, to meet the President's criteria?

Mr. KAVANAUGH. Well—

Chairman SPECTER. That is what you are saying, Mr. Kavanaugh. Can you give him another yes?

Mr. KAVANAUGH. I'll give him a yes, and say that's what the President said to the American people—

Senator SCHUMER. I understand.

Mr. KAVANAUGH. —twice—

Chairman SPECTER. OK, Senator Schumer.

Senator SCHUMER. Just one more question. Were there ever people who were too activist from the conservative side as opposed to the liberal side?

Mr. KAVANAUGH. Yes.

Chairman SPECTER. This is your last question, Mr. Kavanaugh. Did you say yes?

Mr. KAVANAUGH. Yes.

Chairman SPECTER. Atta boy.

[Laughter.]

Senator SCHUMER. You can see why the Senator from Pennsylvania was a very fine prosecutor. He is very good at helping his witness.

[Laughter.]

Chairman SPECTER. All out in the open, all out in the open, all transparent.

Senator Graham, you have been waiting patiently. I have tabulated Senator Schumer's questions were 42¾ minutes, so you are limited now to 37¾ minutes.

[Laughter.]

Senator GRAHAM. I really do not have much to add, but that will not stop me. I found it actually fascinating. I mean you seem no worse for the wear. Senator Kennedy's staff has a good question I think. Maybe I should not have said that, but I think it is a good enough question I will make it my own.

Mr. Bybee, Judge Bybee, if you had known—well, you repudiated the memo, you thought it was not good legal reasoning; is that correct, the Bybee memo?

Mr. KAVANAUGH. Yes. The administration has repealed that memo, and I stated my own personal agreement with repealing the memo.

Senator GRAHAM. Would that have disqualified him, in your opinion, from being a judge if you had known it?

Mr. KAVANAUGH. Senator, I've drawn a line here today which I think is important for maintaining the integrity of the judicial selection process, not to talk about people who are currently sitting judges or other judicial nominees by name. I don't think that is appropriate for me to do.

Senator GRAHAM. I will just end it and take my time. There is a fine line between doing your job as a White House counselor, being part of the judicial selection team and being a judge yourself. There is a line between being advocate and being a judge. I think you understand that line. And I think the questions have been very, very good, to be honest with you. And I expect President Bush to live up to his campaign promise of picking strict constructionist, non-judicial activists as he sees it. That is what the election was about. And if you have been part of that weeding-out process to make sure somebody in the conservative movement or the liberal movement does not get on the court, then I think not only have you done a good job in the White House, you fulfilled your obligation to the President.

Now, your obligation is no longer to President Bush. Your obligation is to those people that come before you like they came before your mother. You are going to have a lot of characters come before you in a courtroom where their case is on appeal. And some of them you won't like, and some of them you may feel close to philosophically.

If you could, just in a very short statement, tell me what your job, what you will do with that responsibility, no matter who the person is that comes before you. What is your job now?

Mr. KAVANAUGH. Senator, if I were confirmed, I believe in the absolute sanctity of ensuring the integrity of the—sanctity and integrity of the judicial process, which means treating all parties who come before the court equally. I think I did that as a law clerk for

the two Court of Appeals judges and Justice Kennedy. I understand that function. That's really central to the whole judicial role, equal justice under law. It doesn't matter where you come from, it doesn't matter what you look like, doesn't matter what your background is. When you come into that courtroom, you have the right to present your case, and if you're right on the law, you should prevail in your case. It doesn't matter.

And that's the genius of our system. It's been part of our system throughout our history, and if I were confirmed, I pledge to you and to all the members of the Senate that I would absolutely fall within that tradition.

Senator GRAHAM. I look forward to voting for you. Thank you.

Chairman SPECTER. Thank you very much, Mr. Kavanaugh. As previously announced, we will proceed to a vote on Mr. Kavanaugh on Thursday. I believe at this date—and I have checked with staff, who have been listening attentively, as have I—there are no outstanding questions for you to answer. Gone over what Senator Feingold's letter said, and I believe you have responded on the Karl Rove answer, and I believe all the issues have been responded to.

I want to compliment you on your stamina. I will reserve comments on your testimony until we meet on Thursday, when we will discuss your nomination, Mr. Kavanaugh, but I do not think there will be any disagreement in 3 hours and 27 minutes, without having moved from the witness chair, of your stamina, which is a tribute to your age and good health.

[Laughter.]

Chairman SPECTER. That concludes the hearing.

[Whereupon, at 5:27 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

RUSSELL D. FEINGOLD
WISCONSIN

506 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5323
(202) 224-1280 (TDD)
feingold.senate.gov

United States Senate
WASHINGTON, DC 20510-4904

COMMITTEE ON THE BUDGET
COMMITTEE ON FOREIGN RELATIONS
COMMITTEE ON THE JUDICIARY
SELECT COMMITTEE ON INTELLIGENCE
DEMOCRATIC POLICY COMMITTEE

May 5, 2006

VIA FAX to the Department of Justice – [202-353-9163]

Mr. Brett Kavanaugh
Assistant to the President and Staff Secretary
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. Kavanaugh:

As you know, I was not able to attend your first hearing before the Senate Judiciary Committee on April 27, 2004, but I did submit written questions to you following that hearing. Those questions were delivered to the Committee for transmission to you on May 4, 2004. Your attached responses, which were not sent to the Committee until November 19, 2004, were inadequate. In light of your failure to answer written questions for over seven months, it was by no means clear that you were serious about pursuing the nomination so I did not ask you for additional information at that time.

