

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, May 28, 2003 10:07 AM
To: 'David_G_Leitch@who.eop.gov'; Remington, Kristi L; Ciongoli, Adam; 'Carolyn_Nelson@who.eop.gov'; 'hbartolo@who.eop.gov'; 'jbroshah@who.eop.gov'; 'Patrick_J._Bumatay@who.eop.gov'; 'nfrancis@who.eop.gov'; 'Wendy_J._Grubbs@who.eop.gov'; 'bkavanau@who.eop.gov'; 'Charlotte_L_Montiel@who.eop.gov'; 'jnewstea@who.eop.gov'; 'bapowell@who.eop.gov'; 'ksampson@who.eop.gov'; 'Tullyot@who.eop.gov'
Subject: RE: WHJSC meeting CANCELLED for 5/28/03

(b) (6)

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

From: David_G_Leitch@who.eop.gov [mailto:David_G_Leitch@who.eop.gov]
Sent: Tuesday, May 27, 2003 5:55 PM
To: Remington, Kristi L; Ciongoli, Adam; Dinh, Viet;
Carolyn_Nelson@who.eop.gov; hbartolo@who.eop.gov; jbroshah@who.eop.gov;
Patrick_J._Bumatay@who.eop.gov; nfrancis@who.eop.gov;
Wendy_J._Grubbs@who.eop.gov; bkavanau@who.eop.gov;
Charlotte_L_Montiel@who.eop.gov; jnewstea@who.eop.gov;
bapowell@who.eop.gov; ksampson@who.eop.gov; Tullyot@who.eop.gov
Subject: RE: WHJSC meeting CANCELLED for 5/28/03

In this regard, at least, Viet Dinh's tenure ends not with a bang but a whimper. (b) (6)

(b) (6)

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

From: Nelson, Carolyn
Sent: Tuesday, May 27, 2003 5:51 PM
To: wendy keefer; adam ciongoli; albert brewster; amy bass; andrew beach; Bartolomucci, H. Christopher; Bennett, Melissa S.; Brilliant, Hana F.; Brosnahan, Jennifer R.; Bumatay, Patrick J.; Ellison, Kimberly; evelyn long; Francisco, Noel J.; Gray, Ann; Grubbs, Wendy J.; Heather McNaught; Jones, Alison; Kavanaugh, Brett M.; Kristi Remington; Kyle, Ross M.; Leitch, David G.; Lockart, Sarah K.; McMaster, David; Montiel, Charlotte L.; Newstead, Jennifer G.; Powell, Benjamin A.; Ralston, Susan B.; Sampson, Kyle; tracy washington; Ulliot, Theodore W.; viet dinh
Subject: WHJSC meeting CANCELLED for 5/28/03

Thanks!

THE WHITE HOUSE

WASHINGTON

April 23, 2003

Dear Senators Allen, Dole, Edwards, Mikulski, Sarbanes, and Warner:

I write about the status of the four vacancies on the U.S. Court of Appeals for the Fourth Circuit.

There are 15 authorized seats on the Court of Appeals. Federal law imposes only one requirement for allocation of seats within a circuit -- that each State have at least one judge. Each State in a circuit often has a number of judges sitting in that State that corresponds at least roughly to the State's percentage of the overall population in the circuit or to the percentage of the circuit's caseload that arises from that State. To be sure, such geographic balance is not established in law or binding on the President or Senate. And there often are deviations in some circuits for a variety of historical and other reasons. (I would note, in addition, that judges can move from one State to another State in the circuit after their appointment, as has happened on some occasions in the past.) But this measure is generally a rough baseline for assessing the geographic allocation of seats within a circuit.

Based on this measure, of the 15 authorized seats, it appears that the allocation would roughly resemble the following: North Carolina: 4 or 5, Virginia: 4 or 5, South Carolina: 2 or 3, Maryland: 2 or 3, and West Virginia: 1 or 2. As of now, taking into account that Judge Widener recently notified the President of his intended retirement, the Fourth Circuit is significantly out of geographic balance:

	Baseline Allocation	Current Number of Judges
North Carolina:	4 or 5	0
Virginia:	4 or 5	3
South Carolina	2 or 3	4
Maryland:	2 or 3	2
West Virginia:	1 or 2	2

There are four current vacancies on the Court. The four judges who previously occupied these seats maintained their chambers in North Carolina, Virginia, and Maryland (which is why I have sent this letter to you as the Senators from those States). Judge Terry Boyle of North Carolina was nominated for one vacancy in May 2001. For the three additional vacancies, the President intends to nominate well-qualified and well-respected individuals in a manner that will bring the circuit closer to geographic balance, recognizing that it would take several years and additional vacancies for the circuit to achieve balance and recognizing further that absolute geographic balance is neither legally nor historically required. In particular, the President intends to nominate two such individuals on Monday, April 28 -- one who currently lives in Virginia and has strong roots in and ties to both Virginia and North Carolina and one who currently lives in North Carolina and has served on the state judiciary in North Carolina. Both

are African-American, and their confirmations by the Senate will further dismantle an historic barrier. For the last remaining vacancy, the President would intend to submit a nomination no later than September 2003, consistent with the President's commitment to submit nominations within 180 days of receiving notice of an intended retirement or vacancy.

I remain disappointed that Judge Boyle's nomination has been pending for two years. But I am pleased that we otherwise have been able to consult extensively and work cooperatively on other circuit and district nominees in Virginia, North Carolina, and Maryland. Please feel free to contact me at any time with your thoughts regarding the Fourth Circuit or other issues of concern to you.

Sincerely,

A handwritten signature in dark ink, appearing to read "A. Gonzales", written in a cursive style.

Alberto R. Gonzales

Counsel to the President

The Honorable George Allen
The Honorable Elizabeth Dole
The Honorable John R. Edwards
The Honorable Barbara A. Mikulski
The Honorable Paul S. Sarbanes
The Honorable John W. Warner
United States Senate
Washington, D.C. 20510

Dinh, Viet

From: Dinh, Viet
Sent: Friday, May 23, 2003 2:55 PM
To: Ciongoli, Adam; Ayres, David; 'David_G._Leitch@who.eop.gov'; 'Kavanaugh, Brett'; 'Schlapp. Matt'
Subject: FW: article

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

From: Charnes, Adam
Sent: Friday, May 23, 2003 1:17 PM
To: Dinh, Viet; Clement, Paul D
Subject: article

In case you hadn't see this: <http://www.jsonline.com/news/state/may03/142787.asp>

007104-002006

Benczkowski, Brian A

From: Benczkowski, Brian A
Sent: Wednesday, May 21, 2003 5:00 PM
To: Dinh, Viet; Charnes, Adam; Joy, Sheila; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: FW: More WH Delays

(b) (5)

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

From: Alex_Dahl@Judiciary.senate.gov
[mailto:Alex_Dahl@Judiciary.senate.gov]
Sent: Wednesday, May 21, 2003 4:02 PM
To: Benczkowski, Brian A
Cc: Rena_Johnson_Comisac@Judiciary.senate.gov
Subject: FW: More WH Delays

Brian this does seem a little slow. Is there a reason that I can report back? Thanks.

Deputy Staff Director & Senior Counsel

Committee on the Judiciary

United States Senate

224 Dirksen Building

Washington, DC 20510

phone: (202) 224-5225

fax: (202) 228-1115

CONFIDENTIALITY NOTE:

007104-002007

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

From: Graves, Lisa (Judiciary)

Sent: Wednesday, May 21, 2003 3:41 PM

To: Graves, Lisa (Judiciary); Dahl, Alex (Judiciary)

Subject: More WH Delays

Alex: We are very concerned about the WH continuing to nominate people prematurely, before their Qs are completed (Rivkin being the extreme example). However, Claude Allen has been "pending" for 24 days without a questionnaire being submitted and we do not want to get the bum's rush on him when he suddenly supplies a Q. As you know, we need adequate time to review these lifetime circuit court nominees. Thank you. Lisa

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Wednesday, May 21, 2003 11:33 AM
To: Brett_M._Kavanaugh@who.eop.gov
Subject: Letter re Kuhl's record and issues
Attachments: FINAL KUHL LETTER.pdf

(See attached file: FINAL KUHL LETTER.pdf)

THE WHITE HOUSE

WASHINGTON

May 20, 2003

Dear Senator Frist and Senator Hatch:

I write to provide you a summary of relevant information about Judge Carolyn Kuhl as the Senate prepares for debate on her nomination to the Ninth Circuit. Judge Kuhl is a woman of exceptional experience, integrity, and intellect who represents the mainstream of American law and values. Her record has been unfairly distorted and her character unfairly attacked by interest groups. They have done a disservice to this highly qualified woman and would do a disservice to the Judiciary and the American people if they were to succeed in blocking her from confirmation.

This letter first will summarize Judge Kuhl's record and support and then will respond to issues that have been raised by interest groups opposing her nomination.

I. Judge Kuhl's Record and Support

Judge Kuhl possesses superb qualifications, has strong bipartisan support, and received a "well qualified" rating from the American Bar Association, which Democrat Senators have referred to as the gold standard. Born in Missouri, she graduated with honors from Princeton University and Duke University Law School. She served as a law clerk on the Ninth Circuit to then-Judge Anthony Kennedy. She came to Washington at the beginning of President Reagan's Administration and served for five years in the Department of Justice. She began as a special assistant to the Attorney General, moved on to be Deputy Assistant Attorney General in the Civil Division, and then was named Deputy Solicitor General. She then returned to California in 1986 and became a partner at the prestigious Los Angeles firm of Munger Tolles & Olson. In 1995, Governor Wilson appointed her to the Los Angeles County Superior Court.

Judge Kuhl thus has extensive experience in federal and state government, in the Executive and Judicial Branches, and in public service and private legal practice. Since 1995, she has served on the Los Angeles Superior Court. Judge Kuhl now serves as the Supervising Judge of the Civil Department of that Court and is the first woman to hold that position. She supported Judge Richard Paez in his nomination to the Ninth Circuit, demonstrating her commitment to law and fair process without regard to politics or political gain. In short, Judge Kuhl has devoted extraordinary time and effort in her life to public service and the legal process, and she possesses a combination of intellect, experience, and character that makes her ideally suited to be an excellent circuit judge.

Given her record, it is no surprise that Judge Kuhl has garnered bipartisan support from California and national bar leaders, Republicans and Democrats, and defense lawyers and plaintiffs' lawyers. This support speaks volumes about the kind of judge she would be on the Ninth Circuit.

- **Vilma Martinez**, who is a Democrat, an accomplished and nationally respected California attorney, and a past President of the Mexican American Legal Defense and Educational Fund, wrote: “Kuhl is what I think of as an old fashioned judge. She cares about due process for everyone. In her seven years on the Superior Court bench, she has shown that she is careful to hear both sides. She does not try to influence the outcome of a case to favor one side or the other. She is serious about her oath to follow the law, whatever the result. . . . Both the plaintiff and defense bars in Los Angeles actively support Kuhl.”
- **The officers of the Litigation Section of the Los Angeles County Bar Association** (which has over 3000 members) have written in support of Judge Kuhl, both in May 2001 and April 2003. They stated that they are “life-long Democrats” who have “first-hand knowledge of Judge Kuhl’s integrity, intellect, judicial competence, fairness, and commitment to improving the administration of justice. . . . Those of us who appear before and work with Judge Kuhl know that she is a fair and caring person and an exceptional jurist.” They also stated that she has a “well-deserved reputation as being a fair minded judge who follows legal precedent. . . . On a personal level, we have come to know her as a warm, witty, and deeply caring person.”
- **A bipartisan group of nearly 100 judges who serve with Judge Kuhl on the Superior Court** have signed an extraordinary joint letter to the Senate supporting Judge Kuhl: “We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.”
- **A bipartisan group of 23 women judges who have served with Judge Kuhl** wrote: “Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs’ and defense bar. . . . Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges She has helped promote the careers of women, both Republican and Democrat. . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend. As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.”
- **A bipartisan group of more than a dozen Justices of the California Court of Appeal** -- appointees of Democrat and Republican Governors who as appellate judges have worked directly with Judge Kuhl or have reviewed her work as a trial judge -- have written individual letters of support for Judge Kuhl. To take one example, Justice Paul Boland wrote: “[Judge Kuhl] has distinguished herself as a judge who is highly

intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair.”

- **California Supreme Court Justice Carlos Moreno**, who previously was appointed to the federal district court in Los Angeles by President Clinton, wrote to express his “strong and unequivocal support” for Judge Kuhl. He wrote: “I had the pleasure of serving on the Los Angeles Superior Court with Judge Kuhl. She was widely respected among her fellow colleagues and lawyers for her dedication, scholarship, fairness, and adherence to the law. I have never discerned in her any ideological predisposition to decide a legal or factual issue in a predetermined manner. To the contrary, her reputation and practice is to decide matters with an open mind as to all issues. Judge Kuhl is a warm, intelligent, and decent person who should be fairly considered for this distinguished appointment. I can think of no one more qualified or deserving for this office.”
- **The President of the Consumer Attorneys Association of Los Angeles** wrote that “[t]hose who respect her judicial abilities, fairness, and temperament include attorneys on either side of an issue.” The Board of Governors of that Association voted to encourage individual members to support Judge Kuhl’s nomination.
- **Leo Terrell, a California civil rights lawyer**, wrote: “I am an attorney for the NAACP. . . . I am a lifelong Democrat. . . . I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.”

II. Responses to Issues Raised Against Judge Kuhl

Certain special-interest groups have raised questions about Judge Kuhl, but the allegations do not withstand scrutiny.

1. *Sanchez-Scott Case.* Some groups have raised questions about Judge Kuhl’s ruling as a state-court judge in the *Sanchez-Scott* case. We believe the case has been badly mischaracterized, and are disappointed that this case has unfairly become part of the brief against Judge Kuhl.

The plaintiff in the case sued four parties -- a doctor, the doctor’s employer medical partnership, a pharmaceutical company, and the pharmaceutical company’s representative -- after an incident in which the plaintiff was examined by the doctor in the presence of a pharmaceutical company representative. The company representative was present as part of an oncology mentorship program established to allow pharmaceutical company salespersons to better learn how an oncologist attends to patients and manages medications. It was common for physicians to explain the program and seek consent from the patient at the beginning of the visit, but the plaintiff alleged that this had not occurred in her case. The plaintiff knew that a third person was in the room (in other words, there was no *surreptitious* viewing or 2-way mirror) and, according to her complaint, was told that the company representative was a “person who was looking at Dr. Polonsky’s work.” But the plaintiff was not told of the third-party’s role or affiliation.

The fundamental wrong that occurred here -- as reflected in plaintiff's complaint -- was that the attending *doctor* failed to ask for the patient's consent to the presence of the third-party company representative before conducting the examination. If the doctor had asked and received consent, there could be no complaint about the third party's presence; if he had asked and not received consent, then the company representative would not have been present for the examination. *In short, the doctor was the clear wrongdoer for his failure to seek and obtain the patient's consent to the presence of the third party.*

The plaintiff did not just sue the doctor for failure to obtain consent, however, but also sued the pharmaceutical company and company representative. The plaintiff alleged two primary torts: (i) common-law "intrusion upon seclusion" against all defendants; and (ii) negligence by the doctor and medical partnership in failing to obtain the patient's consent to the presence of the company representative before conducting the examination. (The plaintiff also alleged a cause of action under the California Constitution, but ultimately did not pursue that claim.)

As often occurs in civil litigation, the plaintiff here asserted multiple causes of action arising out of a single incident. Judge Kuhl then was called upon to assess which causes of action did and did not apply to the facts as alleged by plaintiff, and thus which claims could proceed toward trial.

In this case, Judge Kuhl dismissed the common-law intrusion upon seclusion claim. *She thus allowed the other cause of action against the doctor and medical partnership for failure to obtain consent to proceed to trial.* In dismissing one cause of action and thus allowing the other to proceed to trial, she reasoned based on California precedent that (i) the plaintiff was aware that the third person was in the room so the incident was not a surreptitious taping or viewing or a trespass, which under California law were the types of cases in which intrusion upon seclusion had been recognized, (ii) the purpose for having the third party present was otherwise legitimate if consent had been requested by the doctor and provided by the patient, (iii) the fundamental problem here was the doctor's failure to seek and obtain consent from the patient, which was covered by the plaintiff's separate negligence claim against the doctor and medical partnership.

At the core, there are two critical points to keep in mind about this case. First, the negligence tort, which was based on the doctor's failure to seek and obtain consent, applied to these facts and would allow the plaintiff to obtain *full recovery*. Second, Judge Kuhl's ruling allowed this claim to move toward trial, and thus her ruling did not prevent the plaintiff from obtaining full recovery.

Justice Paul Turner was one of the three judges who heard this case on appeal. Although the three-judge panel allowed the intrusion upon seclusion claim to proceed, he wrote to the Judiciary Committee to explain that a claim for intrusion upon seclusion when there was no surreptitious viewing or taping or the like was a case of "first impression" under California law. (At oral argument in the trial court, plaintiff's counsel admitted that their theory would allow patients to sue and recover whenever *any* third party was present in an examination, including a medical student for example.) Justice Turner added that a "strong argument can be made that

[Judge Kuhl] correctly assessed the competing societal interests the California Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred.” Justice Turner concluded: “With all respect to those who have criticized Judge Kuhl as insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect.”

In sum, while one can debate the proper scope of the intrusion upon seclusion tort and whether it ordinarily should cover non-surreptitious activities (which also can be covered by other torts), we do not think this one ruling should be permitted to negate the strong record and support Judge Kuhl has amassed. Moreover, it is important to place this case in context. Judge Kuhl has handled more than 2000 civil cases during her 7-year tenure on the bench. This is the only case she ruled upon or decided as a judge that has engendered any criticism, and it was a case in which her decision allowed the plaintiff’s case to trial (contrary to the suggestion in much of the misleading commentary about it).

2. Thornburgh Case. Some groups have raised questions about the fact that Judge Kuhl, as a government lawyer in 1986 (before the Supreme Court’s 1992 decision in *Casey*), worked on a Supreme Court brief that re-stated President Reagan’s position that *Roe v. Wade* should be overruled. It bears mention that John Rogers, who was confirmed to the Sixth Circuit without controversy, also was listed as an attorney for the government on this brief. We do not know Judge Kuhl’s policy views on abortion or on *Roe v. Wade*, and we do not ask candidates their personal views on abortion or *Roe v. Wade*. But regardless of what her views may be, she was in that 1986 brief representing her client President Reagan, and we are confident based on her record that she would faithfully apply Supreme Court precedent as a judge on the Court of Appeals. She wrote to Senators Feinstein and Boxer, for example, that “[t]he constitutional right of a woman to make her own choices regarding personal medical issues, including choices regarding issues of reproductive freedom, has been established by both *Roe v. Wade* and *Planned Parenthood v. Casey* [citations omitted]. As a judge I am fully committed to following the precedent established by these cases and would do so fairly and properly.”

Many attorneys who indicated they are pro-choice have written to the Senate that they are confident, based on their personal knowledge of Judge Kuhl, that she will faithfully follow precedent as a lower-court judge. For example, Anne Egerton, former law partner of Judge Kuhl and current fellow judge, wrote:

I understand that some have raised concerns about Judge Kuhl’s commitment to gender equality and reproductive rights. I do not share those concerns. I have been active in feminist and pro-choice organizations since I first joined the nascent Arizona Women’s Political Caucus in 1971. . . . I provided legal services on a pro bono publico basis for Planned Parenthood Los Angeles, serving as their outside general counsel for about two years in the late 1980s. . . . I have been a registered Democrat for thirty years, and I have supported financially and otherwise [Senator Feinstein], Senator Boxer, and other Democratic legislators and candidates. I have no reservations in recommending Judge Carolyn Kuhl . . . for appointment to the Ninth Circuit Court of Appeals. I know Judge

Kuhl to be committed to the rule of law and to the application of governing precedent. In the area of reproductive freedom, that precedent of course includes *Roe v. Wade* and the many cases such as *Akron* that have applied its landmark holding.”

Gretchen Nelson, officer of the Litigation Section of the Los Angeles County Bar Association and prominent plaintiff’s attorney in Los Angeles, wrote:

I am a life-long Democrat. I am also a plaintiff’s attorney. My political views are and have always been liberal. . . . I firmly agree with the U.S. Supreme Court’s opinion in *Roe v. Wade*, 410 U.S. 113 (1973), and I trust that the decision will remain viable. I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all of the facts and legal issues presented in any matter. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

3. Role as Special Assistant to the Attorney General in 1981. Some groups have raised questions about Judge Kuhl’s record as a 29-year-old special assistant to the Attorney General on the *Bob Jones* case. Judge Kuhl’s position at the time was that the Internal Revenue Service ruling at issue in the case was inconsistent with the governing statute, which of course is the kind of basic administrative law question that arises frequently in government litigation. In addition, as a policy matter, she was concerned about the effect a free-standing IRS power to decide “public policy” on its own and without congressional direction would have with respect to the tax-exempt status of all-girls and all-women’s schools.

As she testified at her hearing, however, she came to realize that the position taken by the Department of Justice in that case was a mistake for two reasons. First, the traditional role of the Department of Justice is to defend federal agencies if a reasonable argument can be made in support of the agency position (regardless whether the Justice Department lawyers might agree or disagree with that legal position), and a reasonable argument could have been made to defend the IRS position. Second, given the nature of the university’s policies, the position taken in the case badly undermined the Administration’s commitment to civil rights and became in her words a “disaster” for the Reagan Administration. There should be no suggestion, however, that Carolyn Kuhl was somehow sympathetic to the university’s practices at the time. Indeed, she testified that, as a Catholic, she brooked no sympathy for the university’s religious and racial discriminatory practices. Judge Kuhl made a basic analysis of administrative law principles (one which law professor Laurence Tribe subsequently stated was well-reasoned), but she ultimately came to believe that was not the right approach in that case under all of the circumstances.

Please do not hesitate to contact me with any questions about this superb nominee, and thank you for your support of her nomination.

Sincerely,



Alberto R. Gonzales

Counsel to the President

The Honorable Bill Frist
The Honorable Orrin Hatch
United States Senate
Washington, DC 20510

cc: The Honorable Thomas Daschle
The Honorable Patrick Leahy
The Honorable Dianne Feinstein
The Honorable Barbara Boxer

Dinh, Viet

From: Dinh, Viet
Sent: Friday, May 16, 2003 3:57 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; 'Jennifer_R._Brosnahan@who.eop.gov'
Subject: RE: No judicial nominating commissions in NC -- no fears

phew!

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, May 16, 2003 3:37 PM
To: Dinh, Viet; Jennifer_R._Brosnahan@who.eop.gov
Subject: No judicial nominating commissions in NC -- no fears

Dinh, Viet

From: Dinh, Viet
Sent: Monday, May 12, 2003 1:36 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Invites

Sorry about that--I was pretty exercised when Fed Soc were inviting my own people to WH events.
thanks

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, May 12, 2003 1:00 PM
To: Dinh, Viet
Subject: RE: Invites

no problem. just wanted to be clear because your voice mail was weird.

(Embedded
image moved "Viet.Dinh@usdoj.gov" <Viet.Dinh
to file: 05/12/2003 11:54:50 AM
pic03563.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Invites

thanks

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]

007104-002018

[mailto:brett_m._navarraugh@wht.eop.gov]

Sent: Thursday, May 08, 2003 2:38 PM

To: Charnes, Adam; Remington, Kristi L; Dinh, Viet

Subject: Invites

Please make clear to everyone there that our intention from the get-go was to invite any and all comers from OLP for the precise purpose of expressing President's and WH appreciation of the hard work. The problem was that Cabinet Affairs does DOJ invites and does not usually make calls until 2-3 days before event. Meanwhile, Public Liaison handles outside groups and has to give more advance notice. Pub Liaison had called Fed Soc late last week and told them to round up 25-50 people. Fed Soc then stupidly called people in your office and some Senate staffers instead of calling people on the outside. Sorry for confusion, but please make sure people in OLP and FBI unit understand they always were to be invited by us.

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, May 7, 2003 5:46 PM
To: 'Ashley_Snee@who.eop.gov'; 'Kavanaugh, Brett'
Cc: McNaught, Heather
Subject: chuck Lane a (b) (6) on filibusters

can you guys handle? am heading out of town to London. thanks

Goodling, Monica

From: Goodling, Monica
Sent: Thursday, May 8, 2003 5:15 PM
To: 'David_G_Leitch@who.eop.gov'; Brett Kavanaugh (E-mail); Ashley Snee (E-mail)
Cc: Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Comstock, Barbara; Dinh, Viet
Subject: DOJ response to NYT story on Priscilla Owen

All - This is the final NYT will run tomorrow. They refused to use the first part of the letter I submitted, insisting that it was the responsibility of the news dept to consider that for a correction (no indication that they will issue one). I did at least get them to add one sentence about Judge Gonzalez, for what it's worth.... Best, Monica

To the Editor:

Given the debate over Priscilla R. Owen's nomination to the Fifth Circuit Court of Appeals (news article, May 2), the most important point is that Justice Owen's record as a person, a lawyer and a judge demonstrates that she is well within the mainstream of American law.

Justice Owen has been in the majority in 11 of the 14 parental-notice abortion cases that the Texas Supreme Court has decided. She has voted to allow the minor to obtain an abortion without parental notice in two cases and voted to remand to the trial court in two others, demonstrating that she does not have a result-oriented approach in these matters.

Moreover, she has not questioned Roe v. Wade in her writings. Instead, she testified that as a lower-court judge, she would adhere to her duty to follow Roe.

Alberto R. Gonzales, the White House counsel and a former Texas Supreme Court justice, has said Justice Owen is "an outstanding jurist" and will perform "superbly as a federal appeals court judge."

Her record has been distorted by some Senate Democrats and single-issue interest groups. Priscilla Owen will be an outstanding judge once confirmed.

VIET D. DINH

Assistant Attorney General for Legal Policy, Justice Dept.
Washington, May 7, 2003

Dinh, Viet

From: Dinh, Viet
Sent: Friday, May 2, 2003 10:26 AM
To: 'brett_m._kavanaugh@who.eop.gov'
Subject: Fw: Joan Biskupic

Brett, (b) (6) Can you help? Thx

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

From: Dinh, Viet <Viet.Dinh@USDOJ.gov>
To: McNaught, Heather <Heather.McNaught@USDOJ.gov>; Charnes, Adam <Adam.Charnes@USDOJ.gov>
Sent: Fri May 02 10:25:50 2003
Subject: Re: Joan Biskupic

Pls have ashley snee and monica goodling handle and advise whether I should talk to her

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

From: McNaught, Heather <Heather.McNaught@USDOJ.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Fri May 02 09:58:54 2003
Subject: Joan Biskupic

Joan Biskupic is writing a story on lower court nominees and says she needs to talk to you for about 15 minutes by COB Tuesday. She said you could call her whenever-- 202-906-8182 (w) or (b) (6) (b) (6)h. If you want me to pass along a message to her, I'd be happy to.

Hope the Ashworths and Dinhs are mixing well! Can't wait to hear about it on Monday.

Heather C. McNaught
Office of Legal Policy
U.S. Department of Justice
202.514.9148 (phone)
202.514.2424 (fax)

007104-002022

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Friday, May 2, 2003 9:23 AM
To: Charnes, Adam
Cc: Dinh, Viet
Subject: RE: May 9 event
Attachments: pic05241.pcx

sure, let me know.

(Embedded
image moved "Adam.Charnes@usdoj.gov" <Adam.Charnes
to file: 05/02/2003 09:03:22 AM
pic05241.pcx)

Record Type: Record

To: "Viet.Dinh@usdoj.gov" <Viet.Dinh@usdoj.gov>, Brett M.
Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: May 9 event

We will get a list together. If possible, it would be nice also to invite folks in the FBI BI unit who worked hard to pull the BI reports together.

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, May 01, 2003 6:19 PM
To: Charnes, Adam; Dinh, Viet
Subject: May 9 event

Thanks to your office for such a great job on the recent noms (as always).

007104-002023

Please make sure everyone who should be invited from OLP (including Sheila and Nancy) is aware of the May 9 Rose Garden event at 10:30. They will be there.

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, May 1, 2003 2:08 PM
To: 'David_G._Leitch@who.eop.gov'; 'Kavanaugh, Brett'; 'Bartolomucci, Chris'
Subject: FW: Prodo vote at 2:15 today; Cook at 4:40 Monday; nancy is check on Roberts

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

From: Joy, Sheila
Sent: Thursday, May 01, 2003 2:07 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Benedi, Lizette D; Sales, Nathan; Anderson, Carl A
Subject: Prodo vote at 2:15 today; Cook at 4:40 Monday; nancy is check on Roberts

007104-002025

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, April 29, 2003 4:59 PM
To: 'brett_m._kavanaugh@who.eop.gov'
Subject: Fw: War Room Meeting

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

From: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>
To: 'jpardue@fed-soc.org' <jpardue@fed-soc.org>
CC: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Tue Apr 29 16:35:09 2003
Subject: RE: War Room Meeting

We are fine with this list. WH Counsel's office should be consulted and concur on date, time and attendees.

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

From: jpardue@fed-soc.org [mailto:jpardue@fed-soc.org]
Sent: Tuesday, April 29, 2003 4:13 PM
To: Benczkowski, Brian A
Subject: War Room Meeting

How does the 22nd of May look to have this meeting. Say 12:00-3:00 PM at Jones Day. We have 11 people. I believe I sent you a list. Is there anyone you think we should add or take off (Mark Dissler, Randy Rader, Duke Short, Mike Carvin, Chuck Cooper, Fred Fielding, Boyden Gray, Manus Cooney, Doug Cox, Tim Flanigan)? I need to get this list, plus your list over to Tim Goeglein and Brett Kavanaugh as soon as I can. Let me know what you think.

Joel Pardue
Associate Director, Lawyers Division

007104-002026

Charnes, Adam

From: Charnes, Adam
Sent: Monday, April 28, 2003 3:33 PM
To: 'JGRoberts@HHLAW.com'
Cc: David G. Leitch (E-mail); Brett M. Kavanaugh (E-mail); Dinh, Viet; Christopher Bartolomucci (E-mail)
Subject: RE: change in plan: Someone from our office is walking it over.

There has been no recent FOIA requests related to you. There was a FOIA request back in 1991 or 1992, (b) (5)

(b) (5) Unfortunately, DOJ discards FOIA records that old, so we don't have immediate access to the document(s) provided pursuant to FOIA. However, we are checking with the archives and may be able to get it that way.

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

From: JGRoberts@HHLAW.com [mailto:JGRoberts@HHLAW.com]
Sent: Friday, April 25, 2003 3:52 PM
To: Charnes, Adam
Subject: RE: change in plan: Someone from our office is walking it over.

The Alliance for Justice website "full report" on me refers to documents that I wrote when I was a Special Assistant to Attorney General Smith, which they obtained pursuant to a FOIA request. You may recall that several of the written questions I answered also referenced such documents. (b) (5)

(b) (5)

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

From: Adam.Charnes@usdoj.gov [mailto:Adam.Charnes@usdoj.gov]
Sent: Thursday, April 24, 2003 5:30 PM
To: John G. Roberts Jr. (E-mail)
Subject: change in plan: Someone from our office is walking it over.

This electronic message transmission contains information from the law firm of Hogan & Hartson L.L.P. which may be confidential or privileged. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by telephone (202-637-5600) or by electronic mail (PostMaster@HHLAW.COM) immediately.

007104-002027

Dinh, Viet

From: Dinh, Viet
Sent: Monday, April 28, 2003 10:20 AM
To: 'fried@law.harvard.edu'; 'ckuhl@lasuperiorcourt.org'; 'brett_M._Kavanaugh@who.eop.gov'
Subject: RE:

thanks, charles.

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

From: fried@law.harvard.edu [mailto:fried@law.harvard.edu]
Sent: Monday, April 28, 2003 10:02 AM
To: Dinh, Viet; ckuhl@lasuperiorcourt.org;
brett_M._Kavanaugh@who.eop.gov
Subject:

Dear Friends,

I suppose you saw the NYTimes editorial this morning, April 28, attacking Jeff Sutton. It plays right into my first and last paragraphs. perhaps Senator Feinstein should be made aware of this.
Charles

April 27, 2003

To the Editor:

Re "Another Unworthy Judicial Nominee" (editorial, some editions, April 24):

Your editorial opposing the confirmation of Judge Carolyn Kuhl - who served as my deputy from 1985 to 1986, when I was solicitor general - omits any mention of the support Judge Kuhl has received from more than 100 fellow judges, bar leaders in California, plaintiff's lawyers and civil rights lawyers. This is surely the best evidence of how she would perform as a federal judge.

You characterize Judge Kuhl as "outside the ideological mainstream" because, among other things, she joined my brief calling Roe v. Wade an unwarranted extension of constitutional doctrine. That was also the view then of mainstream liberal scholars like Archibald Cox, John Ely and Paul Freund.

You also state that Judge Kuhl wrote a brief "backing the defendant in a sexual harassment case." On the contrary, she signed my brief in the Vinson case urging the Supreme Court for the first time to hold that sexual harassment was indeed a violation of the Civil Rights Act's guarantee of equal economic opportunity. We did go on to write that as applied to the particular facts in that case, the employer might not be liable under that important general principle.

007104-002028

might not be liable under that important general principle.

It is ironic that the Senate Democrats have been willing to confirm several men as conservative as Judge Kuhl but now threaten to make a goal-line stand against two women and a Hispanic.

CHARLES FRIED

Cambridge, Mass., April 24, 2003

Charles Fried
1525 Massachusetts Avenue
Cambridge, MA 02138

(b) (6)
fax: (617) 496 4865

Dinh, Viet

From: Dinh, Viet
Sent: Friday, April 25, 2003 2:43 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Charnes, Adam; 'David_G._Leitch@who.eop.gov'
Subject: RE: FW: 4th Cir.

thanks. Just wanted final so we are prepared.

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, April 25, 2003 2:40 PM
To: Dinh, Viet
Cc: Charnes, Adam; David_G._Leitch@who.eop.gov
Subject: Re: FW: 4th Cir.

Attached in pdf. You all had reviewed draft of same and it was then parked for a week and then sent.

(See attached file: Judges letter 4th Circuit 4 23 03.pdf)

(Embedded
image moved "Viet.Dinh@usdoj.gov" <Viet.Dinh
to file: 04/25/2003 02:37:47 PM
pic05663.pcx)

Record Type: Record

To: David G. Leitch/WHO/EOP@EOP, Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Adam.Charnes@usdoj.gov" <Adam.Charnes@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested)
Subject: FW: 4th Cir.

007104-002030

copy of letter? thanks

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

From: Charnes, Adam

Sent: Friday, April 25, 2003 12:22 PM

To: Dinh, Viet; Remington, Kristi L; Benczkowski, Brian A

Subject: 4th Cir.

Did anyone know about the referenced Gonzales letter?

<http://newsobserver.com/news/story/2486882p-2311678c.html>

THE WHITE HOUSE

WASHINGTON

April 23, 2003

Dear Senators Allen, Dole, Edwards, Mikulski, Sarbanes, and Warner:

I write about the status of the four vacancies on the U.S. Court of Appeals for the Fourth Circuit.

There are 15 authorized seats on the Court of Appeals. Federal law imposes only one requirement for allocation of seats within a circuit -- that each State have at least one judge. Each State in a circuit often has a number of judges sitting in that State that corresponds at least roughly to the State's percentage of the overall population in the circuit or to the percentage of the circuit's caseload that arises from that State. To be sure, such geographic balance is not established in law or binding on the President or Senate. And there often are deviations in some circuits for a variety of historical and other reasons. (I would note, in addition, that judges can move from one State to another State in the circuit after their appointment, as has happened on some occasions in the past.) But this measure is generally a rough baseline for assessing the geographic allocation of seats within a circuit.

Based on this measure, of the 15 authorized seats, it appears that the allocation would roughly resemble the following: North Carolina: 4 or 5, Virginia: 4 or 5, South Carolina: 2 or 3, Maryland: 2 or 3, and West Virginia: 1 or 2. As of now, taking into account that Judge Widener recently notified the President of his intended retirement, the Fourth Circuit is significantly out of geographic balance:

	Baseline Allocation	Current Number of Judges
North Carolina:	4 or 5	0
Virginia:	4 or 5	3
South Carolina	2 or 3	4
Maryland:	2 or 3	2
West Virginia:	1 or 2	2

There are four current vacancies on the Court. The four judges who previously occupied these seats maintained their chambers in North Carolina, Virginia, and Maryland (which is why I have sent this letter to you as the Senators from those States). Judge Terry Boyle of North Carolina was nominated for one vacancy in May 2001. For the three additional vacancies, the President intends to nominate well-qualified and well-respected individuals in a manner that will bring the circuit closer to geographic balance, recognizing that it would take several years and additional vacancies for the circuit to achieve balance and recognizing further that absolute geographic balance is neither legally nor historically required. In particular, the President intends to nominate two such individuals on Monday, April 28 -- one who currently lives in Virginia and has strong roots in and ties to both Virginia and North Carolina and one who currently lives in North Carolina and has served on the state judiciary in North Carolina. Both

are African-American, and their confirmations by the Senate will further dismantle an historic barrier. For the last remaining vacancy, the President would intend to submit a nomination no later than September 2003, consistent with the President's commitment to submit nominations within 180 days of receiving notice of an intended retirement or vacancy.

I remain disappointed that Judge Boyle's nomination has been pending for two years. But I am pleased that we otherwise have been able to consult extensively and work cooperatively on other circuit and district nominees in Virginia, North Carolina, and Maryland. Please feel free to contact me at any time with your thoughts regarding the Fourth Circuit or other issues of concern to you.

Sincerely,



Alberto R. Gonzales
Counsel to the President

The Honorable George Allen
The Honorable Elizabeth Dole
The Honorable John R. Edwards
The Honorable Barbara A. Mikulski
The Honorable Paul S. Sarbanes
The Honorable John W. Warner
United States Senate
Washington, D.C. 20510

that we can and will defeat this threat to our values.

I'm asking you to do three things:

1. Come to our Supreme Court Action Center and sign the petition to President Bush letting him know you'll fight his attempts to attack our values and stack the Supreme Court with right-wing extremists.

<http://mailer democrats.org/rdr/002JK04vsv0001E>

2. Once you've signed the petition, get as many as your friends as possible to sign it.

<http://mailer democrats.org/rdr/002JK04vsv0001F>

3. Join our Supreme Court Action Team by signing up to become a Democratic eCaptain today.

<http://mailer democrats.org/rdr/002JK04vsv0001G>

Signing this petition and telling your friends is the most important thing I have asked you to do since I've been Chairman of the Democratic National Committee.

<http://mailer democrats.org/rdr/002JK04vsv0001H>

I pledge that in the weeks to come, I will personally obtain and deliver to your inbox the support of our top Democratic leaders in this effort.

Sincerely, Terence R. McAuliffe Chairman

Cites: [1] New York Times, 12/27/02 [2] Washington Post, 1/6/03, UPI, 6/30/00 [3] Washington Post, 11/27/02 [4] Washington Post, 4/15/03 [5] New York Times, 12/27/02

From: CKuhl@LASuperiorCourt.org
Sent: Thursday, April 17, 2003 11:42 AM
To: Remington, Kristi L; Dinh, Viet; Brett_M._Kavanaugh@who.eop.gov
Subject: Fwd: Letters to the Editor; re: 4/17 editorial
Attachments: Letters to the Editor(059) re: 4/17 editorial.msg

Charles obviously acted promptly.

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, April 17, 2003 3:00 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Joy, Sheila
Cc: Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L
Subject: RE: Fisher -- 3rd

(b) (5)

Sheila, where exactly is he and can we insist that he fly back?

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, April 17, 2003 2:55 PM
To: Joy, Sheila
Cc: Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Dinh, Viet
Subject: Re: Fisher -- 3rd

Can they get the information they need to have other interviews over the phone?

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image moved "Sheila.Joy@usdoj.gov" <Sheila.Joy
to file: 04/17/2003 02:52:27 PM
pic04292.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Viet.Dinh@usdoj.gov" <Viet.Dinh@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Adam.Charnes@usdoj.gov" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Brian.A.Benczkowski@usdoj.gov" <Brian.A.Benczkowski@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Kristi.L.Remington@usdoj.gov" <Kristi.L.Remington@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)

007104-002036

Subject: Fisher -- 3rd

Brett, - Apparently Mr. Fisher has gone out of town and will not be available to be interviewed by the FBI until after his return 4/22. -- The Bureau was attempting to meet the 4/25 deadline but this will most likely make it impossible. They are conducting the interviews that they can but need some additional information from him before other interviews are conducted. Sheila

fried@law.harvard.edu

From: fried@law.harvard.edu
Sent: Thursday, April 17, 2003 10:23 AM
To: editorial@nytimes.com
Subject: Letters to the Editor(059) re: 4/17 editorial

To the editor

Your editorial Filibustering Priscilla Owen [April 17, 2003] was unfair to Judge Carolyn Kuhl and Senator Dianne Feinstein. All you have to say to justify a minority's blocking a vote on her confirmation is that she "was a strong supporter of maintaining the tax-exempt status of Bob Jones University." You omit to mention that that was some twenty years ago, when as a junior Department of Justice staffer fresh out of law school she gave the legal judgement that the Internal Revenue Service did not have the authority to make that kind of judgment; that she has said many times that she thinks that she had been wrong; and more importantly that in nine years as a trial judge she has won praise and support from a broad range of lawyers who have appeared before her--including civil rights and plaintiffs' lawyers. You also reproach Senator Feinstein for having been "silent" on the nomination. In fact at Judge Kuhl's hearing Senator Feinstein spoke at length, reporting that she had received strong expressions of support for Judge Kuhl from a diverse range of lawyers, as well as strong opposition from a number of interest groups. She was not silent; she was candid and fair. She set an example in this rancorous and slanted campaign.

Charles Fried
Beneficial Professor of Law, Harvard Law School Judge Kuhl served as my Deputy 1985-86, when I was Solicitor General.

Charles Fried
1525 Massachusetts Avenue
Cambridge, MA 02138

(b) (6)
fax: (617) 496 4865

007104-002038

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, April 15, 2003 9:04 PM
To: Dinh, Viet; CKuhl@LASuperiorCourt.org; Brett_M._Kavanaugh@who.eop.gov
Cc: Remington, Kristi L
Subject: Re: Specter letter

Can we have conf call wed at 1115 am east coast time to discuss and resolve.

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

From:CKuhl@LASuperiorCourt.org
To:Viet.Dinh@usdoj.gov,
Brett M. Kavanaugh/WHO/EOP@EOP
Cc:Kristi.L.Remington@usdoj.gov
Date: 04/15/2003 02:44:33 PM
Subject: Re: Specter letter

Here is the attachment. Sorry for the omission from the prior e-mail.
Carolyn

>>> <Brett_M._Kavanaugh@who.eop.gov> 04/14/03 03:08PM >>>

(b) (5)

(Embedded
image moved Judge Carolyn Kuhl <CKuhl@LASuperiorCourt.org> to file: 04/14/2003 05:06:50 PM
pic01296.pcx)

Record Type: Record

007104-002039

To: Kristi.L.Remington@usdoj.gov, Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: Specter letter

Attached redraft for your comments.

- att1.htm - Hatch Letter Post Confirmation.doc

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, April 15, 2003 5:14 PM
To: CKuhl@LASuperiorCourt.org
Cc: Remington, Kristi L; Dinh, Viet
Subject: Re: Specter letter
Attachments: att1.htm; Hatch Letter Post Confirmation.doc; pic21192.doc

This is a letter to Hatch rather than the Specter letter, I believe.

(Embedded
image moved Judge Carolyn Kuhl <CKuhl@LASuperiorCourt.org>
to file: 04/15/2003 02:44:33 PM
pic21192.pcx)

Record Type: Record

To: Viet.Dinh@usdoj.gov, Brett M. Kavanaugh/WHO/EOP@EOP

cc: Kristi.L.Remington@usdoj.gov

Subject: Re: Specter letter

Here is the attachment. Sorry for the omission from the prior e-mail.
Carolyn

>>> <Brett_M._Kavanaugh@who.eop.gov> 04/14/03 03:08PM >>>

Duplicative

007104-002041

Dinh, Viet

From: Dinh, Viet
Sent: Saturday, April 12, 2003 2:02 AM
To: Charnes, Adam; 'brett_m._kavanaugh@who.eop.gov'
Subject: Re: Bea was sent up today

Thx for raising my blood pressure. Brett, this one is on you.

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

From: Charnes, Adam <Adam.Charnes@USDOJ.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Fri Apr 11 22:32:42 2003
Subject: Fw: Bea was sent up today

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

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Charnes, Adam <Adam.Charnes@USDOJ.gov>; Remington, Kristi L <Kristi.L.Remington@USDOJ.gov>
Sent: Fri Apr 11 17:02:58 2003
Subject: Bea was sent up today

007104-002042

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, April 8, 2003 6:01 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: We have Political Affairs on call.

great. Frank Brown is pseaking with Paul turner as we speak.

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, April 08, 2003 5:41 PM
To: Dinh, Viet
Subject: We have Political Affairs on call.

007104-002043

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, April 8, 2003 5:49 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: We have Political Affairs on call.

thanks. (b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, April 08, 2003 5:41 PM
To: Dinh, Viet
Subject: We have Political Affairs on call.

Sales, Nathan

From: Sales, Nathan
Sent: Monday, March 31, 2003 6:25 PM
To: Charnes, Adam; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE:

ok.

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

From: Charnes, Adam
Sent: Monday, March 31, 2003 5:22 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Sales, Nathan
Subject: RE:

sure. Nathan, please handle.

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, March 31, 2003 4:59 PM
To: Charnes, Adam
Subject:

Should (b) (5)

(b) (5)

Sales, Nathan

From: Sales, Nathan
Sent: Thursday, March 27, 2003 10:32 AM
To: Charnes, Adam; Remington, Kristi L; Dinh, Viet; 'Brett Kavanaugh'; Benczkowski, Brian A; Benedi, Lizette D
Subject: RE: Kuhl Moot

me too.

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

From: Charnes, Adam
Sent: Thursday, March 27, 2003 9:13 AM
To: Remington, Kristi L; Dinh, Viet; 'Brett Kavanaugh'; Benczkowski, Brian A; Benedi, Lizette D; Sales, Nathan
Subject: RE: Kuhl Moot

noon works for me.

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

From: Remington, Kristi L
Sent: Thursday, March 27, 2003 9:06 AM
To: Dinh, Viet; 'Brett Kavanaugh'; Charnes, Adam; Benczkowski, Brian A; Benedi, Lizette D; Sales, Nathan
Subject: Kuhl Moot

We are planning to do a moot with Carolyn Kuhl on Sunday -- please let me know when you are available. Judge Kuhl indicated that she would like to do it earlier rather than later. Perhaps noon?

007104-002046

Joy, Sheila

From: Joy, Sheila
Sent: Thursday, April 3, 2003 12:01 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Kuhl questions
Attachments: tmp.htm; Kuhl Written questions.doc

FYI

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

From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov]
Sent: Wednesday, April 02, 2003 6:13 PM
To: Joy, Sheila; Comisac, RenaJohnson (Judiciary); Dahl, Alex (Judiciary); LeBon, Cherylyn (Judiciary); Green, Tanya (Judiciary); Soliemanzadeh, Payam (Judiciary); Prior, Swen (Judiciary); Haywood, Amy (Judiciary); Morcombe, Cecilia (Judiciary)
Subject: FW: Extension of Q & A deadline for last Thursday's Nominations Hearing

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

From: Berman, Jeff (Judiciary)
Sent: Wednesday, April 02, 2003 5:50 PM
To: Stahl, Katie (Judiciary)
Subject: RE: Extension of Q & A deadline for last Thursday's Nominations Hearing

I've attached a few questions from Senator Schumer to Judge Kuhl. He will be submitting more questions soon, but these are done so we thought we'd get them over to you. jeff

007104-002047

Questions from Senator Schumer to Judge Carolyn Kuhl

1. As a Department of Justice lawyer you swore to uphold and defend the Constitution. You then authored a memo encouraging the Department to urge the Supreme Court to reverse Roe v. Wade. Given that you were upholding the Constitution and urging Roe's reversal, you must have believed that Roe was unconstitutional. Is this the case or not? If so, please explain why you believed Roe was unconstitutional. If not, please explain why, having taken an oath to uphold the Constitution, you urged the reversal of a case you believed to be constitutional.
2. If you did believe Roe was unconstitutional when you were a DOJ lawyer, do you still believe Roe is unconstitutional and should be reversed? If so, why? If not, why not?
3. In your colloquy with Chairman Hatch after my round of questions, you stated that there are instances where a DOJ lawyer, acting in accord with her duty to uphold and defend the Constitution, could argue that settled Supreme Court law should be reversed. Brown v. Board of Education was cited as one example where it was appropriate to encourage setting aside unconstitutional law in favor of a more enlightened Constitutional interpretation. I agree with that assertion wholeheartedly and, in my questions, did not intend to imply that a government lawyer could not urge the reversal of decisions that are contrary to the Constitution.

That said, I also believe Roe v. Wade is not comparable in any way to Plessy v. Ferguson, the case Brown overturned. Did you view the two as comparable cases when you wrote the memo urging the Department to seek Roe's reversal? If so, why? If not, why not? Do you view the two as comparable cases now? If so, why? If not, why not?

4. What standards should a Department of Justice lawyer use when deciding whether to encourage the reversal of Supreme Court precedent?
5. What standards did you use when you urged the Department of Justice to seek Roe's reversal?
6. Do you believe that you employed the proper standards when you urged Roe's reversal while you were at the Department of Justice? If so, why? If not, why not?

Joy, Sheila

From: Joy, Sheila
Sent: Thursday, March 27, 2003 12:54 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Sales, Nathan; Anderson, Carl A; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: New Vacancy Notice

James A. Parker USDJ New Mexico to retire 9/1/03

007104-002049

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, March 26, 2003 8:31 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re: CALL ME AT (b) (6) IF YOU WANT ME TO COME TO CLASS for war stories; sorry for late response

Am on plane. (b) (6)

--- Sent from my BlackBerry.

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

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Clement, Paul D <Paul.D.Clement@USDOJ.gov>; Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Wed Mar 26 18:19:45 2003
Subject: CALL ME AT (b) (6) IF YOU WANT ME TO COME TO CLASS for war stories; sorry for late response

007104-002050

Judge Carolyn Kuhl

From: Judge Carolyn Kuhl
Sent: Wednesday, March 26, 2003 2:30 PM
To: Dinh, Viet
Cc: Brett_M._Kavanaugh@who.eop.gov
Subject: Support letters
Attachments: tmp.htm; Support Letters List.doc

Attached is a summary list that we can work from/add to. Could someone work with this to attach the actual support letters as exhibits?

(b) (5)

Also, I believe some support letters have been sent to Sen. Hatch without sending copies to me. In other words, I do not think I have a complete set of support letters. Could someone work with Senate staff to make sure that there is a complete set we can use?

If your office does not have copies of any of these letters, let me know & I can fax.

(b) (5)

Many thanks -
Carolyn

LETTERS OF SUPPORT FOR JUDGE CAROLYN KUHL

SUMMARY:

Letter of support from Justice Carlos Moreno, California Supreme Court
Over a dozen letters of support from Justices of the California Court of Appeal
Letter of support signed by 96 Judges of the Superior Court of the State of California for the County of Los Angeles
Letter of support signed by 23 of Judge Kuhl's women colleagues
Letter of support signed by the Officers of the Litigation Section of the Los Angeles County Bar Association (which has over 3,000 members)
Letter urging support authorized by the Board of Governors of the Consumer Attorneys Association of Los Angeles
Letter of support from over 30 Law Professors
Letters of support from Bar leaders such as Tom Girardi, Ron Olson, Bruce Broillet, Gretchen Nelson, Rex Heinke and Patricia Phillips
Letters of support from persons who describe themselves as pro-choice

EXCERPTS FROM SUPPORT LETTERS:

LETTER FROM 96 JUDGES OF THE LOS ANGELES SUPERIOR COURT:

"We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge."

LETTER FROM 23 OF JUDGE KUHL'S WOMEN COLLEAGUES

"Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. . . . Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges She has helped promote the careers of women, both Republican and Democrat. . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend. As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary."

LETTERS FROM JUSTICES OF THE CALIFORNIA COURT OF APPEAL

“Judge Kuhl] has distinguished herself as a judge who is highly intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair. . . . During our years of service together on the Superior Court, I never heard any criminal or civil lawyer express the view that Judge Kuhl issued a ruling or rendered decisions that were in any way influenced by a particular judicial philosophy or political ideology, or were motivated by a judicial or political agenda.” (Honorable Paul Boland, appointed to the Superior Court by Governor Edmund Brown, Jr. and to the California Court of Appeal by Governor Gray Davis.)

“If we could be assured that all President Bush’s judicial picks would be of Judge Kuhl’s high caliber in all respects, those of us with major concerns in this area could feel more secure.” (Honorable Joan Dempsey Klein, appointed to the California Court of Appeal by Governor Edmund Brown, Jr.)

“She is a solid and independent judge who is dedicated to and follows the law. . . . She will reason to a conclusion based on our Constitution, statute, and established precedent, rather than reason backward from some predetermined result.” (Honorable Norman L. Epstein.)

“As someone who was an active Democrat prior to my appointment to the bench by Governor Gray Davis, I have no desire to see our federal courts filled with conservative ideologues who inject personal, social and political agendas into the judicial process. Judge Kuhl is not such a person. During her tenure on the Los Angeles Superior Court, Judge Kuhl has demonstrated a commitment to intellectual honesty and independent and impartial decision making, as well as an active concern for ensuring a fair and accessible legal system.” (Honorable Dennis M. Perluss, appointed to the California Court of Appeal by Governor Gray Davis.)

“[Judge Kuhl] has an excellent reputation among the judicial and legal community in Los Angeles. Thus, as indicated by the American Bar Association, Judge Kuhl is well qualified for the position.” (Honorable Richard M. Mosk, appointed to the California Court of Appeal by Governor Gray Davis.)