In recent weeks, the leadership in the Senate has indicated renewed interest in your nomination, and Chairman Specter has now scheduled a second confirmation hearing for you on Tuesday, May 9, 2006. In anticipation of that hearing, I request that you now answer my questions 3 through 7. These questions, other than the very last part of question 7, concerning your recommendation to the President on the signing of Judge Ron Clark's commission, which I hereby withdraw, fall into two categories. Both kinds of questions are entirely appropriate for me to ask and for you to answer:

1. Factual questions concerning your knowledge and the timing of your knowledge of ethical controversies that arose in connection with certain nominations that occurred during your time in the White House Counsel's office. Answering these questions will not in any way intrude on internal Executive Branch communications concerning these long since confirmed judges. Many of them can be answered with a simple "yes" or "no."

2. Questions concerning your current, personal judgment on and analysis of certain ethical issues raised during consideration of nominations that occurred during your time in the White House Counsel's office. It is not

1600 ASPEN COMMONS
ROOM 100
MIDDLETON, WI 53562
(608) 828-1200
(608) 828-1215 (TDD)

517 EAST WISCONSIN AVENUE
ROOM 408
MILWAUKEE, WI 53202
(414) 276-7282

401 5TH STREET
ROOM 410
WAUSAU, WI 54403
(715) 848-5660

425 STATE STREET
ROOM 225
LA CROSSE, WI 54601
(608) 782-5585

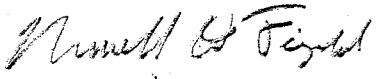
1640 MAIN STREET
GREEN BAY, WI 54302
(920) 465-7508

PRINTED ON RECYCLED PAPER

only appropriate but crucial for you to answer questions concerning judicial ethics since you seek confirmation to be a federal appellate judge.

I would appreciate your providing answers to these questions, which are not complicated or lengthy, by the close of business on Monday, May 8, so that I may discuss them with you at the hearing on Tuesday. Thank you for your prompt attention to this matter.

Sincerely,



Russell D. Feingold
United States Senator

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 2006

The Honorable Russell Feingold
United States Senate
Washington, D.C. 20510

Dear Senator Feingold:

We write in response to your May 5, 2006, letter to Mr. Brett Kavanaugh requesting that he supplement his previous responses to your written questions. As you know, Chairman Specter has scheduled a hearing on Mr. Kavanaugh's nomination on May 9, 2006. At that time, Mr. Kavanaugh will be available to respond to questions from all Senators on the Committee.

As we previously informed the Chairman, the Department looks forward to working with the Committee to facilitate its consideration of Mr. Kavanaugh's nomination. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Arlen Specter
Chairman
Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary

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

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

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

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

Response: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

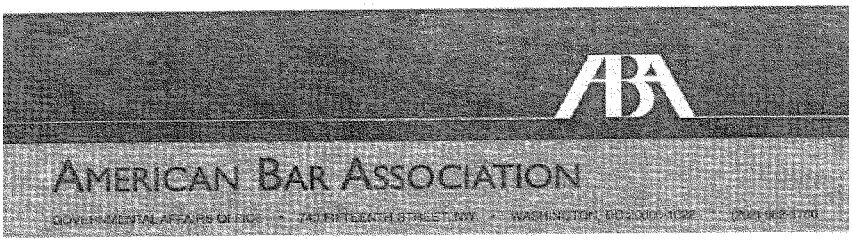
7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking,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

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

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

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

SUBMISSIONS FOR THE RECORD



STATEMENT

of

STEPHEN L. TOBER

on behalf of the

STANDING COMMITTEE ON FEDERAL JUDICIARY

of the

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF BRETT MICHAEL KAVANAUGH

TO BE JUDGE OF THE UNITED STATES COURT OF APPEALS
for the
THE DISTRICT OF COLUMBIA CIRCUIT

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

May 8, 2006

I. Statement of Stephen L. Tober

Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober. I am a practicing lawyer in Portsmouth, New Hampshire, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. I am submitting this written statement for the hearing record to present the Standing Committee's supplemental peer review evaluation of the nomination of Brett Michael Kavanaugh to serve on the United States Court of Appeals for the District of Columbia Circuit. This statement is divided into two sections. In this first section, I am pleased to summarize the Standing Committee's general investigative procedures and present an overview of the investigation of the nominee. In the second section, I will explain the process in this particular matter and the reasons for the Standing Committee's rating.

After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is "Qualified" for the appointment. A minority found him to be "Well Qualified."