“It is the strength of our judicial system that the vast majority of judges have the integrity to put aside their personal beliefs and biases and decide issues based on the law, whether they personally agree with the outcome or not. Carolyn is just such a person. In the cases she worked on with our panel, and in the cases of hers that I have reviewed, I have seen no evidence that Carolyn has allowed her personal beliefs or biases to affect the result.” (Honorable J. Gary Hastings)

“[Judge Kuhl] is highly respected by trial and appellate judges and by lawyers alike. She has been assigned to several demanding assignments by at least four presiding judge. She has performed superbly. . . . Judge Kuhl has no apparent political or social agenda, which would interfere with service on the court.” (Honorable Daniel A. Curry)

“I have known Judge Kuhl for over five years and I have great regard for her repeatedly demonstrated judicial skills and abilities. My views are widely shared in the southern California legal community. She is uniformly praised by her fellow judges as well as the attorneys who appear before her. She will make a great addition to the appellate bench.” (Honorable H. Walter Croskey)

“To me, it has been apparent that she has endeavored to state the law as written by the Legislature and interpreted by prior judicial decisions, not skewed by her own preference or predilections. I cannot speak to her views on controversial issues that have been discussed in the media, but I can say that I would have complete confidence in the manner in which she would approach any of these issues were they to come before her on the federal bench. I have no doubt that she would faithfully adhere to the decisions of the Supreme Court, that she would interpret federal statutes as well as the constitution reasonably and without a preconceived agenda, and that her decisions would be balanced and far from any political or ideological extremes.” (Honorable Stuart Pollak, Justice of the California Court of Appeal, First Appellate District, appointed by Governor Gray Davis.)

“I am appalled at published reports that suggest that [Judge Kuhl] is dogmatic or something of an ideologue. Nothing could be further from the truth. This is a judge who has an open mind on the legal issues of the day and one who applies the law fairly and evenly. Having watched her in action during intense intellectual discussions, I am convinced that she would be an excellent appellate court judge.” (Honorable James D. Ward, Justice of the Court of Appeal, Fourth Appellate District.)

“[In discussions on the Judicial Council Task Force on Jury Instructions Judge Kuhl] is always prepared, she is intelligent and thoughtful on the law, and she listens carefully to others on the subjects we discuss. She makes her suggestions to the committee with tact and discretion and her contributions are substantial. . . . Based on my knowledge of Judge Kuhl through our work on the committee, I am confident that she would be a studious, objective and effective appellate judge and I recommend her confirmation to the Court of Appeals.” (Honorable Harry E. Hull, Jr., Justice of the Court of Appeal, Third Appellate District.)

LETTER FROM OFFICERS OF THE L.A. COUNTY BAR ASSOCIATION:

“By reputation and our personal experience, Judge Kuhl is extremely intelligent, hard working and thoughtful. She gained the prestigious appointment as Supervising Judge of the Complex Courts after only a few years on the bench because of those traits. In addition, she has a well-deserved reputation as being a fair minded judge who follows legal precedent. . . . On a personal level, we have come to know her as a warm, witty and deeply caring person.”

LETTERS FROM PERSONS DESCRIBING THEMSELVES AS PRO-CHOICE

“I am a pro-choice physician. I also am a former colleague of Judge Kuhl at the law firm of Munger, Tolles & Olson LLP. I have known Judge Kuhl for over a decade. She is compassionate. She has the highest integrity, and she is blessed with a gifted mind. These traits have made her an outstanding Judge on the Los Angeles Superior Court indeed, her reputation is second to none and they will serve her well on the Ninth Circuit.” (Dr. Robert L. Dell Angelo)

“I am a life-long Democrat. I am also a plaintiffs’ attorney. My political views are and have always been liberal. . . . I firmly agree with the U.S. Supreme Court’s opinion in Roe v. Wade, 410 U.S. 113 (1973), and I trust that the decision will remain viable. I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all of the facts and legal issues presented in any matter. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.” (Gretchen Nelson, Chair, Litigation Section, L.A. County Bar Association)

“I have been active in feminist and pro-choice organizations since I first joined the nascent Arizona Women’s Political Caucus in 1971. . . . “I co-authored a brief filed in the United States Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.* . . . The *Akron* decision in which the Court cited our amicus brief helped to expand access to safe and legal abortion. While I was at Munger, Tolles & Olson, I provided legal services on a *pro bono publico* basis for Planned Parenthood Los Angeles, serving as their outside general counsel for about two years in the late 1980s. . . . I have no reservations in recommending Judge Carolyn Kuhl to you for appointment to the Ninth Circuit Court of Appeals. I know Judge Kuhl to be committed to the rule of law and to the application of governing precedent. In the area of reproductive freedom, that precedent of course includes *Roe v. Wade* and the many cases such as *Akron* that have applied its landmark holding. Some people talk about mentoring and supporting women: Carolyn Kuhl is someone who does it, generously and consistently.” (Honorable Anne H. Egerton, Judge of the Superior Court)

Also in this category, letters from Justice Joan Dempsey Klein, Dr. Susan Reynolds, Honorable Terry Friedman and Anita Fromholz

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Thursday, March 20, 2003 5:08 PM
To: Benczkowski, Brian A
Cc: Charnes, Adam; Remington, Kristi L; Dinh, Viet
Subject: RE: draft letter to Sen. Boxer
Attachments: judges letter kuhl 3 18 03 102 FINAL SIG.pdf; pic15963.pcx

Thanks for this addition. V. helpful.

(See attached file: judges letter kuhl 3 18 03 102 FINAL SIG.pdf)

(Embedded
image moved "Benczkowski, Brian A"
to file: <Brian.A.Benczkowski@usdoj.gov>
pic15963.pcx) 03/20/2003 02:51:55 PM

Record Type: Record

To: "Charnes, Adam" <Adam.Charnes@usdoj.gov>, "Remington, Kristi L"
<Kristi.L.Remington@usdoj.gov>, "Dinh, Viet" <Viet.Dinh@usdoj.gov>, Brett
M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: draft letter to Sen. Boxer

I think the letter is great work. (b) (5)

(b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov

[mailto:Brett_M._Kavanaugh@who.eop.gov]

Sent: Thursday, March 20, 2003 12:19 PM

To: Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Dinh, Viet

Subject: draft letter to Sen. Boxer

Comments by 3:00 if possible

(See attached file: judges letter kuhl 3 18 03 10.doc)

THE WHITE HOUSE

WASHINGTON

March 20, 2003

Dear Senator Boxer:

I write with respect to your March 6 letter to Chairman Hatch regarding the nomination of Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. I first will discuss the Senate's delays in considering Judge Kuhl's nomination and then will turn to Judge Kuhl's superb qualifications to be a judge on the Ninth Circuit. As I will explain, Judge Kuhl is a woman of exceptional experience, integrity, and intellect who represents the mainstream of American law and American values. Judge Kuhl should receive a prompt hearing and up or down vote, as should all judicial nominees.

I. Senate Confirmation Process

Judge Kuhl has been waiting nearly two years for a hearing despite the fact that the Judicial Conference has determined that this vacancy is a judicial emergency and that the Ninth Circuit currently is in need of *ten* additional judges (for a total of 35). In our judgment, such a lengthy delay -- which has become too common in recent years -- is inconsistent with the Senate's constitutional responsibility to vote on judicial nominations within a reasonable time. As the American Bar Association stated last summer when denouncing Senate delays in holding hearings and votes on judicial nominees, "Vote them up or down, but don't hang them out to dry." The Chief Justice, speaking on behalf of the Federal Judiciary, has similarly advocated a prompt up or down vote for all judicial nominees to end the vacancy crisis in the federal courts and restore order and dignity to the confirmation process.

We appreciate your statements on the Senate floor in recent weeks explaining your displeasure at the amount of time two of President Clinton's appointees to the Ninth Circuit, Judge Richard Paez and Judge Marsha Berzon, had to wait before they received their votes. President Bush has explained that too many nominees of both President Bill Clinton and President George H.W. Bush did not receive timely hearings and votes; indeed, many nominees never received votes at all (unlike Judge Paez and Judge Berzon, who ultimately did receive up or down floor votes and were confirmed). The Senate's delay with respect to Judge Kuhl is especially unfortunate because she took the step in 1998 of writing to Chairman Hatch to support Judge Paez, whom she knows and respects. Indeed, at the time, you cited Judge Kuhl's support for Judge Paez when you spoke in the Senate in support of Judge Paez. Judge Kuhl also strongly supported Margaret Morrow in her efforts to be confirmed after you recommended Judge Morrow for the federal bench. These episodes, of course, were just two of many examples in Judge Kuhl's career where she has shown herself to be concerned with law and fair process, not political gain.

Since the 2000 campaign, President Bush has repeatedly stated that every judicial nominee should receive a committee hearing and up or down floor vote within a reasonable time,

no matter who is President or which party controls the Senate. On October 30, 2002, after nearly two additional years of delays, the President advanced a specific plan involving all three Branches that would require, among other steps, the Senate to vote on nominees within 180 days of nomination. The plan would ensure a generous period of time for all Senators to gather information and have their voices heard and votes counted. Whether the nominee is Marsha Berzon or Carolyn Kuhl, whether the President is President Clinton or President Bush, whether the Senate is Republican- or Democrat-controlled, we believe that the procedures for fair and timely Senate consideration and votes on judicial nominations should be the same.

Like President Bush, you have indicated agreement with this important principle in your past statements. On May 14, 1997, for example, you stated: "According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor."

Your letter also refers to the tradition of Senatorial courtesy with respect to home-state Senators and contends that the White House did not engage in "meaningful consultation" with you before the nomination of Judge Kuhl. We respectfully disagree. As Chairman Hatch detailed in his March 4 letter to you, we engaged in an extraordinary degree of consultation with you and your staff over a period of nearly three months. Indeed, we arranged for you to meet personally with Judge Kuhl and to submit written questions to her before nomination -- steps that are quite unusual. Members of my staff also met personally with members of your staff to provide information and answer questions. We understand that you received a call from a reporter shortly after we first asked you for your views on Judge Kuhl; as you know, however, reporters often learn of names of people possibly under consideration for high-level government positions long before an actual decision or nomination has occurred. At the time that we informed you of Judge Kuhl's candidacy, you made clear publicly your opposition to another potential candidate, Representative Chris Cox. Representative Cox eventually withdrew from consideration. In deference to your views and to facilitate additional consultation, the President delayed the initially scheduled nomination date for Judge Kuhl and ultimately allowed you nearly three months to examine Judge Kuhl's record and provide us with your views. When Judge Kuhl's nomination was announced, you did not indicate opposition to her or state that there had been insufficient consultation. Rather, your contemporaneous statement explained that you would continue to evaluate the nomination. In sum, we consulted extensively with you and your staff for nearly three months before the President decided to nominate Judge Kuhl.

In your letter, you also point out that you have provided us with the names of three Republican candidates for the Ninth Circuit. We interviewed and reviewed the records of each of those three candidates and can assure you that they are strong candidates who remain under consideration for future openings on the Ninth Circuit.

It appears to us that, at bottom, your letter ultimately raises a different and important question -- namely, whether the tradition of Senatorial courtesy entails more than just consultation with home-state Senators, but also grants each home-state Senator a veto over a judicial nominee who would hold office in that State. The consistent Senate policy for at least the last 25 years, since Senator Kennedy was Chairman, demonstrates that the blue slip is not a

veto, but rather is a device to ensure adequate pre-nomination consultation with home-state Senators. Senator Kennedy explained the policy on January 29, 1981, at a committee organizational meeting: “If the sponsors of the nominee from a particular State came before the Judiciary Committee, and the Senators themselves wanted to appear before the committee to indicate their own positions or expressing reservations, that ought to be something to be considered by the committee itself rather than letting individual Senators ban, prohibit, or bar the Judiciary Committee from fair consideration of the nominee.” Senator Thurmond adhered to the same policy when he was Chairman, as did Senator Biden. Senator Biden explained in a letter of June 6, 1989, to President Bush that, even with the return of a negative blue slip, “[a] hearing and vote would be held.” He added that a negative blue slip “will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate.” Senator Hatch adhered to the same policy during his years as Chairman, as he stated in his March 4 letter to you.

Apart from the past statements and practices of Senators Kennedy and Biden, among others, several other Democrat Senators in recent weeks (including Senator Leahy) have argued that Jorge Rangel and Enrique Moreno, nominees of President Clinton to the Fifth Circuit, should have received hearings and votes notwithstanding what the committee deemed to be inadequate consultation with home-state Senators. By advancing this argument, these Democrat Senators have recognized (at least implicitly) that home-state Senators should not be allowed to veto a nominee.

In order to advise and assist the President regarding candidates for judicial office, we have engaged in significant consultation with home-state Senators throughout the country, including you and Senator Feinstein. These consultations serve a very valuable purpose for the President, as home-state Senators often provide insights into a prospective nominee that otherwise are difficult to obtain. We also agree strongly with the bipartisan policy maintained by Senators Kennedy, Thurmond, Biden, and Hatch as Chairs of the Judiciary Committee: The tradition of consultation does not and should not entail a veto for home-state Senators, particularly a veto wielded for ideological or political purposes. Rather, the intention of the Constitution and the tradition of the Senate require, in our judgment, that the full Senate hold an up or down vote on each judicial nominee. If the objections of home-state Senators to a nominee are persuasive, those objections either will deter the President from submitting the nomination in the first instance or, alternatively, will convince a majority of the Senate that the nomination should be rejected. As Senator Kennedy stated in 1981, however, the Senate has not allowed and should not allow “individual Senators [to] ban, prohibit, or bar” consideration of a nominee.

In sum, we very much respect your views on Judge Kuhl’s nomination, although we disagree very strongly with your assessment of her record for reasons summarized below. We will continue to ask Senators of both parties to ensure timely up or down votes for all judicial nominees, including Judge Kuhl.

II. Judge Kuhl

Your letter questions Judge Kuhl’s suitability for a seat on the Court of Appeals, arguing that she is outside the mainstream. We respectfully but strongly disagree.

Judge Kuhl has superb qualifications, experience, character, and integrity, as well as strong bipartisan support. She received a well-qualified rating from the American Bar Association, which Democrat Senators have referred to as the gold standard. She has extensive experience in federal and state government, in the Executive and Judicial Branches, in public service and private legal practice. She is a woman of character and accomplishment. Judge Kuhl has a combination of intellect, experience, and character that makes her ideally suited to be an excellent circuit judge.

Given her record, it is no surprise that Judge Kuhl has garnered bipartisan support from California and national leaders. Those supporters include people you know well: Vilma Martinez, who is an accomplished and nationally respected California attorney, a past President of the Mexican American Legal Defense and Educational Fund, and a past member of your judicial nomination advisory committee; Ron Olson, who is a renowned attorney and partner at Munger Tolles & Olson in Los Angeles; and Tom Girardi, one of the country's most accomplished plaintiff's lawyers. The officers of the Litigation Section of the Los Angeles County Bar Association (which has over 3000 members) have written in support of Judge Kuhl, stating that she has a "well-deserved reputation as being a fair minded judge who follows legal precedent. . . . On a personal level, we have come to know her as a warm, witty, and deeply caring person."

In addition, the people who best know her work and reputation as a judge -- a bipartisan group of approximately 100 judges who serve with Judge Kuhl on the Superior Court -- have signed an extraordinary joint letter to the Senate supporting Judge Kuhl. They wrote:

We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

Also, a group of 23 women judges who have served with Judge Kuhl have written a separate letter to the Senate. They wrote:

Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. . . . Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges She has helped promote the careers of women, both Republican and Democrat. . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend. As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.

Finally, more than a dozen Justices of the California Court of Appeal -- appointees of Democrat and Republican Governors who as appellate judges have worked directly with Judge Kuhl or have reviewed her work as a trial judge -- have written individual letters of support for Judge Kuhl. For example, Justice Paul Boland wrote:

[Judge Kuhl] has distinguished herself as a judge who is highly intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair.

We understand that certain special-interest groups have raised questions about Judge Kuhl -- particularly about the fact that as a government lawyer in 1986 she worked on a Supreme Court brief that represented President Reagan's position that *Roe v. Wade* should be overruled. We do not know Judge Kuhl's policy views or moral views on abortion or on *Roe v. Wade*. We do not ask candidates their personal views on abortion or *Roe v. Wade*. But regardless of what her views may be, she was representing her client in that case, and we are confident based on her record that she would faithfully apply Supreme Court precedent as a court of appeals judge. Indeed, in the answers she submitted to you nearly two years ago, Judge Kuhl wrote as follows: "The constitutional right of a woman to make her own choices regarding personal medical issues, including choices regarding issues of reproductive freedom, has been established by both *Roe v. Wade* and *Planned Parenthood v. Casey* [citations omitted]. As a judge I am fully committed to following the precedent established by these cases and would do so fairly and properly."

We believe that Judge Kuhl's statement fully and persuasively addresses any legitimate question on this subject. It also bears mention that the Senate already voted last year to unanimously confirm one nominee to the Sixth Circuit, John Rogers, who as a government lawyer worked on this same 1986 government brief with Carolyn Kuhl. The Senate also voted recently to confirm one circuit judge, Michael McConnell, who has written in the past that *Roe v. Wade* was wrongly decided. We do not believe the Senate should apply an unfair double standard to Carolyn Kuhl, particularly given that she was representing her client's position in that case.

* * *

In sum, I understand and appreciate your views on Judge Kuhl, but I respectfully suggest that all Senators should have their voices heard and their votes counted on this nomination. Although we have different views on Judge Kuhl, I am grateful that you are supportive of Judge Consuelo Callahan, who is another extraordinarily qualified pending nominee who will be a superb judge on the Ninth Circuit. Please do not hesitate to contact me with any questions or thoughts. I look forward to continuing to work with you and your staff on this and other issues.

Sincerely,



Alberto R. Gonzales
Counsel to the President

The Honorable Barbara Boxer
United States Senate
Washington, DC 20510

cc: The Honorable Dianne Feinstein
The Honorable Bill Frist
The Honorable Thomas A. Daschle
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable John Cornyn

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Thursday, March 20, 2003 1:03 PM
To: Charnes, Adam; Benczkowski, Brian A; Dinh, Viet
Subject: will send draft letter to Sen. Boxer shortly

Dinh, Viet

From: Dinh, Viet
Sent: Friday, March 14, 2003 1:22 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: talked to Ashley and McClellan; will let you know if any concerns

Off until Mar. 26; same concept for now. will get materials to you next week.

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, March 14, 2003 11:46 AM
To: Dinh, Viet
Subject: talked to Ashley and McClellan; will let you know if any concerns

007104-002065

Dinh, Viet

From: Dinh, Viet
Sent: Friday, March 14, 2003 9:20 AM
To: Benczkowski, Brian A; 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam
Subject: RE: Miguel in the Post Style section

Great story.

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

From: Benczkowski, Brian A
Sent: Friday, March 14, 2003 7:56 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Dinh, Viet; Charnes, Adam
Subject: Miguel in the Post Style section

Nice to see we got some use out of the photo with the dogs. Good story.

007104-002066

Dinh, Viet

From: Dinh, Viet
Sent: Monday, March 10, 2003 11:17 AM
To: 'James C. Ho'
Cc: Koebele, Steve; 'Kavanaugh, Brett'
Subject: RE: "unconscionable act of judicial activism"

I dont have any concerns. Brett and Kristi, do you know of any?

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

From: James C. Ho [mailto:JamesCHo@stanfordalumni.org]
Sent: Sunday, March 09, 2003 4:00 PM
To: Dinh, Viet
Cc: Koebele, Steve
Subject: "unconscionable act of judicial activism"

Viet:

Steve Koebele suggested that I direct my question to you.

(b) (5)

Thanks (b) (5)

(b) (5)

007104-002067

(b) (5)

James C. Ho
901 North Wayne Street #302
Arlington, VA 22201
(202) 224-2934 (work) (NEW)
(b) (6) (mobile)
(b) (6) (home)
<JamesCHo@stanfordalumni.org>

Joy, Sheila

From: Joy, Sheila
Sent: Thursday, March 6, 2003 7:32 PM
To: Joy, Sheila; Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Sales, Nathan; Benedi, Lizette D; Hall, William; Chenoweth, Mark; Anderson, Carl A; Koebele, Steve; Scottfinan, Nancy; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Gregory Frost is scheduled for a confirmation vote on Monday, 3/10, at 6:00 pm

007104-002069

Joy, Sheila

From: Joy, Sheila
Sent: Thursday, March 6, 2003 7:31 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Sales, Nathan; Benedi, Lizette D; Hall, William; Chenoweth, Mark; Anderson, Carl A; Koebele, Steve; Scottfinan, Nancy; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Tim Stanceu (CIT) was confirmed this evening(3/6) by unianimous consent

007104-002070

Nelson, Carolyn

From: Nelson, Carolyn
Sent: Tuesday, March 4, 2003 6:13 PM
To: Remington, Kristi L; Charnes, Adam; Ciongoli, Adam; Brewster, Albert; Bass, Amy; Beach, Andrew; Long, Evelyn V; Sutton, Jason; Washington, Tracy T; Dinh, Viet; Keefer, Wendy J; Wingate, Heather; Bartolomucci, H. Christopher; Bennett, Melissa S.; Brilliant, Hana F.; Bumatay, Patrick J.; Ellison, Kimberly; Francisco, Noel J.; Gray, Ann; Grubbs, Wendy J.; Jones, Alison; Kavanaugh, Brett M.; Kyle, Ross M.; Leitch, David G.; Lockart, Sarah K.; McMaster, David; Montiel, Charlotte L.; Newstead, Jennifer G.; Powell, Benjamin A.; Ralston, Susan B.; Sampson, Kyle; Walker, Helgard C.
Subject: WHJSC Meeting tomorrow
Attachments: tmp.htm

There will be a WHJSC meeting tomorrow, March 4, @ 4:45 PM in the Roosevelt Room.

007104-002071

Joy, Sheila

From: Joy, Sheila
Sent: Tuesday, March 4, 2003 5:31 PM
To: 'TTymkovich@halehackstaff.com'; Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi
L; 'Brett_M._Kavanaugh@who.eop.gov'; 'Noel_J._Francisco@who.eop.gov'
Subject: FW: Written questions for Timothy Tymkovich
Attachments: tmp.htm; written.questions.wpd

Tim - more follow-up questions. Sheila

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

From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov]
Sent: Tuesday, March 04, 2003 5:24 PM
To: Joy, Sheila; Delrahim, Makan (Judiciary); Comisac, RenaJohnson (Judiciary); Dahl, Alex (Judiciary); Lundell, Jason (Judiciary); Prior, Swen (Judiciary); Soliemanzadeh, Payam (Judiciary); Higginbotham, Ryan (Judiciary); Haywood, Amy (Judiciary)
Subject: FW: Written questions for Timothy Tymkovich

These also came in for Tymkovich today (my email was having problems earlier).

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

From: Zubrensky, Michael (Judiciary)
Sent: Tuesday, March 04, 2003 12:48 PM
To: Stahl, Katie (Judiciary)
Cc: Keam, Mark (Judiciary)
Subject: Written questions for Timothy Tymkovich

Hi Katie, Senator Durbin would like to submit the attached questions to Mr. Tymkovich. We apologize for getting them to you so late. I can be reached at 4-2152 if you have any questions - thanks.

007104-002072

Written Questions for Timothy Tymkovich
From Sen. Richard J. Durbin
March 4, 2003

1. You are a member of the Federalist Society and reportedly helped organize the Federalist Society Chapter in Colorado.
 - A. Please describe your involvement with the Federalist Society.
 - B. The Federalist Society has provided a forum for discussions about a number of matters you have been involved with, including the Republican Party of Colorado's campaign litigation, the litigation in *Romer v. Evans*, and Gale Norton's environmental policies. Have you been involved in preparing for, assisting with, or participating in Federalist Society events such as these or others? If so, please describe your role and please provide copies of any materials you prepared or provided, as well as any speeches or remarks you have given at Federalist Society or related events. If you do not have copies of such materials or remarks, please describe the substance of the materials or remarks, the approximate date such materials or remarks were provided, and the title of the event.
2. According to the Federalist Society's statement of purpose: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order." Do you agree with this statement? Please explain why or why not.
3. One of the goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities do you believe need to be reordered? What is the role of federal judges and the courts in reordering such priorities? On which traditional values should there be a premium, and why? The Federalist Society also states that its objective "requires restoring the recognition of the importance of these norms among lawyers, judges, and law professors." If you are confirmed, how will you as a judge restore, recognize, or advance these norms?
4. In recent remarks at a Federalist Society event, former D.C. Circuit Judge and Independent Prosecutor Kenneth Starr criticized the doctrine of *stare decisis*, stating that "deference can be quite dangerous to our constitutional order because, at the end of the day, it promotes Congressional supremacy." Do you agree with Mr. Starr's assessment of the dangers of respecting precedents that defer to Congress? Please explain why or why not?

5. Mr. Starr also noted that James Madison would have agreed that "It is, in short, emphatically the province of the judicial department to say 'no,' and to say 'no' with some regularity, and particularly to Congress." Do you agree or disagree?
6. Mr. Starr also told the Federalist Society that "we are not going to allow law by bureaucracy without a perfectly aggressive muscular judicial check."
 - A. Do you agree with this sentiment? Why or why not?
 - B. How much deference is owed, for example, to the EPA's exercise of discretion in challenges to environmental regulations?
 - C. How has the non-delegation doctrine affected agency rule-making and discretion?
7. Mr. Starr also stated that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955 (2001) has "the ultimate meaning that non-consenting states may not be sued, even by private individuals in federal court, each individual having a very poignant and moving and sympathetic story." Do you agree? Please explain why or why not.
8. Mr. Starr also stated, "Is the Court willing to be the policeman? It did so in *Bush v. Gore*, and asserted its supremacy over a runaway state supreme court that was simply ignoring the structure of federal law, as well as a specific mandate in round one." Do you agree with this assessment? Please explain why or why not.
9. During a recent Federalist Society presentation on "Environmental Law in the 21st Century," Becky Norton Dunlop, a Senior Vice President at the Heritage Foundation, stated: "[F]ederal environmental laws generally, and EPA in particular, often prevent states from adopting innovative enforcement regimes that would provide the same or significantly more environmental protection at a lower social and economic cost." Do you agree with this assessment? Please explain why or why not.

Joy, Sheila

From: Joy, Sheila
Sent: Tuesday, March 4, 2003 5:26 PM
To: 'TTymkovich@halehackstaff.com'; Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; 'Remington, Kristi'; 'Brett_M._Kavanaugh@who.eop.gov'; 'Noel_J._Francisco@who.eop.gov'
Subject: FW: Tymkovich Questions
Attachments: tmp.htm; Follow-upqwestions.doc

Tim -- attached are additional follow-up questions, please try to get a draft back to us by early afternoon tomorrow. Sheila -----Original Message----- From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov] Sent: Tuesday, March 04, 2003 5:04 PM To: Joy, Sheila; Comisac, RenaJohnson (Judiciary); Dahl, Alex (Judiciary); Delrahim, Makan (Judiciary); Haywood, Amy (Judiciary); Prior, Swen (Judiciary); Lundell, Jason (Judiciary); Higginbotham, Ryan (Judiciary); Soliemanzadeh, Payam (Judiciary) Subject: FW: Tymkovich Questions

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

From: Eichner, Leesa (Judiciary)
Sent: Tuesday, March 04, 2003 11:22 AM
To: Stahl, Katie (Judiciary)
Subject: Tymkovich Questions

Katie,
Attached are follow-up written questions from Senator Leahy for Timothy Tymkovich.
Leesa

Leesa Klepper Eichner
Nominations Counsel
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510
Phone: 202-224-3910
Fax: 202-228-0861

007104-002075

Follow-up Questions from Senator Patrick Leahy to Timothy Tymkovich

1. You have stated in your Senate Questionnaire that Qwest Communications has been one of the major clients that you have represented in private practice. As you know, Qwest has been the subject of an extended investigation by the Department of Justice and SEC based upon its financial affairs. Please answer the following additional questions:
 - a. Please describe in as much detail as possible the nature of your representation of Qwest or any affiliated person or entity.
 - b. To your knowledge, did you work for Qwest on any subject or matter that is now or has been within the last 18 months the subject of any subsequent investigation or inquiry by any federal or state law enforcement or regulatory agency?
 - c. Have you been contacted, directly or indirectly, by any person in relation to any such investigation? If so, what was the nature of that contact?
 - d. Have you retained an attorney in relation to your representation of Qwest or any affiliated person or entity? If so, please provide that person's name and contact information.