A. Procedures Followed By the Standing Committee

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures. A more detailed description of the Committee's procedures is

contained in the Committee's booklet (commonly described as our *Backgrounder*), *Standing Committee on Federal Judiciary: What It Is and How It Works (2005).*

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee -- his or her competence, integrity and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, knowledge of the law, breadth of professional experience, courtroom experience, character, integrity, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Pamela Bresnahan conducted the original formal investigation in 2003, and updated her report in 2005, as the District of Columbia Circuit representative on the Standing Committee. Marna Tucker, who succeeded Attorney Bresnahan as the District of Columbia Circuit representative on the Standing Committee in August 2005, subsequently conducted a further supplemental evaluation of the nominee.[1]

The investigator starts his or her investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications,

[1] Marna Tucker was joined by Federal Circuit representative John Payton for the interview of the nominee.

including professional experience, significant cases handled and major writings. The investigator makes extensive use of the questionnaire during the course of the investigation. In addition, the investigator examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer-review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the investigator will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the Standing Committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the investigator takes whatever additional steps are necessary to reach a fair and accurate assessment of the

nominee.

Upon completion of the investigation, the investigator submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the investigator then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications. This formal report, together with the public portion of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire committee, composed of fourteen "circuit" members and the Chair. After carefully considering the formal report and its attachments, each member independently submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified" or "Not Qualified." An investigator who is not a current member of the Standing Committee would not vote.

I would like to re-emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the Committee members by multiple sources. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given a full opportunity to explain the matter and to provide any additional information

bearing on it. If the information cannot be shared with the nominee, it is not included in the formal report and is not considered by the Committee in reaching its evaluation.

B. The Investigation of the Nominee

The Standing Committee has issued three evaluations on the nomination of Brett Kavanaugh. This is due to the fact that Mr. Kavanaugh has been nominated once (2003) and re-nominated twice (2005 and 2006). It is the established practice of the Standing Committee to conduct a further investigation on any nominee who is re-nominated, and the extent and scope of that further investigation is often influenced by the length of time that has passed from the date of the original evaluation and rating. Whenever a supplemental evaluation is performed, copies of all previous confidential formal reports on the nominee are reproduced, and presented to every member of the Standing Committee for review before they vote, alongside the new formal report. Thus, it is important that every supplemental evaluation performed goes back to the end-date of the original formal report, and brings the investigation forward from that point. That is what occurred here.

Concern has been raised that the most recent rating from the Standing Committee somehow results solely from a "change in personnel" on the Committee. In fact, such is not the case. Indeed, no less than six members who served on the Standing Committee before August, 2005,[2] and who continue to serve today, changed their votes on this nominee from "Well Qualified" to "Qualified" between the rating issued on February 16,

[2] Appointments to the Standing Committee are made by the incoming ABA President, and according to the ABA Constitution, all new appointments to this committee begin their service at the conclusion of the ABA Annual Meeting, which is generally in August of each year.

2005, and the rating issued April 3, 2006.

There are at least three general reasons to support the most recent rating given to this nominee. First, there was a wider universe of individuals contacted during the supplemental evaluation, than during the initial formal report or its update. The Standing Committee generally requires, at a minimum, 40 to 60 contacts with judges, lawyers and others in any nomination it is reviewing, although an evaluator is certainly free to do more. In 2003 there were 55 such contacts regarding Mr. Kavanaugh. In 2006, there were 91 such contacts. Nineteen more judges and seventeen more lawyers with potential knowledge about Mr. Kavanaugh were contacted, and not all of the original 55 contacts were summarily repeated. Thus, in 2006 a larger group of individuals was given the opportunity to share with the Standing Committee knowledge of the nominee's integrity, professional competence, and potential for judicial temperament.

Second, some individuals who may have had no contact with the nominee in 2003 were now individuals who had crossed paths with him. Some in public service or in the practice of law in 2003 were now no longer active, having been replaced in some measure by others. And, simply put, events and times had moved on, creating new and different developments and landscapes in which the professional qualifications of the nominee could be viewed, that were not present in 2003 or even 2005.

Third, it should be pointed out that with both earlier ratings issued by the Standing Committee, there was a "minority Qualifed" as part of the vote. The official rating by the Standing Committee has always been and remains the majority rating, yet nonetheless it is important to underscore that some members of the 2003 and 2005 Standing Committee considered this nominee to be "Qualified."

The Standing Committee takes most seriously its responsibility to conduct an independent, non-political, non-ideological examination of the professional qualifications of judicial nominees. There is no bright-line litmus test as to whether a nominee is "Well Qualified" or "Qualified." The *Backgrounder* makes clear that "(t)o merit a rating of 'Well-Qualified,' the nominee must be at the top of the legal profession in his or her legal community; have outstanding legal ability, breadth of experience and the highest reputation for integrity; and either demonstrate or exhibit the capacity for judicial temperament."

The *Backgrounder* also makes clear that "(t)he rating of 'Qualified' means that the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

It is, at its most basic, the difference between the "highest standard" and a "very high standard." Our rating is not the result of tallying the comments - pro and con - about a particular nominee. Nor is it about politics or ideology or empirical data. Rather, in making our evaluation, we draw upon our previous experiences, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment.

From the outset in 2003, even with an earlier rating of "Well Qualified" for this nominee, there were considerations arising from confidential interviews and other background information that act to explain the thread of "Qualified" running through the Standing Committee evaluations. The 2003 confidential record makes it clear that there

were then-present concerns regarding this nominee's breadth of professional experience. It was noted that he had never tried a case to verdict or judgment; that his litigation experience over the years was always in the company of senior counsel; and that he had very little experience with criminal cases. Indeed, it is the circumstance of courtroom experience that fills the transcripts that make the record before the Court of Appeals, and concerns were expressed about the nominee's insight into that very process. Nonetheless, a substantial majority saw other overriding factors that supported a rating of "Well Qualified."

The additional interviews conducted in 2006 expanded upon those earlier concerns. One judge who witnessed the nominee's oral presentation in court commented that the nominee was "less than adequate" before the court, had been "sanctimonious," and demonstrated "experience on the level of an associate." A lawyer who had observed him during a different court proceeding stated: "Mr. Kavanaugh did not handle the case well as an advocate and dissembled." Other lawyers expressed similar concerns, repeating in substance that the nominee was young and inexperienced in the practice of law.

Further, the 2006 interviews raised a new concern involving his potential for judicial temperament. Unlike the earlier 2003 final report and 2005 updated report, the recent supplemental evaluation contained comments from several interviewees with more recent experience with the nominee, which caused them to characterize the nominee as "insulated." One interviewee suggested that much of his concern about the nominee being insulated was due, understandably, to the nominee's current position as Staff Secretary to the President. However, this interviewee remained concerned about the

nominee's ability to be balanced and fair should he assume a federal judgeship. And another interviewee echoed essentially the same thoughts: "(He is) immovable and very stubborn and frustrating to deal with on some issues." Both issues—his professional experience and the question of his freedom from bias and open-mindedness—were brought up (along with others) with the nominee during his 2006 interview, and he was provided a full opportunity to address them in detail as part of our supplemental evaluation material.

This nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability. The concern has been and remains focused on the breadth of his professional experience, and the most recent supplemental evaluation has enhanced that concern. When taken in combination with the additional concern over whether this nominee is so insulated that he will be unable to judge fairly in the future, and placed alongside the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context. A substantial majority of the Standing Committee believes that Mr. Kavanaugh is indeed qualified to serve on the federal bench.

Thank you for the rather unique opportunity to present these remarks.

AMERICAN BAR ASSOCIATION

Standing Committee on
Federal Judiciary
740 Fifteenth Street, NW
Washington, DC 20005-1022
Facsimile: (202) 662-1762

CHAIR
Stephen L. Tober
P.O. Box 1377
381 Middle Street
Portsmouth, NH 03802-1377

FIRST CIRCUIT
Manuel San Juan
8th Floor
Banco Popular Bldg.
206 Tetuan Street
Old San Juan, PR. 00902

SECOND CIRCUIT
Lorna G. Schofield
919 Third Avenue
New York, NY 10022-3902

THIRD CIRCUIT
Roberta D. Liebenberg
28th Floor
1835 Market Street
Philadelphia, PA 19103-2968

FOURTH CIRCUIT
D. Alan Rudlin
P.O. Box 1535
Richmond, VA 23218

FIFTH CIRCUIT
Kim J. Askew
Suite 2400
1717 Main Street
Dallas, TX 75201-7342

SIXTH CIRCUIT
Randall D. Noel
Suite 700
80 Monroe Avenue
Memphis, TN 38103-2467

SEVENTH CIRCUIT
Harold S. Barron
Suite 1400
980 N. Michigan Avenue
Chicago, IL 60611

EIGHTH CIRCUIT
Charles M. Thompson
P.O. Box 160
503 S. Pierre Street
Pierre, SD 57501-0160

NINTH CIRCUIT
Max A. Hansen
P.O. Box 1301
Dillon, MT 59725-1301

Raymond C. Marshall
18th Floor
Three Embarcadero Center
San Francisco, CA 94111-4067

TENTH CIRCUIT
James B. Lee
Suite 1800
201 S. Main Street
Salt Lake City, UT 84111-2218

ELEVENTH CIRCUIT
Teresa Wynn Roseborough
999 Peachtree Street, NE
Atlanta, GA 30309-3996

D.C. CIRCUIT
Mamie S. Tucker
Suite 200
2001 L Street, NW
Washington, DC 20036-8103

FEDERAL CIRCUIT
John Payton
2445 M Street, NW
Washington, DC 20037-1435

BOARD OF GOVERNORS
LIAISON
Roderick B. Matthews
Floor 22
1111 East Main Street
Richmond, VA 23219-3531

STAFF LIAISON
Denise A. Cardman
202-662-1761
cardmand@staff.abanet.org

May 18, 2006

Honorable Arlen Specter, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Brett Kavanaugh, nominee to the U.S. Court of Appeals for the District of Columbia

Dear Chairman Specter:

During the teleconference hearing on Monday, May 8, between Members and staff of the Senate Judiciary Committee and members of the ABA Standing Committee on Federal Judiciary (FJC) to discuss FJC's recent evaluation of Brett Kavanaugh, your nominations counsel, Pete Jensen, asked us to submit a written response to three issues raised during the telephone exchange. This letter responds to that request.

1. In response to the suggestion that FJC's 2006 rating of the nominee, which differed from its 2005 rating, was the result of a change in composition of FJC, I explained that eight members of the current committee were also members of the committee in 2005, when the earlier evaluation was rendered. I disclosed that six of those eight members had changed their votes from "well-qualified" in 2005 to "qualified" in 2006. Mr. Jensen asked if the other two "carryover" members changed their vote from "qualified" to "well-qualified." I was unable to answer with certainty at the time. I have now had an opportunity to review the voting record of the committee and the answer is that the other two members who participated in both evaluations did not change their votes.