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, February 27, 2003 11:02 PM
To: Remington, Kristi
L; 'CKuhl@LASuperiorCourt.org'; 'brett_m._kavanaugh@who.eop.gov'
Subject: Re: Fwd: Draft Letter

Let's collect all comments and I will call bill to discuss personally one academic to another. Thanks.
--- Sent from my BlackBerry.

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

From: Remington, Kristi L <Kristi.L.Remington@USDOJ.gov>
To: 'CKuhl@LASuperiorCourt.org' <CKuhl@LASuperiorCourt.org>; Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Thu Feb 27 19:34:55 2003
Subject: Re: Fwd: Draft Letter

I traded phone calls with Prof Lash today and can discuss with him tomorrow (b) (5)

(b) (5)

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

From: Judge Carolyn Kuhl <CKuhl@LASuperiorCourt.org>
To: Remington, Kristi L <Kristi.L.Remington@USDOJ.gov>; Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Thu Feb 27 19:29:16 2003
Subject: Fwd: Draft Letter

Viet & Kristi -

This letter was drafted by Prof. Kurt Lash of Loyola Law who has been good enough to try to get some law professor signatures on a letter. I think you will see that the letter needs work. I am sending the draft to Brett Kavanaugh (b) (5)

CBK

Joy, Sheila

From: Joy, Sheila
Sent: Tuesday, February 25, 2003 8:37 AM
To: 'TTymkovich@halehackstaff.com'; Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Benedi, Lizette
D; 'Benjamin_A._Powell@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: FW: Questions for Timothy Tymkovich
Attachments: tmp.htm; Questions.wpd

Tim - Attached are follow-up questions from Senator Feinstein. Please provide a draft as soon as you can. sheila -----Original Message----- From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov] Sent: Monday, February 24, 2003 6:03 PM To: Joy, Sheila; Comisac, RenaJohnson (Judiciary); Dahl, Alex (Judiciary); Higginbotham, Ryan (Judiciary); Soliemanzadeh, Payam (Judiciary); Haywood, Amy (Judiciary); Lundell, Jason (Judiciary); Prior, Swen (Judiciary) Subject: FW: Questions for Timothy Tymkovich

These just came in.

-----Original Message-----
From: Caramanica, Jessica (Judiciary)
Sent: Monday, February 24, 2003 5:54 PM
To: Stahl, Katie (Judiciary); Prior, Swen (Judiciary)
Subject: FW: Questions for Timothy Tymkovich

I think these should have gone to you.

-

007104-002078

Questions for Tenth Circuit Nominee Timothy Tymkovich

1. **Romer v. Evans: Protecting Gays from Discrimination**

Mr. Tymkovich, in *Romer v. Evans*, you defended a state constitutional amendment commonly known as "Amendment 2" before the Supreme Court. Amendment 2 barred state and local governments' laws or ordinances from protecting gays against discrimination. The Supreme Court struck down the amendment ruling that "singling out a certain class of citizens for disfavored legal status" served no legitimate state interest, but rather in Colorado's case, it made homosexuals unequal to everyone else.

If Amendment 2 had been upheld, not only would public institutions and accommodations be free to discriminate against gays and lesbians, they would also have no legal recourse, "no matter how public or widespread the injury." The majority in the *Romer* case held that such state action was impermissible under the Fourteenth Amendment.

QUESTIONS:

- a. **Mr. Tymkovich, how is your view of the U.S. Supreme Court's ruling in *Romer v. Evans* different today than it was nearly six years ago, when you strongly criticized the Majority's reasoning, as well as the outcome of the case?**
- b. **Could you please explain how the Court should have applied a Fourteen Amendment—Equal Protection analysis?**

2. **Romer v. Evans**

After the passage of Amendment 2, a national boycott of Colorado was undertaken, which, coupled with a decline in tourism, may have cost the State \$120 million in lost revenue. Yet, Amendment 2 had other, more substantial costs. **Hate crimes increased by as much as 800% following its passage, which is consistent with the effect of anti-gay rights campaigning in other states.**

QUESTIONS:

- a. **Could you please explain how you came to the decision to defend the referendum?**
- b. **Now that this case is over, can you assess whether you agree with the arguments that you were making at the time?**
- c. **Had Colorado adopted a referendum that protected gays against discrimination, would you have defended that measure as vigorously as you had defended Amendment 2?**

3. **Romer v. Evans – Federalism**

Mr. Tymkovich, Colorado's Amendment 2 was enacted for the purpose of repealing or preventing existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. At the time of the amendment's enactment, the Cities of Aspen and Boulder, and the County and City of Denver, had erected such anti-discrimination measures.

During the oral arguments in *Romer v. Evans*, you argued that the purpose of the State's constitutional amendment was to "preempt State and local laws that extended special protections." And that "[i]t was a response to political activism by a political group that wanted to seek special affirmative protections under the law."

You claimed that the purpose of Amendment 2 was to deny "preferred legal status" to gay people, "which could conflict with civil rights protections of other citizens." You mentioned freedom of religion and freedom of association as examples.

QUESTIONS:

- a. **Specifically, how would an anti-discrimination ordinance interfere with the civil rights of another protected class?**
- b. **Under the constitutional scheme you defended, would a hospital have been permitted to turn away a gravely ill patient on account of his or her sexual orientation. If YES, is that an acceptable result of Amendment 2? If NO, please explain why?**
- c. **Could you explain where you draw the line between deference to the will of the majority and the protection of rights of the minority?**

4. **Judicial Temperment**

Mr. Tymkovich, after the Supreme Court struck down the Colorado constitutional provision, you wrote an article in the University of Colorado Law Review sharply criticizing the Court's decision in *Romer v. Evans*. In the article you wrote:

"With the wave of the judicial pen, Justice Anthony Kennedy and five of his colleagues on the Supreme Court dismissed as illegitimate the desire of Colorado voters to prohibit special legal protections for homosexuals. [*Romer v. Evans* is more than simply an unsatisfactory decision interpreting rationality review under the Equal Protection Clause. **Rather, it is an important case study of the Supreme Court's willingness to block a disfavored political result—even to the point of ignoring or disfiguring established precedent.**" (See Univ. of Colorado Law Review Article at 287-88.)

***QUESTION:* Do you believe this writing reflects the appropriate temperment of a candidate for the Federal Court of Appeals?**

5. **Judicial Temperment/Judicial Activism**

Mr. Tymkovich, in the same law review article, you also criticized the Justices' questions, stating:

"While the purpose of this article is not to critique the Supreme Court's oral argument process, it is safe to say that oral argument seems to have become less and less relevant to the ultimate 'judging' of a case and that the Court's format leads more to **judicial histrionics** than to Socratic dialogue. . . .

You continued by adding,

"That leaves the critics of *Romer* with the inevitable conclusion that the case is merely **another example of *ad hoc*, activist jurisprudence without constitutional mooring.**"

QUESTIONS:

- a. **Please explain what you meant by that statement and, more specifically, where you found the Supreme Court to be without "constitutional mooring," as you put it.**
- b. **Do you believe this writing reflects the appropriate temperament of a candidate for the Federal Court of Appeals?**

6. **Reproductive Rights**

Mr. Tymkovich, on March 1, 1996, you testified before the Senate Governmental Affairs Committee in support of "restoring the balance of power to the States" and "the continuing effort to return to the States matters which properly belong within their control."

You cited as an example of Federal intrusion into matters of State concern the Federal court ruling regarding State responsibilities under the Medicaid program. As Solicitor General, you had unsuccessfully defended in Federal court a Colorado provision that prohibited State Medicaid funding to women who sought to terminate pregnancies that were the result of rape or incest.

The Federal District Court struck down the State law in *Hern v. Beye*, ruling that it directly conflicted with Federal law. The 10th Circuit Court of Appeals, to which you are seeking to be appointed, unanimously affirmed it.

Before the Senate Committee you observed, "[t]his problem could have been avoided if Federal officials clearly understood their own responsibility to protect State prerogatives." However, Congress clearly understood the States' prerogatives when it permitted States to choose whether or not to participate in the Medicaid program. If Colorado had chosen not to participate in Medicaid, it would not have been required to fund abortions whatsoever.

***QUESTION:* Could you please explain how broad a State's prerogative should be when the State uses federal funds to operate a program like Medicaid?**

8. **Medicaid Funding of Abortion Services in Colorado**

The freedom to choose is a fundamental freedom, but restrictions on funding make it an unattainable choice for many women. Since 1977, the so-called "Hyde Amendment" has prohibited federal Medicaid funds from paying for most abortions for low-income women. In its current form, the Hyde Amendment bans federal funding for abortions except in cases of rape, incest, or life endangerment.

Some States have tried to go even further and deny Medicaid funding to some of our most vulnerable citizens even in cases of rape and incest. Colorado is one of those States, in that Colorado passed by referendum a constitutional amendment prohibiting the public funding of abortion except to save the life of the woman.

In 1995, in the case of *Hern v. Beye*, the Tenth Circuit Court of Appeals, the court you would join should you be confirmed, affirmed the district court and held that Colorado must fund abortion services in cases of rape and incest in its Medicaid program. You were part of the team that petitioned the U.S. Supreme Court for review of the Tenth Circuit decision, at which point the name of the case was *Weil v. Hern*.

QUESTIONS

- a. **How did you become involved with this case?**
- b. **Here the Colorado Department of Health Care Policy had to reconcile conflicting requirements of the State constitution and the federal Medicaid law. Did you consider defending this policy to be mandatory or discretionary for the Attorney General of Colorado?**
- c. **Were you involved in the decision-making process which led to that case being appealed to the Supreme Court?**
- d. **Did you consider petitioning the U.S. Supreme Court for certiorari to be mandatory or discretionary for the Colorado Attorney General?**
- e. **What was your role in the preparation of the Petition for Certiorari in that case?**
- f. **Did you agree with the arguments presented in that petition? Specifically, did you agree with the assertion that Colorado should not have to adhere to the requirements of the "Hyde Amendment" which requires States participating in Medicaid to cover abortions in cases of rape and incest?**
- g. **Did you agree with the Supreme Court's decision to deny certiorari in that case? Please explain your answer.**

9. **Medicaid Funding of Abortion Services in Colorado**

In *Hern v. Beye*, the trial court held as follows:

"The testimony here concerning the injury which will occur to pregnant women who are pregnant as a result of rape or incest . . . is compelling to the effect that it endangers their health, in some cases, it endangers their life, and I do not weigh that very lightly in the balance, even the balance [as stated by defendant's counsel that the state of Colorado will have to withdraw from the Medicaid program]."

As you know, findings of fact by the trial court will be disturbed on appeal only under the most extraordinary circumstances. Yet, in your petition, you argued that "there are no medical reasons" to finance abortion in cases of rape and incest.

QUESTIONS:

- a. **What was your basis for contradicting the clear factual finding of the District Court?**

10. **Medicaid Funding of Abortion Services in Colorado**

In testimony before the Senate Government Affairs Committee in support of the Tenth Amendment Enforcement Act of 1996 you again argued against the federal requirement that states receiving federal Medicaid funds must pay for abortion services for low-income women in cases of rape and incest.

QUESTIONS:

- a. **Do you believe it is appropriate and constitutional for the Federal Government to set requirements for the Medicaid program?**
- b. **Alternatively, do you believe health care for the poor should be entirely up to the states?**

11. **Federalism and Guns**

In *U.S. v. Lopez*, the Fifth Circuit, and later the U.S. Supreme Court, struck down a law regulating guns near schools based on the argument that Congress had overstepped its bounds. This case is one of several cases in recent years that have challenged the traditional role of Congress in addressing issues of national concern with national regulations.

QUESTION: To what extent do you believe that Congress can regulate in the area of dangerous firearms, particularly when those weapons travel in interstate commerce, affect commerce and tourism, and have such a devastating impact on the children of this country?

These just came in.

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

From: Caramanica, Jessica (Judiciary)
Sent: Monday, February 24, 2003 5:54 PM
To: Stahl, Katie (Judiciary); Prior, Swen (Judiciary)
Subject: FW: Questions for Timothy Tymkovich

I think these should have gone to you.

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

From: Strickland, LaVita (Judiciary)
Sent: Monday, February 24, 2003 10:15 AM
To: Caramanica, Jessica (Judiciary)
Subject: Questions for Timothy Tymkovich

Hi Jessica:

Senator Feinstein has asked that the attached questions be submitted to the hearing record and to Tenth Circuit nominee Timothy Tymkovich. Please feel free to give me a call if you have questions. I can be reached at 224-9480. Thank you!

LaVita

Joy, Sheila

From: Joy, Sheila
Sent: Friday, February 21, 2003 2:54 PM
To: 'TTymkovich@halehackstaff.com'; Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi
L; 'Benjamin_A._Powell@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: FW: Tymkovich Questions
Attachments: tmp.htm; written.questions.doc

Tim - Attached is the first round of follow-up questions. Please prepare a draft response in the following manner; put a heading at the top of the page (ie Responses of Timothy Tymkovich to Follow-up Questions from Senator _____); repeat the question, followed by the answer. Please fax the draft to OLP at either 202 514-2424 or 202 616-3180. Thanks sheila

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

From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov]
Sent: Friday, February 21, 2003 2:22 PM
To: Joy, Sheila
Subject: FW: Tymkovich Questions

Hi Sheila,

Here's the first set...

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

From: Arfa, Rachel (Judiciary)
Sent: Friday, February 21, 2003 2:04 PM
To: Stahl, Katie (Judiciary)
Subject: FW: Tymkovich Questions

Katie:

Here are Senator Leahy's questions for Tymkovich.

Thank you,
Rachel

007104-002085

Follow-Up Questions from Senator Leahy to Timothy M. Tymkovich

Q. Not only did you defend Colorado's anti-gay ballot initiative in court, but you later wrote a law review article expressing your strong view that you were right and that the Colorado trial court, the Colorado Supreme Court, and the United States Supreme Court were wrong on the factual and constitutional questions about Amendment. Because you have publicly expressed your personal and strongly held views on this matter, I want to ask you some questions to further clarify your views:

a. At the time it was passed, you were actively involved in Colorado politics. Did you support the passage of Amendment 2?

b. In your Colorado Law Review article you compare the Colorado measure, which singles out people based on their status as gays or bisexuals, with "certain activities [that] are considered ... 'contra bonos mores,' i.e. immoral. ... [I]nclud[ing], for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. ..." Do you not see any constitutional difference between a law that outlaws conduct like drug dealing and a law that excludes a group of people from protection against discrimination because of their status as gays or lesbians?

c. You write in your Colorado Law Review article that you view protections for gays and lesbians as providing "special treatment" for them. What is the difference between a law that protects gays and lesbians from discrimination and a similar law for African Americans, Hispanics, or people with disabilities? Do those laws also provide "special treatment?"

d. What is the difference between a law that protects gays and lesbians from discrimination and one that protects people who chose a certain religion from discrimination? Are such laws also "special rights" laws?

e. In your article, you describe the Supreme Court decision in Romer v. Evans as "one more example of ad hoc activist jurisprudence without constitutional mooring." If you believe Romer is "just one more example" please elaborate on others. Please cite specific examples of cases in which you believe the Supreme Court has engaged in "ad hoc activist jurisprudence."

f. In your law review article on the Romer case, you suggest that it is proper that landlords and employers be allowed to discriminate in rental and hiring decisions based on an individual's sexual orientation. You wrote, "Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider." Can you explain the value you place on the freedom of a landlord to evict a tenant from a building simply based upon his or her sexual orientation? Or of an employer to fire a highly-performing employee merely because that person is gay?

Q. In your law review article on Romer v. Evans, you called the six Justice majority opinion “an important case study of the Supreme Court’s willingness to block a disfavored political result even to the point of ignoring or disfiguring established precedent.” You state that the opinion is cause “for great uneasiness about the health of self-government.” The Romer opinion was written by Justice Kennedy, whom you criticize by name in your article.

a. Can you explain what you meant in calling Justice Kennedy’s opinion “political”?

b. You write that this is only one “case study” of “political” decisions by the Supreme Court. Please list other opinions that you believe were “political.” Was Bush v. Gore, another equal protection case, a “political” decision, in your view?

c. If confirmed as a judge, please explain how you would treat a Supreme Court decision that you decide to be a “political” decision as compared to one that you believe was motivated by non-political motives?

Q. You harshly criticize the Supreme Court’s oral argument process in your Colorado Law Review article. You wrote:

“[The Colorado Supreme Court] is composed of intelligent and experienced judges who are not shy about questioning counsel. Those arguments had been aggressive and comprehensive. On the other hand, the U.S. Supreme Court for better or for worse has taken the traditional give and take of appellate argument to extremes. it is safe to say that oral argument seems to have become less and less relevant to the ultimate ‘judging’ of a case and that the Court’s format leads more to judicial histrionics than to Socratic dialogue.”

a. Could you explain what you meant by the term “judicial histrionics” in referring to the Justices of the U.S. Supreme Court?

b. How should the Committee consider your characterization of the Supreme Court in assessing your judicial temperament and whether or not you will respect the decisions of the same Supreme Court that you seem to hold in such low regard?

Q. In your 1996 testimony in favor of the Tenth Amendment Enforcement Act you talk about a “continuing effort to return to the States matters which properly belong within their control.” When you stated this, what matters did you think should be returned to state control? Please identify the U.S. Supreme Court decisions since your 1996 testimony that illustrate an effort to “return to the States matters which properly belong within their control.”

Q. In your testimony before the Senate Governmental Affairs Committee in 1996, you cite a Colorado “self-audit” program that granted enforcement immunity to polluters that voluntarily came forward and agreed to address the problem in the future. This amnesty from penalties or remediation applied to *all* polluters, no matter how egregious or longstanding their violations. The Colorado legislation was strenuously opposed by the U.S. Environmental Protection Agency because it violated Colorado’s obligations under the Clean Air Act, Clean Water Act and other federal statutes and because it interfered with criminal and civil law enforcement for environmental violations. You cite EPA’s refusal to refrain from prosecuting polluters under federal law as an example of an “intrusive” federal action that infringes on state prerogatives.

a. Do you believe that federal pollution control laws, including the Clean Water Act, Clean Air Act, CERCLA, RCRA, and other programs are intrusions into fields that should be the *exclusive* province of the state?

b. How exactly does EPA’s decision to enforce these laws notwithstanding a state self-audit provision intrude into state prerogatives?

Q. You have argued in testimony against federal intrusion into state affairs; you have argued against EPA enforcement and national standards in environmental laws; and you have argued against the Motor Voter law and against Medicaid funding of abortions in the case of rape or incest all on the basis of state rights.

In addition, you supported a bill that would have redefined Supreme Court precedent on preemption. The Tenth Amendment Enforcement Act essentially called on Congress to eliminate implied preemption a well-recognized form of preemption that has been consistently recognized by the Supreme Court.

Your writings indicate a desire to redefine constitutional law to promote states’ rights, even if it means overturning settled law. As a circuit court judge, how would you reinterpret rulings to favor the states?

Q. The law commonly referred to as the McDade Amendment has created problems for federal prosecutors. Federal prosecutors can now face conflicting ethical rules governing their conduct. The Guidelines that Attorney General Ashcroft gives them may say one thing, while a state code of ethics may say another. In Colorado, there was precisely such a problem when you were the State’s Solicitor General. Before the Tenth Circuit, you took the position that in order to get clarification so that he or she could do the job better, a federal prosecutor would first have to intentionally break the Colorado ethics rules and be subject to discipline, including potential disbarment. Fortunately, the Tenth Circuit disagreed with that view.

a. I am concerned that this view betrays a states’ rights agenda that extends to an actual hostility towards federal law enforcement. In your

view, was there anything that Colorado's federal prosecutors could have done to obtain clarification short of risking disbarment?

b. As a former prosecutor, your stance troubles me. It seems that the federal prosecutors in this case were doing precisely the right thing in trying to fully understand the ethical rules before they acted. In fact, they even wrote to the Supreme Court to try to and get clarification before going to court. Why did you take the position that a federal prosecutor would have to intentionally violate ethical rules, and potentially injure an innocent third party, before getting a court to provide clarification?

Q. On your Senate Questionnaire you listed as both the first and second most significant cases of your legal career the campaign finance reform case where you represented the Colorado State Republican Party, the Libertarian Party, and several state legislators in their challenge to Colorado's Fair Campaign Practices Act (FCPA). According to the Tenth Circuit decision, you attempted to argue a claim before the Court of Appeals after the claim was dismissed by the District Court. The claim involved a constitutional challenge to section 106(1) of the FCPA, which limited how a candidate could use money left over from a prior campaign. In fact, although you attempted to argue that the claim had been dismissed by the trial judge "without explanation" the Court of Appeals reviewed the transcript and found that you had actually agreed to the dismissal.

a. Did the Tenth Circuit rule that you had consented to the dismissal of one of your client's constitutional claims in open court? Did you intend to pursue the claim, but accidentally agreed to its dismissal?

b. Is it correct that your client, Mr. Pankey, was the only plaintiff with standing to pursue this particular claim, so that its dismissal meant that there was no way that the Circuit Court could consider this important constitutional claim?

c. Instead of confronting this potential problem head on, did you assert that the trial judge had simply dismissed the claim "without explanation?" Did you review the transcript before making this serious accusation against the trial court?

d. In your Senate Questionnaire describing the appeal which you list as the most important one you have ever handled -- you describe the ruling as follows: "The Tenth Circuit upheld the district court's ruling on issues which the plaintiff had prevailed and reversed several rulings adverse the plaintiffs." Why did you fail to inform the Committee that the Tenth Circuit had also upheld the district court's ruling dismissing one of your client's claims, especially when the reason for the dismissal bore so directly upon your skill as an attorney?

e. A lawyer has an ethical duty of candor to the court in matters such as this. Please explain whether you fulfilled that duty before the Tenth Circuit in this case, specifically addressing your claim in the appellate brief that the court dismissed the claim "without explanation"?

f. If you claim that you did not agree to dismissal of your client's claim under section 106(1) before the district court whether by accident or not why did you not cite the court's dismissal order either in your notice of appeal or docketing statement laying out the issues? If you did not agree to dismissal of the claim below, did you mistakenly forget to properly preserve the appeal on this claim?

g. Please explain all steps you took to preserve this claim on appeal, and explain any difference you have with the Tenth Circuit's reasoning in that regard.

Q. How many cases did you argue before the Colorado Supreme Court in your tenure as Solicitor General? Is that number more or less than is typical for a five-year tenure in that position?

Q. When you defended Colorado's anti-gay ballot initiative both in the courts and in your Colorado Law Review Article, you argued that the potentially broad language of the statute should be read narrowly to preserve its constitutionality. However, when you attacked the decision made by the popularly elected Colorado legislature to reform their campaign finance system, you opposed your successor's arguments that the statute would be read and enforced narrowly so that issue advocacy groups would not be prosecuted. Can you explain why you took one position when it came to the protecting the rights of a vulnerable minority and the opposite stance when attacking efforts to reform campaign finance?

Dinh, Viet

From: Dinh, Viet
Sent: Friday, February 14, 2003 12:10 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re: what was Otero's ABA rating?

Q WQ

--- Sent from my BlackBerry.

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

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Thu Feb 13 22:05:18 2003
Subject: what was Otero's ABA rating?

007104-002091

Joy, Sheila

From: Joy, Sheila
Sent: Wednesday, February 12, 2003 3:41 PM
To: Dinh, Viet; Charnes, Adam; Remington, Kristi L; Benczkowski, Brian A; Benedi, Lizette D; Sales, Nathan; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: FW: Bybee questions
Attachments: tmp.htm; Written Questions for Bybee.ahb.doc

FYI

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

From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov]
Sent: Wednesday, February 12, 2003 3:36 PM
To: Joy, Sheila
Subject: Bybee questions

Here's another set.

Senator Russell Feingold
Written Questions for Jay Bybee

1. During your confirmation hearing before the Judiciary Committee on October 4, 2001, in connection with your nomination to your current position, you spoke about your experience having represented the government in the reparations lawsuit filed against the government by the more than 110,000 Japanese-American victims detained during World War II. As you are aware, almost two-thirds of the detainees were U.S. citizens. At your confirmation hearing, you told the Committee that you believed “the United States made a very bad decision under very difficult circumstances. And I believe that the Supreme Court made a very difficult made a very bad decision under very difficult circumstances.”
 - a. In your testimony, were you referring to the Supreme Court cases of *U.S. v. Hirobayashi*, 320 U.S. 81 (1943) and *U.S. v. Korematsu*, 323 U.S. 214 (1944)? If so, why do you believe that those cases were wrongly decided?
 - b. If you were a judge on the Court of Appeals during World War II and the cases of *Hirobayashi* and *Korematsu* had come before you, how would you have ruled as a judge?
 - c. Would you agree that it was wrong for the U.S. government to label and treat all Japanese-Americans as “enemies” simply because they shared the same ethnicity as one of our main adversaries during World War II?
2. According to a *New York Times* article published last week, the FBI has ordered field supervisors to begin counting the number of mosques and Muslims in their areas as part of the Justice Department’s anti-terrorism efforts.
 - a. What role did you have in developing this new Department of Justice policy, or in providing legal analysis of it, or legal justification for it?
 - b. If you did not have a role in developing this program, since learning of the policy, what advice and legal analysis, if any, have you provided on this issue? Please provide copies of any OLC memos or opinions you have authored or approved on this topic.
 - c. There is concern that the counting of mosques and Muslims is a possible prelude to a mass detention plan akin to the ethnic census-taking during

World War II that was a precursor to internment of Japanese-Americans. In a speech to the Federalist Society entitled *War and the Constitution* “*We are All Hamiltonians Now*,” you said “[w]e shouldn’t think that we have the power any more than we should think that the war powers or the commerce authority or some combination of the two justifies the detention and imprisonment of large numbers of American citizens who have not been charged with nor convicted of any crime.” Do you believe that the government would never be justified in detaining all Muslims in the U.S., without charges and without any particularized suspicion, other than the fact that the individuals share the same religion as members of Al Qaeda?

3. In your speech entitled *War and Crime in a Time of Terror* you wrote that “persons accused of being enemy combatants have no right to counsel, at best a limited right to a military tribunal and, if found to [be] an enemy combatant, indefinite imprisonment at least until the conflict is over, after which the combatant has the right to be returned to his homeland.”