2. Mr. Ajit Pai, on behalf of Senator Brownback, asked how many nominees have received three evaluations. After explaining that such a statistic would only be available and useful for comparative purposes for the period covering 2001 to the present because of the change in our role in 2001 from conducting pre-nomination evaluations (for which there are no records) to conducting post-nomination evaluations, I told Mr. Pai that I would have to get back to him with an answer. From 2001 to the present, FJC has evaluated nine additional nominees three times. These are the only nominees we have evaluated more than twice. A chart listing the nominees and their ratings is attached for your reference.

3. Mr. Jensen asked if FJC had ever been asked to testify for a lower court nominee who had received a "qualified" rating. I responded that to our knowledge this had only happened once before, during a confirmation hearing for J. Harvie Wilkinson, III, nominated to the U.S. Court of Appeals for the Fourth Circuit. Mr. Jensen asked us to provide additional information regarding the circumstances for our testimony, including whether we testified before or after his nomination was reported out of the Senate Judiciary Committee.

FJC testified during a hearing on the nominee held on August 7, 1984, which was called after the nomination was on the Senate floor to help end a filibuster of the nominee (Congressional Record, p.S.9658-9, August 2, 1984: unanimous consent agreement to hold a further hearing on the Wilkinson nomination on August 7, 1984, with witnesses specified, followed by cloture vote on August 9).

Judge Wilkinson was first nominated in 1983 (98th Congress, 1st Session). His nomination was withdrawn at the end of the 1st Session and resubmitted at the start of the 2nd Session in January 1984. On November 14, 1983, and again on January 31, 1984, FJC apprised the Senate Judiciary Committee that the nominee had received a formal rating of Q (sm)/ NQ (min). FJC was not asked to testify at an earlier hearing on the nominee. During the August 7, 1984, hearing, FJC was asked questions about its process and whether its rating was influenced by alleged lobbying of members of the committee on behalf of the nominee, including telephone calls from Justice Lewis F. Powell, Jr. to three of the six ABA members who had voted on the nomination and were present at the hearing. When it was disclosed that the three members contacted by Justice Powell had given him the minority rating of "NQ," the issue was dropped. Two days later, the nominee was confirmed by a vote of 58-39.

Please let us know if you have additional questions, and we will be happy to respond.

Sincerely,

Stephen L Tober
Chair

cc: The Honorable Patrick Leahy

Bush II Nominees
Rated More Than Twice for the Same Position by FJC
During
107th Congress - May 15, 2006, 109th Congress
(January 3, 2001-May 15, 2006)

Nominee	# of Ratings	Date of Nomination	Court	Rating
*Boyle, Terrence W.	3	5/9/01 1/7/03 2/14/05	4th Circuit	Q unanimous Q unanimous WQ unanimous
Griffin, Richard A.	**3**	**6/26/02** **1/7/03** **2/14/05**	**6th Circuit**	**WQ^{sm}/Q^{min}** **WQ^{sm}/Q^{min}** **WQ^{sm}/Q^{min}**
Kavanaugh, Brett M.	**3**	**7/25/03** **2/14/05** **1/25/06**	**DC Circuit**	**WQ^{sm}/Q^{min}** **WQ^{sm}/Q^{min}** **Q^{sm}/WQ^{min}**
Ludington, Thomas L.	**3**	**9/12/02** **1/7/03** **2/14/05**	**USDC: Eastern District of MI**	**WQ unanimous** **WQ unanimous** **WQ unanimous**
McKeague, David W.	3	11/8/01 1/7/03 2/14/05	6th Circuit	WQ^{sm}/Q^{min} WQ^{sm}/Q^{min} WQ unanimous
Neilson, Susan Bieke	**3**	**11/8/01** **1/7/03** **2/14/05**	**6th Circuit**	**WQ unanimous** **WQ unanimous** **WQ unanimous**
Owen, Priscilla R.	**3**	**5/9/01** **1/7/03** **2/14/05**	**5th Circuit**	**WQ unanimous** **WQ unanimous** **WQ unanimous**
Pickering, Charles W.	**3**	**5/25/01** **1/7/03** **2/6/04**	**5th Circuit**	**WQ^{sm}/Q^{min}** **WQ^{sm}/Q^{min}** **WQ^{sm}/Q^{min}**
Pryor, William H.	**3**	**4/9/03** **3/12/04** **2/14/05**	**11th Circuit**	**Q^{sm}/NQ^{min}** **Q^{sm}/NQ^{min}** **Q^{sm}/NQ^{min}**
Saad, Henry W.	3	11/8/01 1/7/03 2/14/05	6th Circuit	Q^{m}/WQ^{min} Q^{m}/WQ^{min} WQ^{sm}/Q^{min}

- Bolded entries indicate rating changed for nominee.

SENATE JUDICIARY COMMITTEE HEARING ON THE NOMINATION OF BRETT M. KAVANAUGH TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Senator John Cornyn
Statement for the Record

Thank you, Mr. Chairman.

Here we are again. It's been nearly three years since the President nominated Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. And it's been over two years since Mr. Kavanaugh came before this Committee and ably answered many tough—and even perhaps some unfair—questions.

In fact, Mr. Kavanaugh answered more than 165 questions at that first hearing in April 2004. Following that hearing, he submitted answers to nearly 350 written questions from Democrat Senators on this Committee. That's over 500 questions that he has answered for this Committee, on the record—prior to today's hearing. And I would point out that this total does not include Mr. Kavanaugh's answers to the Judiciary Committee's detailed questionnaire, his interviews and other screening by the ABA Standing Committee, and his one-on-one meetings with Senators from both sides of the aisle.

I would submit that, even before today's hearing began, it's clear that Brett Kavanaugh has been one of the most poked and prodded circuit court nominees in history. He is a known commodity if ever there was

one. Through all of this, Mr. Kavanaugh has remained patient, good-natured, and forthcoming.

So I feel compelled to state the obvious: today's hearing has very little to do with Brett Kavanaugh at all. Everyone knows that this Committee is set to vote straight along party lines—just like the Committee's vote on Justice Alito—and that's a real shame.

That was why some members on my side, including myself, were initially opposed to a second hearing. But I've had a change of heart. I've concluded that this hearing is a valuable chance for the American people to hear from my colleagues on the other side. A chance to be reminded of the other side's approach to judicial nominations. A chance to learn why most of them so vigorously opposed Chief Justice John Roberts and Justice Samuel Alito. And a chance to be reminded of why they continue to oppose so many of the supremely qualified judicial nominees of this President—like the nominee before us today.

The tone and tenor of this nomination and this hearing are reminiscent of the Roberts and Alito confirmation battles. We are meeting under the cloud of the Minority Leader's recent threats of a filibuster. These filibuster threats have been noted by my side—and have certainly captured the attention of the American people.

Here we are today, just a few months removed from the bitter, partisan Alito hearings. A filibuster threat hung over those hearings as well. Recall that a filibuster of Justice Alito's nomination—organized from Davos, Switzerland—was attempted on the Senate floor. That filibuster failed because Justice Alito had earned the bipartisan support that this Committee had denied him.

We've already heard about Brett Kavanaugh's stellar qualifications—his three judicial clerkships, including a stint with Justice Kennedy on the Supreme Court, his public service with the Solicitor General's office and the executive branch, and his experience as an advocate on behalf of both the "big guy" and the "little guy"—to use the other side's descriptions. Like Chief Justice Roberts and Justice Alito, Brett Kavanaugh's intellect is first-rate. And like Chief Justice Roberts and Justice Alito, Brett Kavanaugh firmly believes in judicial restraint. He believes that judges should not make the law, but should simply apply the law made by the people's representatives. Like those two fine Supreme Court nominees, Brett Kavanaugh will not rewrite our Constitution and invent new rights out of thin air. He will respect the legislative choices made by the American people.

I remain convinced that the reason I supported Roberts and Alito—their philosophy of judicial restraint—is the same reason their detractors opposed their nominations. And it's the same reason they oppose Brett Kavanaugh. The sad fact is that there are some in this

country who do not want judges who respect the legislative choices made by the American people.

There are some in this country who have views that are so liberal they have no chance to persuade the American people to accept them. For example, there are some who want to end traditional marriage between only one man and one woman. There are some who want to continue the barbaric practice of partial birth abortion. There are some who even want to abolish the Pledge of Allegiance.

For these people, the only way they will ever see their views enacted into law is to circumvent the American people and to pack the courts with judges willing to impose their liberal agenda on the rest us. They believe in judicial activism because judicial activism is all they have.

Of course, they will never say they believe in judicial activism. They know the American people do not favor judicial activism. They know the American people believe in democracy and do not want unelected judges making the laws in this country.

So like the Roberts and Alito nominations, Brett Kavanaugh's qualifications are beyond reproach—and his opponents are forced to grasp for any means they can find to defeat his nomination. I am reminded of the statement made by Nan Aron, President of the

Alliance for Justice, and one of Justice Alito's biggest detractors. As Ms. Aron put it: "you name it, we'll do it" to defeat Judge Alito.

So here we are again. Very little has changed since Mr. Kavanaugh's first hearing two years ago. The objections to his nomination still proceed as follows. First, he lacks the proper experience. In the alternative, he's got the wrong kind of experience. And, mixed up somewhere in there, he's represented the wrong clients. As this hearing should demonstrate, each of these objections is flimsy at best. Today Mr. Kavanaugh will be introduced by two distinguished members of the judiciary—Judges Stapleton and Kozinski—men for whom he served as a law clerk. I am confident that they will speak to the qualities Mr. Kavanaugh possesses—qualities that make him an outstanding nominee: extraordinary intellect, legal experience, integrity, respect in the legal community, and a commitment to interpreting law rather than making it. These are the qualities that this President seeks in federal court nominees. He found these qualities in Chief Justice Roberts and Justice Alito—and has certainly found them in Brett Kavanaugh.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
May 9, 2006

CONTACT: Laura Capps/Melissa Wagoner
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY ON NOMINATION OF BRETT KAVANAUGH

(AS PREPARED FOR DELIVERY BEFORE SENATE JUDICIARY COMMITTEE)

The Constitution gives the Senate the important responsibility of reviewing judicial nominations to guarantee that federal judges are truly independent, rather than merely a political extension of the White House. We must assure ourselves that judicial nominees, especially appellate nominees – particularly those to the D.C. Circuit - have the experience, ability, and temperament, for that key court, and a commitment to enforcing the basic constitutional and federal statutory protections that are central to our American democracy. If their primary qualification is partisan loyalty, they do not belong on any federal court, let alone the D.C. Circuit.