Jose Padilla is a U.S. citizen who was arrested on U.S. soil. He has been detained as an enemy combatant. The Administration has argued that he has no right to counsel and can be held until the end of the war on terrorism.

- a. In a time of national crisis, how do you distinguish between the rights of an individual like Jose Padilla and the rights of a group of people like the Japanese-Americans during World War II?
- b. If you believe that Korematsu was wrongly decided, how do you reconcile that view with the present Administration’s position to deny enemy combatants legal representation and any meaningful judicial review?
- c. Do you believe that the problem with the way that the Court decided internment cases during World War II was that the Supreme Court followed public emotions and incorrectly deferred to the Executive branch?
- d. In your October 20th confirmation hearing, you stated: “In my conversation with members in White House Counsel’s Office and in my conversations with the Attorney General, both of those offices have made it very clear to me that if I am confirmed for this position that what they want is my objective, frank and honest legal opinion.” What do you believe is the appropriate role of the courts in reviewing the Administration’s decision to detain U.S. citizens?

- e. In your opinion, at present, what conflict should be used as a basis when declaring an individual as an enemy combatant? What conflict should be used to determine if an individual should no longer be detained as an enemy combatant? Who makes the determination if the conflict is over and an enemy combatant should be released?
4. The Seventeenth Amendment was ratified in 1913 and provides for the direct election of Senators by the people. For nearly 100 years, U.S. Senators have been elected by the people of their respective states, not by state legislatures. One of the first Senators to serve my home state, Wisconsin, and the nation, Bob La Follette, was a strong advocate for passage of the Seventeenth Amendment.

You, however, appear to believe that adoption of the 17th Amendment was a mistake. In a law review article entitled, "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment," 91 Nw. L. Rev. 500 (1997), you state that we should consider repealing the amendment and returning the power of selecting Senators to state legislatures.

- a. Do you continue to believe that Senators should not be popularly elected?
- b. What is your current view of the Seventeenth Amendment?
- c. Are there any other Amendments to the Constitution that you believe were mistakenly adopted? If yes, could you please list the amendment and the reason why you believe it was mistakenly adopted.

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, February 12, 2003 1:48 PM
To: 'Kavanaugh, Brett'
Subject: need copy of letter please 514-2424 thx

Charnes, Adam

From: Charnes, Adam
Sent: Wednesday, February 12, 2003 11:52 AM
To: Dinh, Viet; Chenoweth, Mark; 'Kavanaugh, Brett'
Cc: Benczkowski, Brian A; Anderson, Carl A; McNaught, Heather
Subject: RE: Transcript of past DC Cir. hearings.
Importance: High

Carl has the hearing books, from which the quotes are taken. Carl/Heather, please provide Garland and Rogers to Viet asap.

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

From: Dinh, Viet
Sent: Wednesday, February 12, 2003 11:51 AM
To: Chenoweth, Mark; 'Kavanaugh, Brett'
Cc: Charnes, Adam; Benczkowski, Brian A
Subject: Transcript of past DC Cir. hearings.

Brett,

Can you give me transcript citations for the Garland and Rogers hearings (that you cited in the letter). Mark, can you pull the transcript for both of these hearings and also the Tatel hearing? I need these pretty quickly, early this afternoon. Brett (b) (5)

thanks,

viet

Nelson, Carolyn

From: Nelson, Carolyn
Sent: Wednesday, February 12, 2003 8:55 AM
To: Remington, Kristi L; Charnes, Adam; Ciongoli, Adam; Brewster, Albert; Bass, Amy; Beach, Andrew; Long, Evelyn V; Sutton, Jason; Washington, Tracy T; Dinh, Viet; Keefer, Wendy J; Wingate, Heather; Bartolomucci, H. Christopher; Bennett, Melissa S.; Brilliant, Hana F.; Bumatay, Patrick J.; Ellison, Kimberly; Francisco, Noel J.; Gray, Ann; Jones, Alison; Kavanaugh, Brett M.; Kyle, Ross M.; Leitch, David G.; Lockart, Sarah K.; McMaster, David; Montiel, Charlotte L.; Newstead, Jennifer G.; Powell, Benjamin A.; Ralston, Susan B.; Sampson, Kyle; Walker, Helgard C.
Subject: WHJSC Time Change
Attachments: tmp.htm

Please note that WHJSC has been rescheduled for 4:45-5:30 this afternoon. We'll still meet in the Roosevelt Room.

Thanks!

007104-002098

Joy, Sheila

From: Joy, Sheila
Sent: Tuesday, February 11, 2003 6:12 PM
To: Bybee, Jay; Dinh, Viet; Charnes, Adam; Remington, Kristi
L; 'Brett_M._Kavanaugh@who.eop.gov'; Benczkowski, Brian A
Subject: FW: Bybee follow-up questions
Attachments: tmp.htm; bybeefollowups.doc; bybeewrittenquestions.wpd; Follow Up Questions for Jay Bybee.msg

Jay, Attached are some of the follow-up questions. Please prepare a draft response as follows: repeat the question, followed by your response. Fax to OLP, can use either 4-2424 or 6-3180. Ultimately we will need a cover letter to Senator Hatch with cc to Senator Leahy. Within in the body of the letter, please reference the Senator who has sent follow-up question and to which you are responding. Thanks Sheila

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

From: Stahl, Katie (Judiciary) [mailto:Katie_Stahl@Judiciary.senate.gov]
Sent: Tuesday, February 11, 2003 6:03 PM
To: Joy, Sheila
Subject: Bybee follow-up questions

Hi Sheila,

This is what I have received so far. I did receive a message from Senator Feingold stating he would need one more day to submit his questions. I'll keep you posted.

Katie

007104-002099

Follow-Up Questions for Jay Bybee

Background for Questions #1 through #3

Last April, the Justice Department announced that it was considering a legal opinion that apparently came from the Office of Legal Counsel, the office which you oversee, that stated that state and local police officers have the "inherent legal authority" to arrest people for civil and criminal immigration law violations. It appears now that the Justice Department has in fact accepted the OLC opinion, and has been attempting to implement it.

Despite the fact that this opinion changed the nature of law enforcement and seems to enjoy only limited legal support, it has not been made public. This means the public affected by it cannot examine it and decide for themselves whether or not they agree with its conclusions.

This new opinion is not just a departure from precedent, it is bad policy. It would increase the risk of racial profiling and civil rights abuses, against both non-citizens and citizens who are deemed not to look "American." It would also seriously undermine the ability of police departments to establish effective working relations with immigrant communities, and would deter many immigrants from reporting acts of domestic violence and other violent crime.

For these reasons, police chiefs and police associations across the country have come out against your proposal. Chief Charles Moose of Montgomery County, Maryland has said it "is against the core values of community policing: partnerships, assisting people, and being there to solve problems." Sacramento, California Police Chief Arturo Venegas has said that "to get into enforcement of immigration laws would build wedges and walls that have taken a long time to break down." In fact David Keene, chairman of the American Conservative Union and Grover Norquist, president of Americans for Tax Reform have spoken out against this policy as setting a dangerous precedent.

Question #1

Why did your office depart from the previous OLC memo, approved in 1996, which disallowed the practice of having state and local law enforcement officers make arrests for immigration violations, and what is the legal and policy basis of your determination that state and local police may enforce the nation's immigration laws?

Question #2

The war on terror has not changed what constitutes good policing: building relationships with communities and serving the public. If anything, it has made the relationship between police and the immigrant communities they serve more important to domestic security. From a law enforcement perspective, aren't the police chiefs and police associations correct that police cannot build trusting relationships with immigrant communities under your policy?

Question #3

Why has the OLC not made this important opinion public?

Background for Question #4

Education is a key to ensuring that every American has an equal opportunity to succeed. Because they help to further this goal, educational institutions are given a tax exemption under section 501 of the Tax Code. Thus, these institutions receive many of the same government services other entities do, but they effectively receive them for free.

Institutions, educational or otherwise, that discriminate based on race do not reflect our society's values and do not further the national goal of equal opportunity. We thus have no business subsidizing their discrimination with a tax exemption. The Supreme Court has said as much. In the 1983 case Bob Jones University v. United States, the Supreme Court said that the government could deny a tax exemption to educational institutions that practice racial discrimination.

I welcomed that opinion, but you seem to think it was wrongly decided. You have stated in an article in Sunstone Magazine that the government has tremendous leverage over educational and religious institutions and the denial of the section 501 tax exemption in Bob Jones illustrated "how capriciously the government may make use of the leverage."

Question #4

Do you still believe that ending discrimination at educational and religious institutions is good public policy, or is it, as you said, "capricious"?

Background for Questions #5 and #6

The Equal Protection Clause is critically important to protect the civil rights of all Americans. The promise of equal justice under law, in the end, is secured only through a judicial system that ensures that the laws are applied and enforced equally. Given the majoritarian nature of the executive and legislative branches of our federal government, it is essential that the federal judiciary scrupulously ensure the opportunity of minorities, the powerless and the disenfranchised to pursue and obtain justice.

In Romer v. Evans, the Supreme Court struck down a Colorado statute that invalidated any local ordinances that protected the rights of gays and lesbians. In 1997, you noted that it would have been logical in deciding Romer for the Supreme Court to have relied on Hunter v. Erickson. In Hunter, the Supreme Court struck down an amendment to the Akron City Charter that required any ordinance regulating use, on the basis of race, color, religion, national origin or ancestry, of real property to be first submitted to public referendum. The Supreme Court held that the amendment was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it "treated racial housing matters differently from other racial and housing matters."

You have suggested that the Court did not cite Hunter because it was wary of declaring sexual orientation a suspect classification, which it would have had to do had it relied on Hunter. You have further suggested that you believe that discrimination against a group defined by sexual orientation is not worthy of scrutiny under the Equal Protection Clause.

Question #5

What would be necessary to consider gays and lesbians a suspect class or quasi-suspect class under the equal protection clause?

Question #6

You have compared the Court's ruling in Romer to protecting "the illiterate" or "persons with communicable diseases." You have also defended the Defense Department's policy of performing intrusive background investigations before granting gay contractors security clearances because of their sexual orientation and you have contributed to a brief claiming that "a homosexual may be emotionally unstable." Does this brief represent your opinion of lesbian and gay people?

Questions for Jay S. Bybee, Nominee for the Ninth Circuit
Submitted by Senator Patrick Leahy

1. During your time at the Justice Department in the 1980s, you helped shape the federal government's response to a class-action lawsuit filed by survivors of the internment camps where Japanese-Americans and foreign nationals were warehoused during World War II. This horrific deprivation of civil rights was at the time implemented by the executive branch out of what they called a "military necessity."

As you may recall, in October 2001, when you appeared before this Committee for confirmation to your current position as Assistant Attorney General for the Office of Legal Counsel (OLC), you testified about the Internment of Japanese-Americans and you recognized that "the United States made a terrible mistake during very difficult conditions." You indicated that this mistake should never be repeated. You even went so far as to promise to "bring additional sensitivity to the rights of all Americans" and to "not trample civil rights in the pursuit of terrorism" in your role in advising the current Administration in our *current* difficult conditions. I am interested in the legal work you have been involved in since your confirmation in 2001. As you are no doubt aware, this Administration has been accused of encroaching on the civil rights of Americans in the pursuit of terrorism.

It has been reported that OLC advised the Administration on its decision that it did not need to declare the al Qaeda and Taliban detainees prisoners of war under the Geneva Convention. Your recommendation appears to conflict with Secretary Powell, who argued that the detainees at Guantanamo Bay should be declared prisoners of war and afforded protections under the Geneva Convention. Congressional Research Services analysis supports that view: "Because the United States has argued that the intimate connection between the Taliban and Al Qaeda in part justifies the use of armed force in Afghanistan, some observers argue that Al Qaeda ... members may be entitled to treatment as prisoners of war."

Without speaking for Secretary Powell, I suspect the State Department is concerned about the harm that this decision could have on U.S. foreign policy and national security goals -- especially combating terrorism. This decision has angered key allies, including members of the European Parliament and Organization of American States, whose help we will need to disrupt terrorist cells and interdict weapons of mass destruction. Some argue that not declaring these individuals POWs also could affect the treatment of our own soldiers if they are captured in hostile countries.

- (a) In your personal opinion, is the State Department is wrong about the need for POW status of persons detained at Guantanamo Bay?
- (b) What do you see as the strongest part of the State Department's position?
- (c) Are you concerned about the repercussions this could have on the treatment of American soldiers that are captured?

(d) What did OLC advise with regard to POW status for detainees?

2. On a related note, the Administration has taken the position that any individual whom the President declares to be an "unlawful combatant" may be detained indefinitely, without access to counsel, without having any charges brought against him. and without regard to the individual's nationality or to where he was arrested. Since we are considering you for a lifetime appointment to the bench, I am most interested in your view on the access to counsel issue.

There are few safeguards to liberty that are more fundamental than the Sixth Amendment, which guarantees the right to a lawyer throughout the criminal process, from initial detention to final appeal. Yet today, an untold number of individuals at least some of whom are American citizens are being held incommunicado, without access to counsel. In one case that we do know about, the Padilla case in the Southern District of New York, the defendant a U.S. citizen was arrested in Chicago on a material witness warrant, then transferred to a military brig after the President labeled him an "unlawful combatant." For nine months he has been denied the right to consult with a lawyer even after a court ruled that he had a right to do so. As the head of OLC, you have no doubt played a key role in developing the Administration's policy with respect to denying legal representation for "unlawful combatants."

(a) Please explain your involvement in this issue and the legal theories that support the Justice Department's treatment of this person.

(b) Please explain your personal belief of the importance of the Sixth Amendment rights of criminal defendants.

(c) You have recently expressed your beliefs on the subject in speeches entitled "War and The Constitution" and "War and Crime in a Time of Terror" given to the Federalist Society and other groups. During these speeches you have stated that Presidents have "the option" of treating the same person either under criminal rules or under rules reserved for war because in your words these realms "are not mutually exclusive." Have you advised the Administration on the propriety of trying terrorist suspects in *military tribunals*, rather than in district court? Do you concede that this is a new view of executive power?

3. In conducting research on the recent activities of the office that you head at the Justice Department, a substantial roadblock was encountered when it was discovered that you had only published three OLC opinions since your confirmation in 2001. A recent search revealed that 1,187 OLC opinions were publicly available on-line since 1996. Clearly, these opinions were routinely published *prior* to your appointment to Assistant Attorney General.

(a) Please explain to the Committee why *under your leadership* there has been a virtual termination in the routine publication of opinions and why you have only saw fit to release three opinions?

(b) I am concerned that there is a disturbing pattern in your record of an expansive view of Executive Privilege that you do not believe the people have a right to know what the

Administration is doing, what legal rules informed their policy choices and who was consulted. What can you say to assure us that you are for public access to government and are not part of an attempt to stonewall the public to ward off scrutiny about difficult policy decisions implemented by the Administration?

4. In reviewing your record, I note that you appear to have spent much of your professional career in government working against Congress' administrative oversight efforts.

(a) For the first time in the 81-year history of the GAO, the Comptroller General of the United States went to Federal court to ask a judge to order a member of the executive branch to turn over records to Congress. Have you advised the Administration on the propriety of asserting executive privilege and refusing to produce documents to the GAO who sought to investigate how public money is spent? Please explain your reasoning.

(b) Can you give us an example of a federal court case where you thought Executive Privilege should *not* apply? How about an example of a case that upheld the denial of a FOIA request that you disagreed with?

(c) In *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, Yale Law Journal (1994), you analyze Congress' ability to enact laws that requires committees 'utilized' by the President to open their records and to open their meetings to the public. In fact, you contends that the Federal Advisory Committee Act (FACA), is an *unconstitutional encroachment by Congress on the power of the executive*. I am concerned that you have a firm ideological bias against public access to any executive decision making. What do you have to say on this subject?

5. Last year, you were called to Capitol Hill to testify before the House Government Operations Committee to explain why the Administration refused to produce documents prepared by federal prosecutors involving corrupt FBI practices in a 30-year old investigation of organized crime in New England. At this very heated hearing, you were severely criticized by Members from both sides of the aisle for the Administration's lack of disclosing virtually anything to a congressional committee who was engaged in oversight proceedings. I believe your reason for not producing the many documents requested by the Committee was that there was an on-going investigation into the mistakes made by the FBI. If that is the standard for asserting executive privilege that there is an on-going investigation then how will anything be discoverable regarding the mistakes made prior to September 11th?

(a) Wouldn't that standard also encourage the Administration to just keep investigating things in order to block off important disclosures directly relevant to oversight proceedings?

(b) Do you believe that Congress has a valid power of oversight and should be allowed to obtain documents from the Justice Department?

(c) In addition to disagreeing with the Supreme Court's decision in *Public Citizen v. United States*, can you please name three other recent decisions that you disagree with?

6. There has been an overwhelming wave of concern expressed about the Department of Defense's Total Information Awareness system being developed under Admiral Poindexter. I understand that some form of data mining is currently used at the Justice Department.
- (a) Have you advised the Attorney General or the President on the propriety of such data mining and whether it comports with the Privacy Act? Please explain your analysis.
- (b) According to a recent article in *The Nation*, law enforcement officials sought to use databases which maintain information regarding the purchase of guns to monitor the purchasing activities of suspected terrorists. The article quotes an OLC memo, which stated: "We see nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records." Attorney General Ashcroft reportedly refused to allow these officials such access, saying: "It's my belief that the United States Congress specifically outlaws and bans the use of the NICS database - and that's the use of approved purchase records - for weapons checks on possible terrorists or on anyone else." Have you advised the Administration on the propriety of using gun purchase databases to track terrorist suspects, as reported in *The Nation*?
7. I noticed that prior to your appointment to the Justice Department you commented on the constitutionality of states' requiring fingerprints to receive a drivers license. In a Las Vegas newspaper you were quoted as saying that "The Constitution gives us a lot of leeway to decide on these issues."
- (a) Have you contributed to OLC opinions or advised the Administration on the constitutionality of using biometric traits in governmental databases?
- (b) Do you believe there is a constitutional right to privacy? If so, please describe what you believe to be the key elements of that right. If not, please explain.
- (c) Do you support the holding of *Roe v. Wade* and a constitutionally recognized and protected right to choose?
- (d) A number of lawyers designated by the Federalist Society as experts on the constitutionality of abortion are openly hostile to a woman's right to choose and believe that *Roe v. Wade* should be overruled. As a member of the Federalist Society, do you share the views of their experts in this area?
8. You have argued that the Seventeenth Amendment providing for the popular election of U.S. Senator was a significant "mistake" because it removed the state legislature's power. I am concerned that your article reflects a serious disdain for democracy. If you are appointed to the Ninth Circuit you will frequently be required to judge cases on voter initiatives and referenda, which are very popular in the western region of this country. What can you tell us to ensure us that you do not have a bias against instruments of direct-democracy like voter initiatives?

9. You have argued that the Tenth Amendment should be reinterpreted to protect states' rights from encroachments by Congress and have been critical of the Supreme Court's opinions which allowed Congress to expand its powers under the Interstate Commerce Clause. In your article "The Tenth Amendment Among the Shadows," you argue that the Court should further curtail Congress' ability to enact national standards to give states *complete control* in "family law, ordinary criminal law enforcement, and education." In your academic writing on protecting states' rights, you indicate a clear support the Supreme Court's curtailment of Congress' power to act but you do not indicate any support for restrictions on the President's power to act.
 - (a) Certainly, the President's implementation of regulations and executive orders also affects states' rights. Can you provide examples of executive actions that have violated states' rights?
 - (b) Do you agree with the President, who in his first State of the Union said that education is a top federal priority because education is the first, essential part of job creation, or do you agree with the Supreme Court majority in *United States v. Lopez*, which said that education is a "non-economic" activity and is therefore outside the federal regulatory power?
10. In response to the September 11th terrorist attacks, our government has launched a criminal investigation of unprecedented scope. The federal government has responded to the attack in not only in its military, intelligence, and national security capacity, but also in its domestic law enforcement capacity. I have been worked very closely with the Administration to pass comprehensive anti-terrorism legislation to make sure that such a tragedy never happens again. As part of this effort, I proposed creating a new federal crime to punish attacks on mass transit systems, and the Administration has suggested created new federal criminal prohibitions against the possession of biological agents or toxins by unauthorized persons and against harboring terrorists.
 - (a) A few years ago you gave a speech to the Nevada Inn of Court where you said: "Had the Court not struck down VAWA, then, I am afraid, there was (for those concerned about federalism) a *parade of horrors* to follow." In light of this concern, what is your position on proposals to expand federal criminal law to respond to terrorists?
 - (b) You recently gave a speech saying that "Federalism must step aside" to executive power when we are at war. In your view, does this exception also apply to the power of Congress? Please reconcile your answer with the speech you gave to the Federalism Society entitled "War & the Constitution: We are all Hamiltonians Now."
 - (c) Can you provide examples, other than the fight against terrorism where we would be constitutionally justified in establishing national standards? What about, for example, protecting citizens against discrimination? In your view, would that be a justifiable subject for Congress to legislate?
11. In 1997, you wrote that Congress has very limited power to pass criminal statutes. You supported this view with a cite to the Domestic Violence Clause of the Constitution, a little known clause in Article Four, that in your view provides "general criminal law

enforcement to the states." You also argued that even when we act under our enumerated constitutional powers, the clause created "a presumption against federal preemption, co-option and even duplication of state efforts to control [crime]." I understand from your public statements that since September 11th, a lot has changed in terms of the power of the Executive to fight the war on terrorism and I wonder if your view of the power of Congress to enact criminal statutes has also changed.

12. In your law review article, *The Equal Process Clause: A note on the (Non)Relationship Between Romer v. Evans and Hunter v. Erickson*, you wrote that, "If Amendment 2 violates the Equal Protection Clause, it does so because . . . homosexuals are entitled to strict or heightened scrutiny. Whether, however, homosexuals are entitled to strict or heightened scrutiny is the one thing the Court could not bear to answer."

(a) In your opinion, do you believe members of the gay and lesbian community constitute a suspect class and, as such, are entitled to heightened scrutiny? If not, why not?

(b) In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court invalidated "Amendment Two" because the law could not withstand even the most deferential level of review, rationality review. The majority opinion explains that the Amendment, "lacks a rational relationship to legitimate state interests," because it, "seems inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. Yet, you seem to be implying that the Amendment can be found unconstitutional only if gays and lesbians constitute a suspect class, which you suggest they do not. How do you reconcile that argument with the *Romer* majority's position quoted above?

(c) How would you analyze a situation in which a lesbian applied for housing and was denied purely on the basis of her status as a lesbian? Would you say that she should have no recourse under the law? What about a gay man who called 911 and the police refused to respond because of his sexual orientation, as Amendment 2 seemed to allow?

(d) I am impressed by your acknowledgment that as a result of the states' failure to act, Congress amended the Constitution to pass the 14th Amendment. This "Amendment granted expanded authority to Congress and the federal courts to deal with the gross inequities in state laws." Many people argue that discrimination on the basis of sexual orientation is the same as discrimination on the basis of race or gender. In your view, does Congress have the power to enact legislation to protect gays and lesbians from discrimination on the basis of their orientation?

(e) In that same law review article, you criticized the Supreme Court's decision in *Hunter v. Erickson* which invalidated a law that restructured the political process in such a way as to make it harder for minority groups to pass anti-discrimination legislation. If the Supreme Court's analysis in that case is flawed, as you suggest, how should the courts, if at all, protect the rights of minority groups to participate equally in the political process?

(f) You have also suggested that courts should not treat legislative referenda any differently than

laws enacted by legislative officials. Do you believe that referenda raise any special concerns when it comes to protecting the rights of minorities?

13. In your article on *Romer v. Evans*, you state that

In the recent past, when the Court has confronted such controversial questions of general interest, it has attempted to draw on our legal traditions to demonstrate the inevitability of its decision. This idea of judicial precedent possesses a certain Calvinistic fatalism: By ascribing to traditions or prior decision a power beyond the present [Supreme] Court's ability to control, precedent absolves the present Court of responsibility for the decision the Court must make.

Please explain your understanding of judicial precedent and what role it serves in both the judicial and executive branches for guiding and justifying decisions. If the role you believe it serves is different from the role you think it should serve, please explain.

14. In your article "Government Aid to Education: Paying the Fiddler," you criticize the IRS policy ultimately found constitutional by the Supreme Court in *Bob Jones University v. United States*, which denies tax exempt status to universities that employ racially discriminatory practices.

(a) Your concern is that governmental power can be used "against almost any institution in the name of any alleged 'public policy.'" As a judge, how will you differentiate among what you believe are "good" public policies versus "bad" public policies? Can you provide an example of a public policy that, in your view, would allow the government to use its power to protect marginalized groups?

(b) In criticizing the government's so-called capricious leverage, you comment on the multitude of lawsuits that have resulted. You specifically include "sexual preference" as one type of suit courts have "entertained." Does this mean that you would not support government protection against sexual-orientation discrimination?

15. I notice that you have filed at least two Supreme Court briefs on behalf of the Clarendon Foundation—one in the case challenging the Violence Against Women Act and the other challenging the Religious Freedom Restoration Act.

(a) Were you approached by the Foundation to file these Amicus Briefs or did you seek them out?

(b) Please describe the Clarendon Foundation and tell us if you share a common legal philosophy with the Foundation on issues of federalism?

(c) Since your confirmation to the Justice Department, what contact, if any, have you had with the Clarendon Foundation?

16. In the amicus brief you filed on behalf of the Clarendon Foundation on the case *United States v.*

Morrison, you take issue with the constitutionality of the Violence Against Women Act. In particular, you argue that, under the Domestic Violence Clause of the Constitution, art. IV, § 4, "Congress did not assume primary responsibility whether exclusive or concurrent for quelling domestic violence. Rather, its responsibility was secondary: The United States was to 'insure domestic tranquility' when the states, in their own judgment, proved incapable." 1999 WL 1186265. You go on to argue that Congress has interpreted the Commerce Clause too broadly, and that, "Congress's response to the problem of gender-based violence was simply to coopt the field nationally" and that "[t]he framers conditioned the exercise of federal power over domestic violence on the states requesting federal assistance" and that "[t]he Domestic Violence Clause thus shields the states from unwanted federal intervention." Id.

(a) Please explain how you think the Domestic Violence Clause limits the Commerce Clause, and therefore the Congress, from enacting criminal statutes.

(b) What other criminal statutes do you feel run afoul of the Commerce Clause and why?

17. What can you say to assure this Committee and prospective parties that you will be a fair judge, an impartial adjudicator, who will not use the federal bench to achieve the philosophical agenda that you have been advancing as an advocate and officer of the Federalist Society?
18. President Bush previously appointed a judge to an appellate court (John Rogers) who asserted that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. The idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should follow this body of law in the same way they follow other laws of the higher court, and, therefore, a judge should reverse higher court precedent on his own when he thinks that the higher court would. Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent? Or do you believe that lower courts may never overturn precedents of higher courts?