No matter where they live, all Americans are affected by appointments to the D.C. Circuit. It has a unique role among the federal courts in interpreting federal power. It's been given exclusive jurisdiction over many laws that protect consumers, employees' rights, civil rights, and the environment.

It's the only federal appellate court that can hear appeals on rules to protect the environment under the Clean Air Act and the Safe Drinking Water Act. It has exclusive jurisdiction over constitutional challenges to the North American Free Trade Act. It decides far more appeals than any other circuit of decisions by the National Labor Relations Board on unfair labor practices. As a practical matter, because the Supreme Court can review only a small number of lower court decisions, the judges on the D.C. Circuit often have the last word on interpretations of these important rights.

As a result, the Committee needs to take special care in considering judges for lifetime positions on the D.C. Circuit. We must be confident that appointees to this prestigious court have the highest qualifications and ethical standards, and will fairly interpret the laws, particularly laws that protect our basic rights.

The ABA has now completed three evaluations of Mr. Kavanaugh's qualifications. Each time they look more closely, his rating goes down, and now a majority of that committee does not believe he can meet their highest standard for federal nominees. Chairman Specter properly concluded that the ABA's downgrading justified a Judiciary committee hearing to review the details of their investigation and determination. But apparently the White House feared what the ABA would say in public, because at the last minute, we were presented with a private telephone conference call in which most members were unable to participate and no Senator was able to join for more than a few minutes.

The White House fears were justified, since the ABA's testimony and responses to staff questions raised a host of new questions which should be answered by the ABA and then by the nominee in open session. Among other revelations, it appears that, contrary to White House claims that changes in committee membership caused the downgrade, in fact many members of the ABA committee downgraded their own assessments of the nominee based on new information.

We don't know whether the nominee will be any more responsive now than he was in his original hearing three years ago and in his long-delayed answers to written questions two years ago.

So we have a lot to do to meet our constitutional responsibilities in this matter. Yet we are told that we must meet some artificial deadline for dealing with this nomination in Committee. That's uncalled for, and it would be irresponsible of us to consider this nomination until all the relevant questions have been asked and fully answered.

To start with, Mr. Kavanaugh has the heavy burden of showing that his White House experience qualifies him for this Court. He has less than half the average legal experience of D.C. Circuit nominees, having worked as an attorney for just over fourteen years, counting the time he spent as a law clerk. He's been a practicing attorney for only ten years, and he's never tried a case on his own or taken a case to verdict. When asked to name his ten most significant cases on his Senate questionnaire, Mr. Kavanaugh could identify only five in which he appeared in court, and only two in which he served as lead counsel.

So if, as a White House lawyer, he was not pursuing legal issues, he has a problem. If he was involved in legal issues, we need to know what they were, and what he did, and what he thought.

For example, I asked Mr. Kavanaugh whether he had any experience handling labor law matters. He couldn't provide a single example of work in this area - not one. Instead, he made only a vague reference to his work as a law clerk and his brief time in the Justice Department. He also couldn't give even one example showing that he has any experience involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act, or any other aspect of environmental law. Yet the D.C. Circuit plays a critical role in deciding questions under these statutes.

Mr. Kavanaugh is clearly intelligent and well-educated, but there's no question he lacks the depth of knowledge and legal experience that we expect for judges on the D.C. Circuit. The qualifications that he does have are weighted heavily toward partisan politics.

Whether you agree or disagree with the political positions he's advanced during his career, there's no question that he's been a partisan political operator, not a litigator.

Much of his public service has been in the current Bush White House, where his duties included recommending some of the President's most bitterly divisive judicial nominees. His best known work before the White House was investigating the death of Vincent Foster during the Clinton years, and drafting portions of the infamous Starr report.

He states that he worked on the Circuit nomination of Jay Bybee, the author of the notorious memorandum that provided a blueprint for the Administration's torture policy. He never provided that memorandum to us, so we were forced to vote on Bybee's life-time appointment to the federal bench without ever knowing his full record. We need to know whether Mr. Kavanaugh knew anything about the Bybee torture memo at any time before Bybee was confirmed.

Today, when the need is great to de-politicize the nominations process, and members of both parties have expressed a desire for judges who will rise above partisan political interests, it is hard to see why the majority is pressing this candidate. President Bush says he wants independent judges, but his nominations speak louder than any words. He has nominated a clear partisan to one of the nation's most important federal court of appeals – a person who has clearly shown through his own role in the nominations process that he views judges as political actors, not impartial decision-makers.

That is the real issue in this hearing, and it's wrong to duck it.

###

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on the Nomination of Brett Kavanaugh
May 9, 2006

Today marks the fifth anniversary of the day that this President announced his first group of judicial nominees and began his court packing efforts. I went to the White House in good faith that May five years ago to try to work with the President to fill the scores of vacancies left open when Republican Senators stalled more than 60 of President Clinton's nominees. Thereafter, first as Chairman of the Senate Judiciary Committee and later as its Ranking Member, I worked hard to treat those nominees more fairly than Republicans had treated President Clinton's nominees. We were able to join together to move nominations expeditiously, including the confirmation of five of the nine judges confirmed from the President's initial list who were among the 17 circuit court nominees the Senate confirmed in my 17 months as Chairman. I afforded hearings to a number of controversial nominees, something my Republican predecessor as Chairman refused to do. I voted for some and, in good conscience, voted against Senate consent for others.