Nelson, Carolyn

From: Nelson, Carolyn
Sent: Tuesday, February 11, 2003 10:18 AM
To: Remington, Kristi L; Charnes, Adam; Ciongoli, Adam; Brewster, Albert; Bass, Amy; Beach, Andrew; Long, Evelyn V; Sutton, Jason; Washington, Tracy T; Dinh, Viet; Keefer, Wendy J; Wingate, Heather; Bartolomucci, H. Christopher; Bennett, Melissa S.; Brilliant, Hana F.; Bumatay, Patrick J.; Ellison, Kimberly; Francisco, Noel J.; Gray, Ann; Jones, Alison; Kavanaugh, Brett M.; Kyle, Ross M.; Leitch, David G.; Lockart, Sarah K.; McMaster, David; Montiel, Charlotte L.; Newstead, Jennifer G.; Powell, Benjamin A.; Ralston, Susan B.; Sampson, Kyle; Walker, Helgard C.
Subject: WHJSC: Wednesday, February 12
Attachments: tmp.htm

WHJSC has been confirmed for 2/12/03 at 4:00 pm in the Roosevelt Room.

Thanks!

007104-002111

Joy, Sheila

From: Joy, Sheila
Sent: Thursday, February 6, 2003 11:28 AM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Sales, Nathan; Benedi, Lizette D; Hall, William; Koebele, Steve; Scottfinan, Nancy; Anderson, Carl A; 'Brett_M._Kavanaugh@who.eop.gov'; Goodling, Monica; 'Kyle_Sampson@who.eop.gov'
Subject: Judicial nominees for next weeks hearing

The following individuals are scheduled for a hearing on Wednesday, 2/12/03, at 9:30 am

Timothy Tymkovich	10th Circuit
William Steele	AL,S
Thomas Varlan	TN, E
Daniel Breen	TN,W
Timothy Stanceu	Trade
Marian Horn	Federal Claims

The judicial prep session for the group will be scheduled for 2:00 pm on Tuesday, 2/11/03 in OLP 4th Conference Room

Brett - I don't have Rachel Brand's e-mail address - can you let her know Thanks

007104-002112

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, February 5, 2003 5:58 PM
To: 'Ashley_Snee@who.eop.gov'; 'Kavanaugh, Brett'
Subject: FW: Bybee in play???

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

From: (b)(6) - Kay Daly email
Sent: Wednesday, February 05, 2003 5:06 PM
To: Dinh, Viet; (b)(6) Jennifer Oschal email mschlapp@who.eop.gov;
anne_womack@who.eop.gov; Tim_Goeglein@who.eop.gov;
Heather_Wingate@who.eop.gov; Matthew_E._Smith@who.eop.gov;
(b)(6) Barbara Ledeen Senate email
Subject: Bybee in play???

Sent: Wednesday, February 05, 2003 2:27 PM Subject: [NGLTF] Oppose Bybee Nomination

>
> ***** >
NATIONAL GAY AND LESBIAN TASK FORCE > ACTION ALERT
>
> MEDIA CONTACT:
> Sheri A. Lunn
> media@ngltf.org; 323-857-8751; 800-757-6476 (pager)
>
> http://www.ngltf.org
> *****
>
> NGLTF OPPOSES BUSH COURT-PACKING PLAN AND URGES MEMBERS > TO CALL SENATORS TO
OPPOSE BYBEE NOMINATION
>
> George W. Bush has nominated a right-wing slate of judicial > appointments as part of a plan to
pack the federal judiciary while > the Republicans have control of the Senate and the confirmation >
process. While the entire plan is troubling, we specifically oppose > the nomination of Jay Bybee to
the Unites States Court of Appeals for > the Ninth Circuit. Useful links for details on the Bush court
packing > plan are at the bottom of this email. Information is below on Bybee.
>

007104-002113

- >
- > OPPOSE BYBEE!
- >
- > Oppose nomination of Assistant Attorney General Jay Bybee to the > United States Court of Appeals for the Ninth Circuit. An initial > review of Bybee's record shows disturbing disregard for the rights of > GLBT people and for civil rights legislation in general.
- >
- > The most publicized example is a 1997 law review article in which > Bybee offers an extremely troubling analysis of the landmark case of > Romer v. Evans, in which the US Supreme Court struck down Colorado's > Amendment 2 on the basis that by repealing all local civil rights > ordinances that prohibited discrimination based on sexual > orientation, and requiring a state constitutional amendment to pass > any sexual orientation-inclusive civil rights laws in the future, > the Amendment violated the Equal Protection Clause of the fourteenth > amendment to the US Constitution.
- >
- > Bybee asserts his view that sexual orientation-inclusive civil rights > laws are nothing more than government sponsored "preferences" for > "homosexuals." Bybee supports the rights of state governments to > prevent localities from passing sexual orientation-inclusive civil > rights ordinances, which he states amount to "favorable treatment > based on ... sexual orientation." Bybee offers proposed language for > "an Amendment 2 that works," in his article, so that the state could > effectively "repeal the three city ordinances that gave rise to > Amendment 2 [and] ... make it more difficult for person in Colorado > to obtain preferences in any law based on sexual orientation."
- >
- > OPPOSE THE BYBEE NOMINATION!!
- > Confirmation hearings are underway and the Senate will vote very soon.
- > Contact your Senators now!
- >
- > Call the US Capitol Switchboard to contact your Senators by phone:
- > 202-224-3121.
- >
- > Look up your Senators, their office information and email contact at:
- > <http://www.senate.gov>
- >
- > Review the US Senate Judiciary Committee hearing schedule at > <http://judiciary.senate.gov>
- >
- > A brief on Bybee from the Committee for Judicial Independence:
- > <http://www.nglrf.org/downloads/bybeenomination.pdf>
- >
- > People for the American Way on the Bush Court Packing Plan:
- > <http://www.pfaw.org/pfaw/general/default.aspx?oid=103>
- >
- > Leadership Conference on Civil Rights on other Bush nominations:
- > <http://www.civilrights.org/issues/nominations/index.html>
- >

>
> ***** > Founded in
1973, NGLTF works to eliminate prejudice, violence and > injustice against gay, lesbian, bisexual
and transgender people > at the local, state and national level. As part of a broader > social justice
movement for freedom, justice and equality, NGLTF > is creating a world that respects and
celebrates the diversity of > human expression and identity where all people may fully > participate
in society.
>
> To reach the NGLTF Media Relations Manager, please call > 323-857-8751 or 800-757-6476
(pager), or send an email to > ngltf@ngltf.org.
>
> To CHANGE your subscription address or UNSUBSCRIBE:
> Visit <http://www.ngltf.org/support/login.cfm> -- after logging in, > select "Change your NGLTF Web
User Information" to change your > EMAIL address; select "Get Email" to UNSUBSCRIBE. If you are
not > a registered Web user, send your request to listmgr@ngltf.org
>

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, February 5, 2003 10:48 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re: Nick lewis

Thx. Done.

--- Sent from my BlackBerry.

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

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Wed Feb 05 10:32:23 2003
Subject: Re: Nick lewis

talked to ashley. not sure she has your FAX.

(Embedded
image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
to file: 02/05/2003 09:59:50 AM
pic14015.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: Nick lewis

(b) (5)
(b) (5)

We have faxed the substantive materials to ashley on the matter. Thx.

--- Sent from my BlackBerry.

007104-002116

Dinh, Viet

From: Dinh, Viet
Sent: Friday, January 31, 2003 6:47 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Goodling, Monica
Cc: Corallo, Mark; 'Ashley_Snee@who.eop.gov'
Subject: RE: Jackie Judd doing estrada story for Tuesday evening broadcast

Whitewater? what's that? I like Jackie because she complimented my argument in Hibbs.

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, January 31, 2003 6:43 PM
To: Goodling, Monica
Cc: Corallo, Mark; Dinh, Viet; Ashley_Snee@who.eop.gov
Subject: Re: Jackie Judd doing estrada story for Tuesday evening broadcast

I recall her doing some good Whitewater stories once upon a time . . .

(Embedded
image moved "Goodling, Monica" <Monica.Goodling@usdoj.gov>
to file: 01/31/2003 06:40:35 PM
pic29487.pcx)

Record Type: Record

To: "Dinh, Viet" <Viet.Dinh@usdoj.gov>, "Corallo, Mark"
<Mark.Corallo@usdoj.gov>, Brett M. Kavanaugh/WHO/EOP@EOP, Ashley
Snee/WHO/EOP@EOP

cc:
Subject: Re: Jackie Judd doing estrada story for Tuesday evening broadcast

007104-002118

We like jackie.

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

From: Dinh, Viet <Viet.Dinh@USDOJ.gov>

To: Goodling, Monica <Monica.Goodling@USDOJ.gov>; Corallo, Mark
<Mark.Corallo@USDOJ.gov>; 'Ashley_Snee@who.eop.gov' <Ashley_Snee@who.eop.gov>;
'Kavanaugh, Brett' <brett_m._kavanaugh@who.eop.gov>

Sent: Fri Jan 31 18:30:03 2003

Subject: Jackie Judd doing estrada story for Tuesday evening broadcast

I gave her the SG letter and some other background.

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, January 30, 2003 2:44 PM
To: 'Jan_E._Williams@who.eop.gov'
Cc: Higbee, David; Charnes, Adam; 'Kavanaugh, Brett'; Ayres, David
Subject: RE: Resume

Jan,

Thanks for the resumes. We are reviewing them and considering several for DAAG or senior counsel.

As for the so-called CoS, perhaps some explanation is in order. There is no official position as CoS. I designated Wendy Keefer as the person in my office to handle administrative matters and conferred on her authority to act on my behalf for those matters. When she left, I decided that Brian Benczkowski was best to handle those tasks. I consulted with David Ayres prior to asking Brian to take on additional administrative duties, and he assured me that, from his perspective, the decision was mine to make.

(b) (5)

Please let me know which option you decide best, and Adam will advise as to DAAG progress. thanks.

Viet

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

From: Jan_E._Williams@who.eop.gov [mailto:Jan_E._Williams@who.eop.gov]
Sent: Thursday, January 30, 2003 1:50 PM
To: Dinh, Viet
Cc: Higbee, David; Charnes, Adam
Subject: Resume

I have send you resumes for COS and the DAAG openings. Let me know when you want to proceed with

007104-002120

tilling those vacancies.

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, January 28, 2003 1:06 PM
To: Joy, Sheila; 'Kavanaugh, Brett'; 'David_G._Leitch@who.eop.gov'
Subject: FW: I have asked the Committee to save

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

From: Scottfinan, Nancy
Sent: Tuesday, January 28, 2003 1:02 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; 'heather_wingate@who.eop.gov'
Subject: I have asked the Committee to save

14 seats to cover the administration: White House, OLP, OLA. Pls. let your folks know.

007104-002122

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, January 22, 2003 8:40 AM
To: 'Matthew_E._Smith@who.eop.gov'; 'Heather_Wingate@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'Tim_Goeglein@who.eop.gov'; Benczkowski, Brian A; Sales, Nathan
Subject: RE: Jeff Sutton

Excellent. thank you.

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

From: Matthew_E._Smith@who.eop.gov [mailto:Matthew_E._Smith@who.eop.gov]
Sent: Tuesday, January 21, 2003 5:40 PM
To: Dinh, Viet; Heather_Wingate@who.eop.gov;
Brett_M._Kavanaugh@who.eop.gov; Tim_Goeglein@who.eop.gov
Subject: Jeff Sutton

----- Forwarded by Matthew E. Smith/WHO/EOP on 01/21/2003 05:38 PM -----

From: Kathryn J. Hayes on 01/21/2003 05:38:28 PM

Record Type: Record

To: Matthew E. Smith/WHO/EOP@EOP

cc:

Subject: Jeff Sutton

----- Forwarded by Kathryn J. Hayes/WHO/EOP on 01/21/2003 05:35 PM -----

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image moved Doug Hunt <huntt.1@osu.edu>
to file: 01/21/2003 10:49:18 AM
pic11118.pcx)

007104-002123

Record Type: Record

To: Kathryn J. Hayes/WHO/EOP@EOP

cc: Troy Justesen/OPD/EOP@EOP

Subject: Jeff Sutton

Katy & Troy:

I have just spoken to Deborah Kenderick. She is the reporter, who is blind, for several major newspapers in Ohio. She has agreed to do a story on Sutton. By the way, she is very republican! I have also prepared several pro-sutton op eds for people with disabilities to submit; however, I will hold off until you think it is needed. Lastly, I have contacted Dick Thornburgh and he is sched. to call me today. All the best, Doug Hunt Douglas C. Hunt, Ph.D.

Executive Director

Assistive Technology of Ohio

614-292-2426

fax: 614-292-5866

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, January 21, 2003 5:09 PM
To: 'Kavanaugh, Brett'; 'David_G._Leitch@who.eop.gov'; 'Gonzales, Alberto'
Cc: Ayres, David; Ciongoli, Adam
Subject: Danger, Will Robinson: Glenda Sanders

As Brett and I discussed, here is what we know. David Houston of the LA Recorder is running with a story tomorrow that POTUS has rejected Sanders as candidate for CDCA (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

(b) (5)

(b) (5)

Benczkowski, Brian A

From: Benczkowski, Brian A
Sent: Saturday, January 25, 2003 7:01 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Dinh, Viet
Subject: Re: Sanders story in Orange County Register

Much better account.

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

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>; Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Sat Jan 25 16:28:53 2003
Subject: Sanders story in Orange County Register

Judge's federal appointment on hold
White House is re-evaluating Sanders because of tax issue involving a nanny.

By JOHN McDONALD The Orange County Register

A Superior Court judge's possible nomination to a federal judgeship is on hold because of questions over how she hired a caretaker for her children, two members of the Bipartisan Judicial Nomination Panel confirmed Friday.

Both of the members, Wylie Aitken and Thomas Malcolm, said they were surprised at the White House's decision to re-examine Orange County Judge Glenda Sanders. The committee recommended Sanders to the White House in August, along with Orange County Superior Court Judge Cormac Carney.

President George W. Bush nominated Carney for a U.S. District Court judgeship in October, and he awaits confirmation hearings by the Senate. Bush has not acted on Sanders' recommendation.

Sanders, 47, disclosed the caretaker issue to the committee in August and soon after to the White House, but neither raised any objections.

007104-002126

"There is certainly some concern that this is a sexist issue," said Aitken, a Democrat from Santa Ana. "I don't know when this nanny issue has been raised when we've dealt with a male candidate."

Sanders, of Corona del Mar, and her husband have two children, ages 8 and 11.

"She was totally upfront and candid on the issue," Aitken said. "She had a strong opinion from her accountant that it was all right to hire the caretaker as a contractor, rather than an employee. The caretaker had other clients and did not work for Judge Sanders alone."

Aitken said he believed that Sanders had every intention of following the law. An employer must withhold workers' federal income taxes and pay half of the Social Security tax. Contractors are responsible for their own taxes.

Malcolm, a Republican from Irvine, said Aitken's account was correct, but he declined to comment independently.

Sanders declined to discuss specifics but said she had disclosed all the facts to the committee and to the White House.

"When I first volunteered this information, they were satisfied with my tax treatment of this person," she said. "I don't know if this will affect the nomination."

Sanders said the caretaker was not an illegal immigrant, an issue that has been raised in other federal nominations over the years.

The White House said in a statement Friday that Sanders "is a highly qualified candidate for a federal judicial position."

"She was completely forthright with the administration and has acted honorably throughout the selection process," the White House said. "No decision as to the nominee for this seat has yet been made."

Pearl Mann, president of the Orange County Women Lawyers Association, said women are held to higher standards than men when it comes to questions about child care.

"This never comes up with men," she said. "A male nominee with a working wife should be just as responsible for child care as the woman. It just doesn't seem fair."

Sanders and Carney have been subjected to extensive FBI background checks. Sanders' investigation has taken longer than usual because she was born in South Africa and educated there and in England.

Sanders ran for the Superior Court judgeship last fall and was the only judicial candidate in the election to be rated "highly qualified" by the Orange County Bar Association.

Sales, Nathan

From: Sales, Nathan
Sent: Friday, January 24, 2003 9:27 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Cook binder

Hey, Brett, feel free to send a courier whenever it's convenient to pick up your binder. I'm at the Miguel mark-up, but Lizette is at DOJ and will know where to find the binder.

007104-002129

Matthew_E._Smith@who.eop.gov

From: Matthew_E._Smith@who.eop.gov
Sent: Tuesday, January 21, 2003 5:40 PM
To: Dinh, Viet; Heather_Wingate@who.eop.gov;
Brett_M._Kavanaugh@who.eop.gov; (b)(6) Jennifer Oschal email
Tim_Goeglein@who.eop.gov
Subject: Anti-Sutton Rally
Attachments: ATTACHMENT.TXT; pic09349.pcx

----- Forwarded by Matthew E. Smith/WHO/EOP on 01/21/2003 05:38 PM -----

From: Kathryn J. Hayes on 01/21/2003 05:39:26 PM

Record Type: Record

To: Matthew E. Smith/WHO/EOP@EOP

cc:

Subject: Anti-Sutton Rally

Troy is all over this - I've been swamped and just caught this email from last week.

----- Forwarded by Kathryn J. Hayes/WHO/EOP on 01/21/2003 05:36 PM -----

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image moved Doug Hunt <huntt.1@osu.edu>
to file: 01/14/2003 09:34:38 AM
pic09349.pcx)

Record Type: Record

To: Kathryn J. Hayes/WHO/EOP@EOP

cc: Troy Justesen/OPD/EOP@EOP

Subject: Anti-Sutton Rally

007104-002130

Katy & Troy:

FYI. I have copied an email that I received today regarding the anti-Sutton rally. It does not appear to be out of hand at this point (ie. they don't plan to handcuff themselves to the WH fence). If I can be of any assistance, please feel free to call.

Doug

ADA Watch is recalling the last message. The Sutton Press Conference/Rally will be on the 30th (see below) not the 28th which is the date of the State of the Union Address.

Another reminder: Jeffrey Sutton, nominee to the 6th Circuit Court of Appeals, will not have a hearing on January 14th. Disability Rights supporters are scheduled to come to Washington from Sutton's home state of Ohio on January 30th. We will welcome them on the Hill and speak out against Sutton at 11:00 AM on the 30th. This will go forward regardless of the date/time of Sutton's hearing. Also, note that we are having a phone bank at PFAW (2000 M Street, NW 5th Floor) tonight 6-8PM. Join us if you can to help turn folks out and get petition signatures, calls to Senate, etc.

What: Rally/Press Conference on Disability Community's Opposition to the Sutton Nomination (More than 400 National, State, and local organizations have signed our petition against Sutton)

When: January 30, 2003 at 11:00 AM

Where: Senate Office Building (TBA), Washington, DC

For Stop Sutton! Petition and more info go to:
<www.adawatch.org>www.adawatch.org

Douglas C. Hunt, Ph.D.
Executive Director
Assistive Technology of Ohio

(b) (6)
fax: 614-292-5866

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, January 14, 2003 8:16 AM
To: 'David_G._Leitch@who.eop.gov'
Cc: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Ronnie White, the Sequel

yes, now that you volunteered, some evidence that Congress was actually thinking of gender discrimination when it passed the Family and Medical Leave Act would be very helpful for my survival in my maiden voyage tomorrow! Wish me luck. Thanks DGL.

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

From: David_G._Leitch@who.eop.gov [mailto:David_G._Leitch@who.eop.gov]
Sent: Tuesday, January 14, 2003 7:56 AM
To: Dinh, Viet
Cc: Brett_M._Kavanaugh@who.eop.gov
Subject: Re: Ronnie White, the Sequel

I haven't seen the actual letter, but it's posed on Gephardt's web site. Any other searches I can run for you, Mr. Dinh?:

http://dickgephardt.house.gov/info/press_releases/index.asp?ID=97

(Embedded
image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
to file: 01/14/2003 07:44:48 AM
pic13530.pcx)

Record Type: Record

01/14/2003 07:44:48 AM [mailto:Viet.Dinh@usdoj.gov] [REDACTED]

007104-002133

To: Brett M. Kavanaugh/WHO/EOP@EOP, David G. Leitch/WHO/EOP@EOP

cc: "Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested), "Ciongoli, Adam" <Adam.Ciongoli@usdoj.gov>
(Receipt Notification Requested) (IPM Return Requested) Subject: Ronnie White, the Sequel

David and Brett,

Can you shoot over a copy of Gephardt's and Clay's letter to POTUS on CA8 vacancy? (b) (5)

(b) (5)

thanks

Willett, Don

From: Willett, Don
Sent: Monday, January 13, 2003 9:58 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: New judicial vacancy notices

Thanks so much, Brett. It's a cool portfolio, overseeing the equivalent of OLC, OLP, OLA and a few other key divisions. Basically, I'll be the General's consigliere on most everything. It's a neat opportunity, at the intersection of law, policy, and politics, and positions me well for whatever's over the horizon (judicial, other legal, etc.).

DRW

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 13, 2003 9:47 AM
To: Willett, Don
Subject: RE: New judicial vacancy notices

thanks. And CONGRATS on your new position. That will be great for you and for Texas.

(Embedded
image moved "Willett, Don" <Don.Willett@usdoj.gov>
to file: 01/13/2003 09:40:49 AM
pic32266.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: New judicial vacancy notices

007104-002135

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

From: Joy, Sheila

Sent: Monday, January 13, 2003 9:39 AM

To: Dinh, Viet; Charnes, Adam; Willett, Don; Remington, Kristi L; Benczkowski, Brian A; Sales, Nathan; Anderson, Carl A

Subject: New judicial vacancy notices

Marvin Garbis Maryland 6/14/03

Sterling Johnson NY,E 6/1/03

Dinh, Viet

From: Dinh, Viet
Sent: Friday, January 03, 2003 10:14 AM
To: Charnes, Adam; 'Kavanaugh, Brett'
Subject: have call into Schlapp re: Rolfing.

Willett, Don

From: Willett, Don
Sent: Friday, December 20, 2002 3:56 PM
To: Brett Kavanaugh (E-mail)
Subject: POTUS box-checking

Brett, can you pls. tell me who got POTUS-approved today (and who, if anyone, didn't)?

I'm updating some charts and such over here.

Thanks a lot.

DRW

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, December 5, 2002 4:20 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam
Subject: RE:

for your shop or ours?

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, December 05, 2002 3:59 PM
To: Charnes, Adam; Dinh, Viet
Subject:

This guy comes highly recommended by our Office of Political Affairs. Any thoughts?

----- Forwarded by Brett M. Kavanaugh/WHO/EOP on 12/05/2002 04:00 PM -----

(Embedded
image moved Sara Taylor <Staylor@georgewbush.com>
to file: 11/18/2002 03:02:50 PM
pic28391.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: FW: Personal Info

Personal InfoBrett: Thanks for your help - Attached is (b) (6) resume and case summary. I will have him call you.

Sara

007104-002139

To: Sara Taylor

Subject: Personal Info

I forgot to give you my Washington contact info:

(b) (6) (cell)

(b) (6)

(b) (6)

Dinh, Viet

From: Dinh, Viet
Sent: Friday, November 22, 2002 4:48 PM
To: 'Flanigan, Timothy'; 'Kavanaugh, Brett'; 'Berenson, Brad'; Charnes, Adam
Subject: Left message for Sanders

Sheila reports that she may be i (b) (6)

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, November 20, 2002 9:43 AM
To: 'Kavanaugh, Brett'
Subject: Congrats on Terrorism Insurance.

Willett, Don

From: Willett, Don
Sent: Tuesday, December 17, 2002 10:44 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Remington, Kristi L
Subject: RE: interview

Zero problem, Brett. Thanks!

Let us know when (b) (5) gets scheduled.

DRW

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, December 17, 2002 10:26 AM
To: Remington, Kristi L; Willett, Don
Subject: Re: interview

fyi that we just got the names last night and told them to come immediately.
that is why no advance notice. thanks.

Dinh, Viet

From: Dinh, Viet
Sent: Monday, December 16, 2002 7:18 PM
To: 'Heather_Wingate@who.eop.gov'
Cc: Willett, Don; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re: Gonzales meeting

No worries. Thx for the clarification.
--- Sent from my BlackBerry.

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

From: Heather_Wingate@who.eop.gov <Heather_Wingate@who.eop.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
CC: Willett, Don <Don.Willett@USDOJ.gov>; Brett_M._Kavanaugh@who.eop.gov
<Brett_M._Kavanaugh@who.eop.gov>
Sent: Mon Dec 16 17:04:55 2002
Subject: Gonzales meeting

Don called about the roll call article re: meeting on judges.

(b) (5)

(b) (5)

(b) (5)

Sorry for the

confusion. Give me a call when you get back in town.
Sincerely, heather.

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Wednesday, December 11, 2002 6:49 PM
To: Bradford_A._Berenson@who.eop.gov
Cc: Charnes, Adam; Goodling, Monica; Dinh, Viet
Subject: Re: FW: LADJ on possible Kmiec D.C. Circuit nom
Attachments: pic22696.pcx

(b) (5) fyi that Washington Post is doing a general process/DC Circuit story for Friday.

(b) (5)

Bradford A. Berenson
12/11/2002 06:29:07 PM

Record Type: Record

To: "Dinh, Viet" <Viet.Dinh@usdoj.gov>
cc: adam.charnes@usdoj.gov, monica.goodling@usdoj.gov, Brett M.
Kavanaugh/WHO/EOP@EOP
bcc:
Subject: Re: FW: LADJ on possible Kmiec D.C. Circuit nom (Document link: Brett
M. Kavanaugh)

(b) (5)

(Embedded
image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
to file: 12/11/2002 06:22:18 PM
pic22696.pcx)

Record Type: Record

To: "Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP, Bradford A.
Berenson/WHO/EOP@EOP

cc: "Goodling, Monica" <Monica.Goodling@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested)
Subject: FW: LADJ on possible Kmiec D.C. Circuit nom

(b) (5)

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

From: James Meek [mailto:jamesmeek@earthlink.net]
Sent: Wednesday, December 11, 2002 6:17 PM
Subject: LADJ on possible Kmiec D.C. Circuit nom

Group Takes Early Stand Against Possible Appeal-Bench Nominee

By James Gordon Meek
L.A. Daily Journal Staff Writer

Dec. 11, 2002

WASHINGTON -- A liberal judicial advocacy group took the unusual step Tuesday of announcing its opposition to a conservative legal scholar who may one day sit on the U.S. Circuit Court of Appeals for the District of Columbia.

And he hasn't even been nominated by President Bush yet.

Douglas W. Kmiec, dean of the Catholic University School of Law and an outspoken former Pepperdine law professor, is rumored to be Bush's choice for one of the four vacancies on the Washington, D.C., federal bench, the New York Times reported Tuesday.

That circuit is considered second in importance to the Supreme Court.

In response to the report, the liberal Alliance For Justice issued a statement bashing Kmiec for his

In response to the report, the liberal Alliance For Justice issued a statement casting Kmiec for his purported views on abortion and civil rights.

"Kmiec's record reflects an ultra-conservative philosophy opposing a woman's right to choose, bipartisan civil rights legislation and regulations on property," Nan Aron, the group's president, said.

"He would be a very poor, divisive choice for the D.C. Circuit," Aron said.

Reached by phone Tuesday, Kmiec declined to comment on the criticism or his possible nomination by the White House.

Kmiec, 51, is a lecturer and frequent commentator on legal issues at the forefront of national debate. There is some doubt that he would enjoy donning the robes of silence to maintain judicial impartiality.

Erwin Chemerinsky, a liberal USC law professor who has done point-counterpoint debates with Kmiec on innumerable occasions, said his frequent rhetorical adversary may find equal pleasure in speaking out on important issues from the bench.

"I would expect if Doug Kmiec is confirmed, he would continue to be an eloquent spokesman for the conservative perspective," Chemerinsky said.

"But Doug would have to decide, as any judge does, when to speak, what to speak about and what to say," he said.

"I think Doug is a terrific guy, and I think the world of him," Chemerinsky added, "[but] on the other hand, his conservative views could make him the target of a Democratic filibuster in the Senate."

The Alliance For Justice quoted from Kmiec's 1996 testimony before the House Judiciary Committee, when he said, "Abortion is more than the killing, it is also the coarsening of the American heart ... [and] undermines all life."

A closer look at that testimony shows that, while he clearly is anti-abortion, the former Notre Dame law professor demonstrated in his testimony a broader view of abortion's impact on society.

In fact, Kmiec stated then: "[A]bortion is more than the killing, it is also the coarsening of the American heart: abortion invites male irresponsibility and skyrocketing rates of illegitimacy that plague every part of this nation; abortion demeans women as objects of sexual gratification; gratification that need not be in the least inhibited because 'the product of conception' can always, at any time, right up to the moment of birth, be disposed; abortion invokes right, when duty and responsibility are essential; abortion insinuates the cold formality and language of 'rights' into places, like the relations between husband and wife and parent and child, where only duty and fidelity can sustain marriages, form homes and build communities; abortion undermines all life, not just unborn life."

Two other nominations to the Washington, D.C., Circuit, John Roberts and Miguel Estrada, also have faced hard opposition from the Alliance For Justice and other liberal groups.

But with the Senate reverting to Republican control in January, controversial conservative nominations are likely to breeze through to confirmation.

"[If Bush tapped Kmiec for the circuit,] it would be further evidence that this administration is intent on packing the courts with ultra-conservatives, in direct contravention of the interests and will of the American people," Aron said.

Reporter: <mailto:jamesmeek@earthlink.net>

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, November 21, 2002 4:23 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Charnes, Adam
Subject: RE: POTUS letter to the Chief

great thanks.

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, November 21, 2002 4:20 PM
To: Dinh, Viet
Cc: Charnes, Adam
Subject: RE: POTUS letter to the Chief

To clarify, you already have the POTUS letter to Chief. (b) (5)

(b) (5)

(Embedded
image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
to file: 11/21/2002 04:09:03 PM
pic14472.pcx)

Record Type: Record

007104-002148

To: "Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: RE: POTUS letter to the Chief

(b) (5) 514-2424 is my fax number. BTW, Brett, I called you but your voice mailbox is full. Ran into Sally Rider at Justcie hwite's memorial and she said that she has a draft response letter on the Chief's desk to review.

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

From: Charnes, Adam

Sent: Thursday, November 21, 2002 4:05 PM

To: Remington, Kristi L; Keefer, Wendy J; Willett, Don; Dinh, Viet

Subject: POTUS letter to the Chief

Brett wants (b) (5)

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, November 19, 2002 5:08 PM
To: Remington, Kristi L; Charnes, Adam; Keefer, Wendy J; 'Kavanaugh, Brett'
Subject: Vacancies

Not to add to our already significant workload, but in light of the Johnstown (PA) tribune Gazette article today about the brooks Smith dCt. vacancy (b) (5)

thanks

Dinh, Viet

From: Dinh, Viet
Sent: Monday, November 18, 2002 2:32 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re:

Thx

--- Sent from my BlackBerry.

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

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Mon Nov 18 14:14:30 2002
Subject:

congrats on FISA court ruling.

007104-002151

Sales, Nathan

From: Sales, Nathan
Sent: Monday, November 18, 2002 11:17 AM
To: (b)(6) Kay Daly Email; Washington, Tracy T; Benczkowski, Brian A; Keefer, Wendy J; Schauder, Andrew; Day, Lori Sharpe; Huff, Chris; Hall, William; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Updated: to discuss Dennis Shedd
Attachments: Brown v. Gilmore summary.doc

Not aware of anything on the court's current docket, but last year the 4th Cir. decided a very important moment of silence case. I've attached a brief summary that I wrote last summer for the Federalist Society, before I came to DOJ.

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

From: (b)(6) Kay Daly Email
Sent: Monday, November 18, 2002 10:39 AM
To: Washington, Tracy T; Benczkowski, Brian A; Keefer, Wendy J; Schauder, Andrew; Day, Lori Sharpe; Huff, Chris; Hall, William; Sales, Nathan; Brett_M._Kavanaugh@who.eop.gov
Subject: Re: Updated: to discuss Dennis Shedd

Any of you know about a case pending in the 4th Circuit that has something to do with religious liberty or some topic that would be near and dear to Southern Baptist hearts? Wendy emailed me something about some case that was pending and was going to send details, but I never received it. Southern Baptists are chomping at the bit to get the info for their membership and to send out a huge alert.....need it ASAP.

KRD

007104-002152

The latest salvo in the ongoing dispute over the place of religion in public schools comes from the Fourth Circuit. In 2000 Virginia enacted a statute requiring public schools to begin each day with a moment of silence, during which a student, “in the exercise of his or her individual choice,” could “meditate, pray, or engage in any other silent activity” Va. Code Ann. § 22.1-203 (Michie 2000). In a 2-1 split, the court held that the Commonwealth’s statute did not offend the First Amendment’s Establishment Clause. *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001).

Writing for the majority, Judge Niemeyer began by identifying the shared goal of the Constitution’s two religion clauses: “to protect religious liberty.” *Id.* at 273. Because the central objective of the Establishment Clause is promote religious liberty, it does not preclude a state from “accommodating” its citizens’ religious scruples. Crucially, the court pointed out that “the limits of permissible accommodation are not ‘coextensive with the non-interference mandated by the Free Exercise Clause.’” *Id.* at 275 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)). That is, a state can, consistent with the Establishment Clause, enact a religious accommodation that is more extensive than what is required by the Free Exercise Clause.

The court further held that Virginia’s moment-of-silence statute passed muster under the familiar three-prong test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). First, it held that the enactment had a number of “valid secular purposes,” including facilitating classroom discipline and encouraging students to reflect. Significantly, the court stated that accommodating religious scruples *itself* can be a valid secular purpose: “Even though religion is thus the object of one of the statute’s purposes, the *accommodation* of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution.” *Brown*, 258 F.3d at 276. *But see id.* (stating that accommodation “*may be* secular even though it addresses religion” (emphasis

added)). In addition, the court concluded that, even if accommodation were not a secular objective, Virginia's law nevertheless survived *Lemon*'s purpose prong because *Lemon* requires only that "there be *a* secular purpose," not that a statute have *only* a secular purpose. *Id.* at 277 (emphasis added). Because the moment-of-silence law had a valid secular purpose, the fact that it also may have had a religious objective was of no consequence.

Lemon's other two prongs received somewhat less attention. The majority denied that the statute's "primary effect" was to advance or hinder religion. Specifically, the court doubted that non-praying students would assume, from the fact that their classmates were praying, that Virginia endorses prayer; the plaintiffs' fear of "psychological coercion" was "speculative at best," *id.* at 278, since they had facially challenged the statute before it was administered and therefore had not established a factual record to support their claim. Third and finally, the majority concluded that the moment-of-silence law posed little risk that the state would become "excessively entangled" with religion, since it called on teachers to do no more than inform their students that silent prayer was one of several possible options.

The majority had little difficulty distinguishing the Supreme Court's decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985), which invalidated an Alabama moment-of-silence statute. The law at issue in *Wallace* "had *no* secular purpose," and indeed Alabama's governor expressly testified that its purpose was to return prayer to public schools. *Brown*, 258 F.3d at 279 (quoting *Wallace*, 472 U.S. at 56). Nor did Alabama assert that its statute was necessary to accommodate private religious practices until late in the litigation. Virginia's law, by contrast, had both religious and secular purposes, and there was no evidence that teachers coercively led their students in collective prayer. *Id.* at 280-81.

In dissent, Judge King “look[ed] below the surface” to discern the “true purpose” behind Virginia’s statute: “to encourage students to pray.” *Id.* at 284, 286 (King, J., dissenting). The law was not likely to facilitate the free exercise of religion, since it favors silent prayer, and prohibits forms of prayer that require vocal or physical activity—for example, those practiced by Catholics, Jews, and Muslims. Nor was the statute a necessary accommodation, since students’ right to pray would not have been burdened if the state had not included the word “pray” in the statutory text. *Id.* at 287-88. Finally, the statute nowhere asserted Virginia’s claimed interest in encouraging classroom discipline. *Id.* at 290.

Several commentators expect that *Brown* will make its way to the Supreme Court. If the High Court does grant *certiorari* in *Brown*, it may use the case as a vehicle to decide one or more cutting-edge issues in the area of religious liberty and accommodation, including: (1) whether the accommodation of religion can itself be a valid secular purpose, even though it has religion as its subject matter; (2) whether a state’s overtly religious purpose, when twinned with a clearly secular one, satisfies the *Lemon* test’s secular-purpose prong; and (3) whether the threat of student-on-student “psychological coercion” is less weighty in the context of a pre-application facial challenge than in an as-applied suit.

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Monday, November 18, 2002 8:42 AM
To: Remington, Kristi L
Cc: Charnes, Adam; Willett, Don; Joy, Sheila
Subject: Re: Fw: Judges

13 District Court Vacancies with Presidentially Approved Candidates

District Deadline for Nomination Candidate Notes

CD Cal (Letts) April 25, 2003 Glenda Sanders BB CD Cal (new) (t) April 25, 2003 James Selna BB SD Fla (Highsmith) April 25, 2003 Cecilia Altonaga CB ND Ind (Lee) April 25, 2003 Philip Simon KS ND Ind (Moody) April 25, 2003 Theresa Springmann KS WD LA (b) (6) April 25, 2003 Dee Drell NF WD LA (b) (6) April 25, 2003 Patricia Minaldi NF D MD (Smalkin) April 25, 2003 Richard Bennett BK ED MI (Duggan) April 25, 2003 (b) (6) BB ED NY (Raggi) April 25, 2003 Dora Irizarry JN SD NY (McKenna) April 25, 2003 Kevin Castel JN SD NY (Martin) April 25, 2003 Stephen Robinson JN WD PA (Standish) April 25, 2003 Tom Hardiman BK

4 Appeals Court Vacancies with Presidentially Approved Candidates

Circuit Deadline for Nomination Candidate Notes

CA2 NY (Leval) April 25, 2003 Richard Wesley JN CA5 TX (b) (6) April 25, 2003 Ed Prado CB CA9 Cal (b) (6) April 25, 2003 Carlos Bea BK CA9 Cal (Fernandez) April 25, 2003 Consuelo Callahan BK

Sales, Nathan

From: Sales, Nathan
Sent: Wednesday, November 13, 2002 11:59 AM
To: Dinh, Viet; Charnes, Adam; Willett, Don; Keefer, Wendy J; Remington, Kristi L; Benedi, Lizette D; Benczkowski, Brian A; Hall, William; Koebele, Steve; Goodling, Monica; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Fw: Tomorrow
Attachments: tmp.htm

I just learned that Jeff Lord (of the Brooks Smith battle) is meeting with the ed board of the Philadelphia Inquirer to talk about judges issues. (b) (5)

(b) (5)

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

From: (b)(6) Jeff Lord email
To: Sales, Nathan <Nathan.Sales@USDOJ.gov>
Sent: Wed Nov 13 10:59:13 2002
Subject: Tomorrow

Nathan.....

Looks like the log jam is breaking up in Judiciary. I'm on tomorrow at 11:15 in Philadelphia. Will be carrying both the Bush proposal and the Specter protocol, as well as a slew of Leahy quotes from the Clinton era on why deadlines are needed. I'll let you know the results.....they are asking me to do an op-ed, which we will discuss tomorrow as well.

Have a great day tomorrow....try to stifle a smile if you're in the hearing room tomorrow. And wave with five fingers.

Best, Jeff

007104-002157

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, November 12, 2002 10:47 AM
To: Washington, Tracy T
Cc: Keefer, Wendy J; 'Kavanaugh, Brett'; Charnes, Adam
Subject: FW: Sutton murder board and legislative strategy session

tracy, can you put on my schedule and alert the sutton team? thanks

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

From: Heather_Wingate@who.eop.gov [mailto:Heather_Wingate@who.eop.gov]
Sent: Tuesday, November 12, 2002 10:33 AM
To: Bradford_A._Berenson@who.eop.gov
Cc: Charnes, Adam; Bryant, Dan; O'Brien, Pat; Dinh, Viet; Keefer, Wendy J; Bradford_A._Berenson@who.eop.gov; Heather_Wingate@who.eop.gov; Matthew_E._Smith@who.eop.gov; msfried@jonesday.com; jssutton@jonesday.com
Subject: Re: Sutton murder board and legislative strategy session

works for me. Ashley Snee is in Anne Womack's old slot.... she should be included.

Bradford A. Berenson
11/12/2002 10:25:30 AM

Record Type: Record

To: Bradford A. Berenson/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message bcc:
Subject: Re: Sutton murder board and legislative strategy session (Document
link: Heather Wingate)

I've now heard from Jeff: the 11th of December is the day. I suggest we block off from 10:00 a.m. to 2:00 p.m. We can do the murder board from 10 to noon, go over comments during lunch, and ask

007104-002158

the legislative experts to join us at 1 to talk strategy. Will that work for everyone?

Also, Heather, we should probably have a WH Press or Communications person attend the 1:00 session. Now that Anne Womack has left, who should I invite?

Bradford A. Berenson
11/12/2002 10:16:34 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: msfried@jonesday.com @ inet, jssutton@jonesday.com @ inet Subject: Sutton murder board and legislative strategy session

Jeff Sutton will be in town on December 11th or 12th for a NAAG function, and I think it would be a good idea to schedule an initial murder board for him during that visit, with another to follow in early January. (b) (5)

(b) (5)

(b) (5)

I'll get back to you with a firm date and time, but please pencil in an afternoon for the Sutton nomination in mid-December. Thanks.

Message Sent To: _____

wendy.j.keefer@usdoj.gov @ inet
viet.dinh@usdoj.gov @ inet
adam.charnes@usdoj.gov @ inet
adam.h.charnes@usdoj.gov @ inet
Heather Wingate/WHO/EOP@EOP
Matthew E. Smith/WHO/EOP@EOP
dan.bryant@usdoj.gov @ inet
pat.o'brien@usdoj.gov @ inet

Message Copied To: _____

wendy.j.keefer@usdoj.gov @ inet
viet.dinh@usdoj.gov @ inet
adam.charnes@usdoj.gov @ inet
adam.h.charnes@usdoj.gov @ inet
heather wingate/who/eop@eop
matthew e. smith/who/eop@eop
dan.bryant@usdoj.gov @ inet
pat.o'brien@usdoj.gov @ inet
msfried@jonesday.com @ inet
jssutton@jonesday.com @ inet

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Monday, November 11, 2002 6:47 PM
To: Charnes, Adam; Willett, Don; Dinh, Viet
Subject: Senator Bayh on President's judges proposal

HUME: Senator, the president's team came forth in the final days of the campaign with a plan on judicial nominations that would have had retiring judges announce their retirements a year before they did. It would have had a timetable for the consideration of appointments to fill the seats. And it would have provided for a vote on the Senate floor on judicial nominees.

At the time, of course, it was looked as a eleventh-hour proposal, politics. The administration clearly intends to follow up on it and press for it.

What is your view of that proposal? Is that something you'd be interested in seeing passed?

BAYH: I'm willing to give it serious consideration, Brit. I think we need to get away, both parties--you know, this happened when Clinton was president. It's now happening a little bit now. We need to get a more orderly process in place for dealing with these nominations.

The big fight, though, won't be on the district and appellate court nominees.
The big fight will be if there's a Supreme Court vacancy and what to do then.

HUME: Right, but do you believe that a president should be entitled at least to a floor vote on judicial nominees?

BAYH: I think in most cases yes. If someone is just clearly beyond the pale, then the committees do have their rights.

HUME: True, but if someone is clearly...

BAYH: In most cases, yes.

HUME: Clearly beyond the pale presumably means, reported out of the Judiciary Committee with a negative recommendation to the floor, where the Senate, presumably, in its wisdom, if the nominee is

negative recommendation to the floor, where the Senate, presumably, in its wisdom, if the nominee is beyond the pale, would reject it.

BAYH: In most cases, yes. Unless there's something exceptional.

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Monday, November 11, 2002 6:47 PM
To: Charnes, Adam; Willett, Don; Dinh, Viet
Subject: Sen. Hatch letter to editor in Salt Lake Tribune
Attachments: ATTACHMENT.TXT

BY ORRIN G. HATCH

Editorial boards are entitled to their own opinions, but not to their own set of facts. The Salt Lake Tribune's editorial against President Bush's plan to reform the judicial selection process ("Federal Bench Fiasco," Nov. 5) puts The Tribune in the extremely rare company of those who argue against speeding up a process that virtually every sensible observer thinks is too slow.

No one can honestly defend the current 77 empty seats in the federal judiciary, which means that 9 percent of the judicial branch sits vacant. This is one of the highest vacancy rates in modern times.

The Senate's goal -- regardless of who is president and which party controls the Senate -- should be to evaluate and confirm judicial nominees in a timely way in order to ensure a fully functioning federal judiciary. That is difficult to achieve due to the amount of work involved in researching the personal and professional backgrounds of nominees. It is also complicated by too much partisan politics. President Bush's plan to start the process earlier, and to establish a time frame for hearings and votes, is an honorable and practical way to streamline the review process and minimize divisive partisanship.

It is difficult to understand The Tribune's opposition to the idea of judges announcing their retirements in advance. Most other high-level public officials are selected before their offices are vacated; we elect presidents, senators, representatives and governors -- to name just a few -- while their predecessors remain in office. This method ensures continuity.

Moreover, it is entirely possible for the Senate to hold a hearing within three months, and a vote within six months, of the president's nominations. A rule forcing such a timetable would go a long way toward removing the partisan power to slow the process.

Selective statistics from narrow time periods in the past, such as those included in your editorial, only confuse the issues. My record as chairman of the Senate Judiciary Committee demonstrates that, contrary to your assertion, the Republicans who controlled the Senate during the past six years of the Clinton administration did not start the current controversy. In fact, those six years saw the number of judicial vacancies decrease by three.

Overall, during President Clinton's eight years in office, the Senate confirmed 377 judges, essentially the same (only five fewer) as it confirmed for President Reagan, who, by the way, had more judges confirmed than any other president in history. Note that President Reagan had six years of a Senate controlled by his own party, while President Clinton had only two.

Finally, although the Republicans get a lot of blame for the 41 Clinton nominees who did not receive hearings, that number is 13 fewer than the 54 nominees who suffered the same fate at the hands of Democrats during the first Bush administration. By the way, nine of the Clinton 41 were nominated so late in Clinton's eighth year that they could not possibly have been processed by the Senate.

Although neither party has a perfect record in the Senate, President Bush came to the judicial selection process with clean hands, having had no involvement in any of the prior controversies. And he began his term with an astonishing olive branch: The first-ever renomination of a circuit court nomination first submitted by a president of the other party.

It is even more ludicrous to accuse President Bush of failing to nominate fast enough. President Bush has responded to the vacancy crisis in the appellate courts by nominating a total of 32 top-notch men and women. The Senate Democrats have simply stalled them, confirming only 14 and leaving 17 more pending in committee. This disregards precedent. At the end of President Clinton's first year in office, there were only two circuit court nominees

left pending in committee without hearings or votes; after President Bush's first year, there were 23.

There is great wisdom behind President Bush's call for the Senate to hold timely hearings and votes for all judicial nominees, regardless of who is president and who controls the Senate. By streamlining the process and limiting the power of partisan politicians on both sides of the political aisle, such a rule would serve the long-term interests of the judiciary and the American people. I simply don't understand The Salt Lake Tribune's concern here.

Dinh, Viet

From: Dinh, Viet
Sent: Monday, November 11, 2002 3:09 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam
Subject: RE: Letter re POTUS proposal

not yet; but will press

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, November 11, 2002 2:35 PM
To: Charnes, Adam
Cc: Dinh, Viet
Subject: RE: Letter re POTUS proposal

Any bites on this yet?

(Embedded
image moved "Charnes, Adam" <Adam.Charnes@usdoj.gov>
to file: 11/01/2002 01:44:42 PM
pic08827.pcx)

Record Type: Record

To: "Dinh, Viet" <Viet.Dinh@usdoj.gov>, Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Letter re POTUS proposal

007104-002166

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, November 01, 2002 12:41 PM
To: Charnes, Adam; Dinh, Viet
Subject: RE: Letter re POTUS proposal

was not attached on my e-mail; please send attachment; thanks!!

(Embedded

image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov> to file: 11/01/2002 12:00:57 PM pic31660.pcx)

Record Type: Record

To: "Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested)

cc: "Keefer, Wendy J" <Wendy.J.Keefer@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP Subject: RE: Letter re POTUS proposal

Brett,

Here's the letter that Wendy and Adam worked up. (b) (5)

(b) (5)

Viet

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

From: Charnes, Adam
Sent: Friday, November 01, 2002 9:00 AM
To: Dinh, Viet
Cc: Keefer, Wendy J
Subject: FW: Letter re POTUS proposal

Viet, Wendy caught a nit; please use this version. (Thanks, Wendy.)

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

From: Keefer, Wendy J
Sent: Friday, November 01, 2002 8:55 AM
To: Charnes, Adam
Subject: RE: Letter re POTUS proposal

There was a word missing in the first paragraph

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

From: Charnes, Adam
Sent: Thursday, October 31, 2002 9:55 PM
To: Dinh, Viet
Cc: Keefer, Wendy J
Subject: Fw: Letter re POTUS proposal

Attached is a draft of the law professors letter you requested.

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

From: AdamCharnes@aol.com <AdamCharnes@aol.com>
To: Charnes, Adam <Adam.Charnes@USDOJ.gov>
Sent: Thu Oct 31 21:52:51 2002
Subject: Letter re POTUS proposal

Dinh, Viet

From: Dinh, Viet
Sent: Monday, November 11, 2002 3:09 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam
Subject: RE:

thanks

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, November 11, 2002 2:15 PM
To: Charnes, Adam; Dinh, Viet
Subject:

I have e-mailed Heather and Judge Gonzales about the idea to have (b) (5)

(b) (5)

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, November 5, 2002 9:46 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam; Willett, Don; Keefer, Wendy J
Cc: 'Timothy_E._Flanigan@who.eop.gov'
Subject: RE: Unfilled vacancies chart

We have been working on the same here--glad we're on the same page. Adam and Wendy will loop in with you to ensure seamlessness. (b) (5)

(b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, November 04, 2002 5:25 PM
To: Charnes, Adam; Willett, Don; Dinh, Viet
Cc: Timothy_E._Flanigan@who.eop.gov
Subject: Unfilled vacancies chart

(b) (5)

(See attached file: judges status report on unfilled vacancies 11 04 02 #2.doc)

007104-002171

Dinh, Viet

From: Dinh, Viet
Sent: Friday, November 1, 2002 5:58 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam
Subject: RE: Letter re POTUS proposal

(b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Friday, November 01, 2002 4:37 PM
To: Dinh, Viet
Subject: RE: Letter re POTUS proposal

(b) (5)

(Embedded
image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
to file: 11/01/2002 12:00:57 PM
pic00689.pcx)

Record Type: Record

To: "Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested)

007104-002172

to: Charles, Adam <Adam.Charles@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested)

cc: "Keefer, Wendy J" <Wendy.J.Keefer@usdoj.gov> (Receipt Notification
Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP Subject: RE: Letter re
POTUS proposal

Duplicative

Dinh, Viet

From: Dinh, Viet
Sent: Friday, November 1, 2002 1:10 PM
To: 'Bartolomucci, Chris'; 'Kavanaugh, Brett'
Subject: FW: [Fwd: Judicial Streamlining Op Ed]
Attachments: Re: Judicial Streamlining Op Ed.msg

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

From: Neal Katyal [mailto:katyaln@law.georgetown.edu]
Sent: Thursday, October 31, 2002 4:00 PM
To: Dinh, Viet
Subject: [Fwd: Judicial Streamlining Op Ed]

fyi, ben = ben wittes, I'll try somewhere else

N

007104-002174

Fred Hiatt

From: Fred Hiatt
Sent: Friday, February 22, 2019 11:44 AM
To: Neal Katyal
Subject: Re: Judicial Streamlining Op Ed

Neal,

I think Ben is editorializing on it, and since our line has been fairly similar to yours, and I assume will be again, I think I'll pass on the oped. Thanks for giving us a shot at it.

Fred

Neal Katyal
<katyaln@law.geor To: hiattf@washpost.com, kenikenberry@washpost.com,
wittesb@washpost.com
getown.edu> cc:
Subject: Judicial Streamlining Op Ed
10/31/2002 10:27
AM

Hi. Attached is a proposed op-ed on the virtues and vices of President Bush's proposal to streamline judicial confirmations, with some special attention paid to the nomination of John Roberts to the DC Circuit. I'm sending it to you exclusively, and would greatly appreciate it if you could let me know if you don't want it.

Neal Katyal
Professor of Law, Georgetown University
Visiting Professor, Harvard Law School

(b) (6)

President Bush on Tuesday outlined a wise and sensible approach to the judicial confirmation mess. The problem is pervasive ? in both the last Administration and this one, the Senate has too often stalled well qualified nominees. Anyone who doubts that the problem exists should look no further than Washington's own John Roberts, nominated over a year ago for a seat on the Court of Appeals. Having given 38 Supreme Court arguments and enjoying the respect of the entire Bar, Roberts is one of the most qualified individuals to be nominated to any appellate court in this nation's history, and yet he can't even get a hearing.

007104-002175

President Bush's proposal asks sitting judges to announce their plans to retire in advance, the President to select a nominee within 180 days, a Senate hearing within three months after the nomination, and an up or down vote on the nominee by the full Senate within 180 days of the nomination. President Bush, ignoring the, well, elephant in the room, claimed that his proposal created a "clean start" and "would not favor Democrats or Republicans" because "it doesn't matter who the President is." But, apart from the timing (six days before an election), there are two obvious problems. First, it pretends that the judicial vacancy crisis started with his Administration, but a Republican Senate obstructed President Clinton's nominees precisely to have more seats to fill in a Republican Administration. (No doubt Democrats wanted a "clean start" after they won the White House in 1992, too, after their mistreatment of Robert Bork.) Second, there is no guarantee whatsoever that a future Senate would adhere to this streamlined process once a Democrat became President. Indeed, President Bush's view is an amplified version of the patently false claim that campaign finance reform doesn't benefit incumbents because the limits apply to everyone, ignoring the obvious advantages of being a sitting legislator. And these two problems are exacerbated by the fact that President Bush has nominated individuals to the courts that are well to the right of the country, a far cry from President Clinton's moderate choices.

Nevertheless, no nominee, regardless of ideology, should be treated with the inertia that the Republican and Democratic Senates have applied in recent years. If nominees are unqualified to serve, then the Senate should say so. The President is absolutely right on this key point. Yet the decisions not to decide, by Senators of both parties, are understandable reactions to the veil of ignorance: they do not know what the future holds, and they know that nominees were mistreated by the other party in the past. The difficulty is that everyone thinks the fight started when the other side hit them back.