All but one of those initial nominations has run their course. With regard to that one, the President should heed the call of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and Paramedics of North Carolina, as well as the advice of Senator John Edwards, and withdraw his ill-advised nomination of Judge Terrence Boyle. Law enforcement from North Carolina and law enforcement from across the country oppose the nomination. Civil rights groups oppose the nomination. Those knowledgeable and respectful of judicial ethics oppose this nomination.

Since President Bush took office in January 2001, the Senate has confirmed 240 of his judicial nominees, including two Supreme Court Justices. One hundred of those judges were confirmed during the 17 months when there was a Democratic majority in the Senate compared to 145 judges in the other 45 months under Republican control. Unfortunately, as demonstrated by the recent withdrawals of several nominations—Claude Allen among them-- all too often this White House seems more interested in rewarding cronies and picking political fights rather than being thorough in selecting lifetime appointments of judicial officers who are entrusted with protecting the rights of Americans.

The difficult and controversial nomination and re-nomination of Judge Terrence Boyle and that of the nominee before us today are further signs that the Bush-Cheney Administration and its allies in the Senate are more interested in picking election year fights rather than well-qualified judges.

At a time when the Senate should be addressing Americans' top priorities, including ways to make America safer, the war in Iraq, rising gas prices, health care costs, stem cell research, comprehensive immigration reform and the reauthorization of the Voting Rights

Act, the President and his Senate allies, instead, try to divide and distract from fixing real problems by pressing forward with controversial nominations.

The siren call of the special interest groups on the right is urging the Senate Republican leadership toward confrontation over controversial judicial nomination, again. The Senate's job is to fulfill our duty under the Constitution so that we can assure the American people that the judges confirmed to lifetime appointments to the highest courts in this country are being appointed to be fair and protect their interests rather than to advance a political agenda.

The Senate Republican leadership is ready to cater to the extreme right-wing and special interest groups agitating for a fight over judicial nominations. These are the same narrow interest groups that opposed the nomination of Harriet Miers to the Supreme Court and forced the President to withdraw her nomination after he said that he would never do so.

With burgeoning scandals throughout the Administration, with word last week of yet another investigation, this one into poker parties at the Watergate and limousine services and who knows what else, with reports of lucrative government contracts being steered to cronies, with the investigations arising from the criminal convictions of Jack Abramoff, Michael Scanlon, and Duke Cunningham, we meet today to hear from a White House loyalist and insider.

With the sudden resignation last Friday of the President's hand-picked head of the CIA, America witnessed another "heck of a job" accolade to an Administration insider leaving a critical job undone. What is desperately lacking throughout this Administration is accountability. A Republican-controlled Congress has not provided a check and has made it all the more important for the courts to be that check to preserve our rights and way of life, to check the Government's overreaching.

This hearing gives this young man another chance to show his independence. Unless he demonstrates that capacity, I will oppose this nomination. I hope that he will start by using this opportunity to correct his testimony from his 2003 hearing and testify straightforwardly about the Administration's resistance to compensating the 9/11 families when I insisted that be part of the legislation granting the airlines special benefits.

Last year, when the President nominated Harriet Miers, a woman who had not gone to Ivy League schools but had a more impressive background of legal experience than this nominee, Republicans questioned her qualifications and demanded answers about her work at the White House and legal philosophy. They defeated her nomination before allowing her a hearing. It appears that Republicans are back to their rubberstamping routine with every Senate Republican ready to approve this nomination without question or deliberation.

I had hoped, as we discussed in open session last Thursday, the Committee would hear from ABA representatives today on why they took the unusual step of lowering Mr. Kavanaugh's initial ABA rating after two years. The White House had put out the word,

falsely, that this was merely the result of a change in the membership of the ABA evaluation committee. We now know that was not correct. In fact, three-quarters of those who continue on the Committee -- who voted previously on this nomination -- downgraded the nomination based on the recent interviews and review. One judge who presided over a case involving Mr. Kavanaugh said his argument was "less than adequate" and described him as "sanctimonious" and as someone who demonstrated "experience on the level of an associate." Others interviewed by the ABA raised concerns about Mr. Kavanaugh's ability to be balanced and fair given his many years in partisan positions working to advance a political agenda. Mr. Kavanaugh was described by interviewees as "insulated" and "immovable and very stubborn and frustrating to deal with on some issues." These are not qualities that make for a good judge.

His work for the past six years at the White House leads to many questions that require answers before we can proceed. What matters is he familiar with at the White House that he will recuse himself from as a judge, if confirmed? Will he protect the rights of the American people to know about their Government given the secrecy policies of this Administration, which he helped design? How did he exercise good judgment while serving in the important Staff Secretary position? And, as I have said, where is the demonstration of his independence from the policies of this Administration? I look forward to answers to these questions and others as this Committee seeks to fulfill its responsibilities to the Senate and the American people.

#####