To solve this problem, two things need to happen. First, the President must offer a mechanism to compensate for the self-dealing of the last Senate, which blocked President Clinton's nominees only to give President Bush extra vacancies to fill. Second, the Senate must develop a credible procedure that would help ensure that the President's streamlining proposal would apply in 2005 and 2009. The second problem is easier to solve: The Senate could enshrine the President's proposed streamlining into its Senate Rules (thus making it more difficult for the Senate to change this baseline rule in future administrations) and each Republican Senator could publicly pledge now to adhere to the rule in the next Administration, regardless of who the nominees are.

But the reward-for-obstructionism problem is more difficult, because it illustrates why President Bush's proposal is not politically neutral. The most obvious way to get true neutrality is to have the proposal take effect later, in 2005. Short of that, real neutrality today requires the President to re-nominate the individuals who didn't get the benefit of the streamlining in the last Administration. The idea of President Bush nominating President Clinton's candidates may sound like a nonstarter, but it creates neutrality and divests the rewards from obstruction the last time around. (Many of the Clinton nominees had substantial Republican support anyway, due to the past Administration's deference to home state legislators.) Of course, the Senate can vote any of these nominees down, and if the President agreed to do this before next Tuesday, the veil of ignorance can become a way to propel reform. The point is not that any of this will happen, only that it explains why real neutrality is so elusive. Another, more palatable way to restore some neutrality is to ensure that streamlining is not used to reward past obstructionism; so the holdover slots left unfilled from the last Administration should be treated quite differently from the new vacancies which arose after Inauguration Day, with strong deference to Democratic home State Senators picks for holdover seats.

President Bush should be commended for putting a smart proposal on the table. It is now time to develop ways to make sure that it is implemented fairly, in a way that penalizes obstruction by both parties. No one knows this better than John Roberts, who was nominated by President George H.W. Bush to the same court in 1992, only to be a victim of obstruction and election year politics then too. It's time for this to end. But it won't happen without more from this Administration to create a real clean start.

Neal Katyal, a Professor at Georgetown University Law Center, is currently a Visiting Professor at Harvard Law School.

Sales, Nathan

From: Sales, Nathan
Sent: Thursday, October 31, 2002 3:15 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam; Willett, Don
Subject: RE:

(b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, October 31, 2002 1:53 PM
To: Charnes, Adam; Willett, Don; Sales, Nathan
Subject:

What do you all think

(b) (5)

(b) (5)

-
<http://www.senate.gov/~rpc/releases/1999/jd050902.htm>

007104-002178

Sales, Nathan

From: Sales, Nathan
Sent: Thursday, October 31, 2002 11:59 AM
To: Brett Kavanaugh (E-mail)
Cc: Charnes, Adam
Subject: Leahy's response to POTUS speech

Brett,

I noticed from today's clippings that that the President's judges proposal has met with a chilly reception from Leahy. (b) (5) (b) (5)

(b) (5)

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:s1906is.txt.pdf

Best,
Nathan

007104-002179

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Wednesday, October 30, 2002 8:06 PM
To: Willett, Don
Subject: REMARKS BY THE PRESIDENT ON JUDICIAL CONFIRMATIONS
Attachments: pic14988.pcx

----- Forwarded by Brett M. Kavanaugh/WHO/EOP on 10/30/2002 07:08 PM -----

(Embedded image moved to file: pic14988.pcx) Rachael L. Sunbarger 10/30/2002 02:42:16 PM

Record Type: Record

To:

cc:

Subject: REMARKS BY THE PRESIDENT ON JUDICIAL CONFIRMATIONS

THE WHITE HOUSE

Office of the Press Secretary _____

For Immediate Release October 30, 2002

REMARKS BY THE PRESIDENT
ON JUDICIAL CONFIRMATIONS

The East Room

1:40 P.M. EST

THE PRESIDENT: Thank you all very much. Thank you, Al. He's -- everybody must have a good lawyer, and I got one in Al Gonzales.

I want to welcome you all here to the White House. Thank you for coming.

The federal courts play a central role in American justice, protecting the innocent, punishing the

007104-002180

guilty, resolving disputes and upholding the rule of law. Yet, today, our federal courts are in crisis.

The judicial confirmation process does not work as it should. Nominees are too often mistreated, votes are delayed, hearings are denied, and dozens of federal judgeships sit empty, and this endangers the quality of justice in America.

Everyone knows these facts. Everyone knows the system isn't working. These concerns are not new. And we will not find a solution in an endless cycle of blame and bitterness.

Today, I'm proposing a clean start for the process of nominating and confirming federal judges. We must have an even-handed, predictable procedure from the day a vacancy is announced to the day a new judge is sworn in. This procedure should apply now and in the future, no matter who lives in this house or who controls the Senate. We must return fairness and dignity to the judicial confirmation process.

I want to thank the Judge Al Gonzales for working on this initiative and I want to thank his team for working hard. I appreciate John Ashcroft's service to our country; he is a great Attorney General. (Applause.) And I'm not saying that just because his wife and her twin sister are here. (Laughter.)

I'm so pleased that Ted Olson, the Solicitor General, is with us. I thank Fred Fielding, the former counsel to President Ronald Reagan. Boyd Gray is with us, former counsel to Number 41. Dennis Archer is with us today, President-elect of the American Bar Association and, of course, the former mayor of Detroit. Mr. Mayor, thank you for coming. Thomas Hayward, Chair of the Committee of Federal Judicial Improvements for the American Bar Association. And all of you, thank you for your interest in this subject.

Nearly 18 months ago, at an event right here in the East Room, I introduced my first 11 nominees to the Court of Appeals. I urged Senators of both parties to provide a fair hearing and a prompt vote to each nominee. Thus far, only three of these 11 nominations have been brought to a vote in the United States Senate.

The eight who are stalled in the Judiciary Committee include people such as John Roberts. John Roberts has argued 38 cases before the Supreme Court. He has served as Deputy Solicitor General of the United States. He's widely regarded as one of the best Supreme Court lawyers in America.

And they include Miguel Estrada, who has argued 15 cases before the U.S. Supreme Court, and has served in the Justice Department under Presidents of both political parties as a federal prosecutor and as the Assistant to the Solicitor General.

The Judiciary Committee has prevented full Senate action on people such as Priscilla Owen, who has served brilliantly on the Texas Supreme Court since 1995, and was overwhelmingly reelected by the people of Texas in the year 2000. Mr. Roberts, Mr. Estrada and Justice Owen have the highest ratings from the American Bar Association, which some Democrat Senators have called, "the gold standard." They have broad support among lawyers in both political parties. Both Mr. Roberts and Mr. Estrada have the support of former President Clinton's Solicitor General. Justice Owen is supported by three former Democrat justices of the Texas Supreme Court.

In all, I have sent to the Senate 32 nominees for the Court of Appeals. They are well qualified men and women with experience, intelligence, character and bipartisan home

state support. They represent the mainstream of American law and American values. Yet the Senate has confirmed only 14 of these 32 nominees, which is far below the pace of past Senates at the start of an administration. It's a lousy record. Not one of my nine pending nominees to fill vacancies on the Sixth and D.C. Circuit Courts has received a Senate vote, not one. As of November, 15 of my Appeals Court nominees will have been forced to wait over a year for a hearing. That's more in this Presidency than under the previous nine Presidents combined.

There's no good reason why any nominee should endure a year, a year-and-a-half, or more, without the courtesy of an up or down floor vote; there is not one good reason why. Whatever the explanation, we clearly have a poisoned and polarized atmosphere in which well qualified nominees are neither voted up or down; they are just left in limbo. This is unfair to the nominees and their families. This process discourages good people from serving as judges. It's also unfair to the courts themselves, which are forced to handle a growing caseload without the judges they need.

Nine percent of all federal judgeships in America are now vacant, nine percent. Of the 12 regional Courts of Appeals, the courts right below the Supreme Court, there is a 17 percent vacancy rate. The Court of Appeals for the D.C. Court, which rules on many significant Constitutional and regulatory issues, now operates with one-third of its judgeships empty. And the Sixth Court of Appeals which covers Kentucky and Ohio, Michigan and Tennessee, is nearly half empty, with nine active judges doing the work of 16.

Meanwhile, the number of federal appeal court filings reached an all-time high this year. Benches are empty, the number of court filings has increased to an all-time high. We can expect them to increase even further as a result of the war on terror, corporate fraud prosecutions, and issues arising out of the September the 11th attacks.

The judicial vacancies go unfulfilled, we will see more crowded dockets and longer delays. The federal courts will be unable to act in a timely manner to protect constitutional rights, to resolve civil disputes, and enforce the criminal laws, the environmental laws, and the civil rights laws that affects the lives and liberties of every single American. Chief Justice Rehnquist has called this situation alarming. The American Bar Association's report has described the current status of the federal judiciary as an emergency situation.

The judicial crisis is the result of a broken system, and we have a duty to repair it. I want to work with the Senate to fashion a new approach to filling federal court vacancies. We should leave behind the arguments and grievances of the past. We need to fix this problem together. That's why we've come to Washington, to fix problems. And each branch of government can contribute and must contribute to a better system.

So today, I'm offering four specific proposals to break the logjam in Washington and bring the federal courts of appeals and district courts to full strength.

First, I call on federal judges on the courts of appeals and district courts to notify the President of their intention to retire at least a year in advance, whenever this is possible. Because the nomination and confirmation of a federal judge is a lengthy process under the best of circumstances, judges who retire without advance notice can unintentionally create a judicial vacancy that can last for many months. The request for one year advance notice builds on existing policy of the judiciary and will help us work toward a system in which a new federal judge is ready to take the bench on a day the sitting judge retires -- that's the goal.

Second, I propose that Presidents submit a nomination to the Senate within 180 days of receiving notice of a federal court vacancy or intended retirement.

In other words, we have a responsibility as well to make sure the judiciary is sound and whole. This will speed up the sometimes time-consuming process of obtaining recommendations and evaluations from home-state senators and representatives and governors and bar leaders, while leaving ample time for Presidents to vet and choose nominees of the highest quality.

Third, I call on the Senate Judiciary -- Senate Judiciary Committee to commit to holding a hearing within 90 days of receiving a nomination. A strict deadline is the best way to ensure that judicial nominees are promptly and fairly considered. And 90 days is more than enough time for the committee to conduct necessary research before holding a hearing -- that's plenty of time.

Finally, I call on the full Senate to commit to an up or down floor vote on each nominee no later than 180 days after the nomination is submitted. This is a very generous period of time that will allow all the Senators to evaluate nominees and have their votes counted.

Our proposals would not favor Democrats or Republicans. The plan would be fair and would apply to -- regardless of who the President is. It doesn't matter who the President is. What matters is a system which works.

For the first time in years, the judicial confirmation process would work as it was intended to work. All Senators would have a chance to make their voices heard, and their views known, and that's important. All nominees would have the certainty of an up or down Senate floor vote within a reasonable period of time, and that is important. All Presidents would know that their judicial nominations would be addressed promptly. All Americans would see a more dignified process, and have their federal courts fully staffed to protect their rights and their liberties. And the vacancy crisis would be resolved once and for all.

I urge every member of the Senate, in particular those serving on the Judiciary Committee, to carefully consider this new beginning for the judicial nomination process, to weigh their responsibilities, to look at the vacancy problem we have, to act in a responsible fashion.

The failure of the judicial confirmation process is harming the administration of justice in America. That is a fact. The current state of affairs is not merely another round of political wrangling. It is a disturbing failure to meet our responsibilities under the Constitution. The Constitution has given us a shared duty and we must meet that duty together.

Thank you all for coming.

END 1:53 P.M. EST

Dinh, Viet

From: Dinh, Viet
Sent: Monday, October 28, 2002 11:26 AM
To: Charnes, Adam; 'Kavanaugh, Brett'
Subject: FW: In the President Alone

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

From: Eastman, John [mailto:jeastman@chapman.edu]
Sent: Sunday, October 20, 2002 12:04 AM
To: bushcheney-l@bu.edu
Subject: In the President Alone

In an op-ed published in Thursday's Wall Street Journal, I repeat the proposal for legislation vesting the power to appoint lower court judges in the President alone whenever the Senate has failed to act on a President's judicial nomination within six months. The op-ed is available at <http://claremont.org/projects/jurisprudence/021018eastman.html>; I'd welcome any feedback from list members.

John Eastman

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

From: owner-bushcheney-l@bu.edu [mailto:owner-bushcheney-l@bu.edu] On
Behalf Of Randy Barnett
Sent: Tuesday, June 18, 2002 12:03 PM
To: bushcheney-l@bu.edu
Subject: List members Op-Eds

I want to encourage list members to post their op-eds to the list, as Steve Presser did earlier today. This is a valuable service that authors can perform for other list members,

Randy

Randy E. Barnett
Austin B. Fletcher Professor
Boston University School of Law
765 Commonwealth Ave.
Boston, MA 02215
mailto:rbarnett@bu.edu
[REDACTED] (phone)
(617) 353-3077 (fax)
<http://www.randybarnett.com>
<http://www.bu.edu/barnett/SOL.htm> (Structure of Liberty page) <http://www.LexanderSprenger.org>

007104-002184

<http://www.bu.edu/barnett/30L.htm> (Structure of Liberty page) <http://www.LysanderSpooner.org>
(Lysander Spooner Website)

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, October 10, 2002 9:00 AM
To: 'Bartolomucci, Chris'; 'Flanigan, Timothy'; 'Kavanaugh, Brett'; 'Gonzales, Alberto'
Subject: FW: Ron Clark -- column today from the Austin American-Statesman's veteran political columnist

[We need to talk about this again](#) (b) (5)
(b) (5)

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

From: Willett, Don
Sent: Thursday, October 10, 2002 8:32 AM
To: Dinh, Viet; Charnes, Adam; Keefer, Wendy J; Joy, Sheila; Bartolomucci (E-mail)
Subject: Ron Clark -- column today from the Austin American-Statesman's veteran political columnist

Lawmaker's delay raises suspicions

By Dave McNeely
AMERICAN-STATESMAN STAFF
Thursday, October 10, 2002

A Republican state representative's request to President Bush to delay finalizing his federal judicial post has Democrats wondering if it's part of the effort to oust Democratic Texas House Speaker Pete Laney.

State Rep. Ron Clark, R-Sherman, was confirmed Oct. 1 for a Beaumont district judgeship but is not dropping his re-election campaign for the Texas House. He said that if re-elected, he wants to serve through next spring's regular legislative session, which ends June 2.

His Democratic opponent, Don Jarvis of Sherman, said Clark is being selfish. A special election to replace Clark if he wins could cost the district's taxpayers more than \$40,000 -- and another \$30,000 if a runoff is needed.

Suspicious Democrats think Clark's balk at trading his \$7,200-a-year state job for the \$150,000 federal one he asked for is designed to help Republican Tom Craddick of Midland unseat Laney, of Hale Center, who's trying for a sixth speaker term.

Clark supports Craddick, but insists speaker politics aren't involved.

Even if he does quit before the election, Clark's name will appear on the ballot. The deadline to replace him was Sept. 3.

If Clark quits and still wins, a special election would be necessary to replace him. The district would have no representative until after the special election, Jarvis said.

007104-002186

If Jarvis wins, Laney will get another vote.

If the vacancy wasn't filled by the time the election for speaker is held Jan. 14, it would take 75 votes to elect the speaker, instead of 76. But at least the GOP could deny Laney the additional Democratic vote.

"I don't see any compelling reason to just hand over the seat to the other side," Clark said. Plus, he said, if he returns to Austin for the session, "the district would have someone with three terms of seniority rather than someone who's never won an election against a

real person."

And yet with Bush and top senators howling about Democratic foot-dragging on filling judicial vacancies, Clark could put Bush in an uncomfortable position.

"(Clark) has 3,700 cases waiting for him over in that district," said Jarvis' campaign manager, Santos Martinez. "He needs to get to work. It's one of the districts that has been declared an emergency because of the backlog. He's got a job to do. The president's been clamoring for judges."

A Bush delay also might be seen as a partisan slap at Laney, supposedly a close friend of Bush's.

Legislative retirement isn't why he's asked for a delay, Clark said, because he'd have to serve until January 2004 to get the eight years of credit to qualify.

Clark did say if Bush signs the letter, he'll put on the judicial robe.

"I'm a private," Clark said. "Whatever instructions I'm given I'll be willing to live by."

The last Texas legislator to go directly to a federal judgeship was Republican James Nowlin in 1981. Nominated in February, Nowlin got Senate confirmation Oct. 22 and took the oath Nov. 6. But that was after the legislative session and well before the election year.

Dave McNeely's column appears Thursdays. Contact him at 445-3644 or dmcneely@statesman.com.

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Sunday, October 6, 2002 1:37 PM
To: Dinh, Viet
Cc: Charnes, Adam; Benczkowski, Brian A; Willett, Don; Remington, Kristi L; Sales, Nathan; Koebele, Steve; Keefer, Wendy J

President's remarks on judges on October 5, 2002, at New Hampshire event

. . . Another way to make sure we've got a strong country is to make sure that our federal bench is a bench full of judges that don't use their position from which to legislate. We've got plenty of legislators. We don't need our judges legislating, we need them strictly interpreting the Constitution. (Applause.)

That's an issue in this campaign -- the bench is an issue in this campaign. I named a fabulous lady from Texas, named Priscilla Owen. She'd been running statewide in our state several times, got elected overwhelmingly, had strong Republican support, strong Democrat support. Number one in her law school class, or tops of her law school class. She's ranked the highest rating possible by the American Bar Association. She is a -- you know, she'll interpret the Constitution, she's not going to try to rewrite it.

And I sent her name up there and they -- they weren't fair with her record. They totally politicized the issue. They made this a huge political deal. For the sake of a solid judiciary, I need John Sununu in the United States Senate. (Applause.)

I named a new man, named Miguel Estrada, to one of our higher benches. It's a great American success story. He couldn't speak English when he came here -- he's now being nominated by the President to one of the highest benches because he's a brilliant lawyer. He's got fantastic support from Democrats and Republicans. John Sununu will cast his vote with Miguel. Judd Gregg would. I wonder if the other candidate in this race will stand up and support the judicial nominees of a President George W. Bush. For the sake of a strong judiciary, we need John Sununu in the United States Senate. (Applause.) . . .

Dinh, Viet

From: Dinh, Viet
Sent: Friday, October 4, 2002 2:23 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re:

(b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Fri Oct 04 08:46:52 2002
Subject:

Is the AG giving that speech on judges? Draft available?

Sales, Nathan

From: Sales, Nathan
Sent: Thursday, October 3, 2002 7:58 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Brent McIntosh

Brett, I talked with McIntosh this week, and I don't think (b) (5)

(b) (5)

Joy, Sheila

From: Joy, Sheila
Sent: Wednesday, October 2, 2002 7:35 PM
To: Dinh, Viet; Charnes, Adam; Willett, Don; Keefer, Wendy J; Remington, Kristi L; Benedi, Lizette D; Sales, Nathan; Benczkowski, Brian A; Hall, William; Loughlin, Ann L (OLP); Koebele, Steve; 'H._Christopher_Bartolomucci@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; Scottfinan, Nancy; Goodling, Monica
Subject: Judicial Confirmations

The Senate confirmed the following judicial nominees by u/c this evening, 10/2

James Gardner	PA,E
Ron Clark	TX, E
Larry Block	Federal Claims

Sheila C. Joy
Office of Legal Policy
USDOJ, Rm 4229
202 514-1607

007104-002191

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, October 3, 2002 6:02 PM
To: Joy, Sheila; Charnes, Adam; Keefer, Wendy J; Remington, Kristi L; Benedi, Lizette D; Sales, Nathan; Willett, Don; Benczkowski, Brian A; Hall, William; Loughlin, Ann L (OLP); Koebele, Steve; 'H._Christopher_Bartolomucci@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Additional nominees have been added to Monday's hearing - Prep session is going to be at 4:00 pm Sunday in OLP conference Room

Ron Leighton!!! Three cheers for affirming the President's nomination authority free from the interference of the Committee for Public Safety--I mean a nominating commission.

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

From: Joy, Sheila
Sent: Thursday, October 03, 2002 5:57 PM
To: Dinh, Viet; Charnes, Adam; Keefer, Wendy J; Remington, Kristi L; Benedi, Lizette D; Sales, Nathan; Willett, Don; Benczkowski, Brian A; Hall, William; Loughlin, Ann L (OLP); Koebele, Steve; 'H. Christopher Bartolomucci@who.eop.gov'; 'Brett M. Kavanaugh@who.eop.gov'; 'Bradford A. Berenson@who.eop.gov'
Subject: Additional nominees have been added to Monday's hearing - Prep session is going to be at 4:00 pm Sunday in OLP conference Room

Ron Leighton WA,W
Rosemary Collyer DC
Gary Klausner CA,C

Sheila C. Joy
Office of Legal Policy
USDOJ, Rm 4641
202 514-1607

007104-002192

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, October 2, 2002 5:59 PM
To: 'Bradford_A._Berenson@who.eop.gov'; '/DDV=H._Christopher_Bartolomucci@who.eop.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/'
Cc: Charnes, Adam; Willett, Don; Keefer, Wendy J; 'Noel_J._Francisco@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'Jennifer_G._Newstead@who.eop.gov'; 'Benjamin_A._Powell@who.eop.gov'; 'Kyle_Sampson@who.eop.gov'; 'Helgard_C._Walker@who.eop.gov'
Subject: RE: Another Hearing

Nominees on Monday are:

Linares
Kugler
Fuller
Smith

No circuit nominee as of yet.

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

From: Bradford_A._Berenson@who.eop.gov
[mailto:Bradford_A._Berenson@who.eop.gov]
Sent: Wednesday, October 02, 2002 5:51 PM
To:
/DDV=H._Christopher_Bartolomucci@who.eop.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/
Cc: Charnes, Adam; Willett, Don; Dinh, Viet; Keefer, Wendy J;
Noel_J._Francisco@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov;
Jennifer_G._Newstead@who.eop.gov; Benjamin_A._Powell@who.eop.gov;
Kyle_Sampson@who.eop.gov; Helgard_C._Walker@who.eop.gov
Subject: Re: Another Hearing

(b) (5)

H. Christopher Bartolomucci
10/02/2002 05:41:14 PM

Record Type: Record

007104-002193

To: See the distribution list at the bottom of this message

cc:

Subject: Another Hearing

I hear that there will be a confirmation hearing on Monday for the two remaining New Jersey district court nominees.

Message Sent To: _____

Bradford A. Berenson/WHO/EOP@EOP
Noel J. Francisco/WHO/EOP@EOP
Brett M. Kavanaugh/WHO/EOP@EOP
Jennifer G. Newstead/WHO/EOP@EOP
Benjamin A. Powell/WHO/EOP@EOP
Kyle Sampson/WHO/EOP@EOP
Helgard C. Walker/WHO/EOP@EOP

Charnes, Adam

From: Charnes, Adam
Sent: Monday, September 30, 2002 3:01 PM
To: Brett M. Kavanaugh (E-mail); Dinh, Viet
Subject: FW: Charts
Attachments: FormerSGOfficeWork.xls; NoPriorJudicialExp.xls; Judicial listfinal.xls; Judicial listalphabetical.xls

Here are the accompanying charts.

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

From: Sales, Nathan
Sent: Monday, September 30, 2002 2:27 PM
To: Benczkowski, Brian A; Charnes, Adam; Keefer, Wendy J; Koebele, Steve
Subject: Charts

Sorry to do this again, but here are new versions of the charts. I found another DOJ lawyer whom Carter appointed to the appellate division of the Court of Claims in 1978.

Name	Circuit	Year	DOJ Positions	Prior Judicial Experience	SG's Office
Friedman, Daniel M.	Fed.	1978	Assistant to SG, 1959-62; Second Assistant to SG, 1962-68; First Deputy SG, 1968-78; Acting SG, 1977	No	Yes
Posner, Richard A.	7	1981	Assistant to the SG, 1965-67	No	Yes
Bork, Robert Heron	DC	1981	SG of the United States, 1973-1977; Acting Attorney General of the United States, 1973-1974	No	Yes
Easterbrook, Frank H.	7	1985	Assist to the SG, 1974-77; Deputy SG, 1978-79	No	Yes
Boggs, Danny J.	6	1986	Assistant to the U.S. SG, 1973-75	No	Yes
Alito, Samuel A. Jr.	3	1990	Assistant to the U.S. solicitor general, 1981-85; Deputy assistant U.S. attorney general, 1985-87; Assistant US Attorney,	No	Yes
Randolph, A. Raymond	DC	1990	Assistant to SG, 1970-73; Deputy SG, 1975-77	No	Yes
Bryson, William Curtis	Fed.	1994	Assistant to the SG (1978-79); Chief, Appellate Section, Criminal Division, 1979-1982; Special counsel, Organized Crime and Racketeering Section, Criminal Division, 1982-1986; Deputy U.S. SG, 1986-1994; Deputy associate U.S. attorney general (acting associate U.S. attorney general), 1994	No	Yes

Name	Circuit	Year	DOJ Positions	Prior Judicial Experience	SG's Office
Alito, Samuel A. Jr.	3	1990	Assistant to the SG, 1981-85; Deputy Assistant U.S. Attorney General, 1985-87; Assistant U.S. Attorney, 1977-81; U.S. Attorney DNJ, 1987-90	No	Yes
Anderson, Stephen H.	10	1985	Trial Attorney, Tax Division, 1960-64	No	No
Archer, Glenn L.	Fed.	1985	AAG, Tax Division, 1981-85	No	No
Barry, Maryanne	3	1999	1983; Assistant U.S. Attorney, Civil Division, 1974-1975; Deputy Chief, Appeals Division, 1976-1977; Chief, Appeals Division, 1977-1982; Executive Assistant U.S. Attorney, 1981-1982; First Assistant U.S. Attorney, 1981-1983	Yes	No
Boggs, Danny J.	6	1986	Assistant to the SG, 1973-75	No	Yes
Boochever, Robert	9	1980	Assistant U.S. Attorney, AK, 1946-47	Yes	No
Bork, Robert Heron	DC	1981	SG of the United States, 1973-1977; Acting Attorney General of the United States, 1973-1974	No	Yes
Boudin, Michael	1	1992	Deputy AAG for Regulatory Affairs, Anti-Trust, 1987-89; Acting AAG, 1989; Deputy AAG for Anti-Trust Policy and Legislation, 1989-90	Yes	No
Breyer, Stephen G.	1	1980	Special Assistant to Assistant U.S. Attorney General for Antitrust, 1965-1967	No	No
Briscoe, Mary Beck	10	1995	Assistant U.S. Attorney, DKS 1974-84	Yes	No
Curtis	Fed.	1994	Appellate Section, Criminal Division,	No	Yes
Bye, Kermit E.	8	1999	Assistant U.S. Attorney, DND, 1966-1968	No	No
Cole, R. Guy	6	1995	Trial Attorney, Civil Division, 1978-80	Yes	No
Cyr, Conrad	1	1989	Assistant US Attorney, Maine, 1959-1961	Yes	No
Daughtrey, Martha C.	6	1993	Assistant U.S. Attorney, MDTN 1968-69	Yes	No
Dyk, Timothy	Fed.	2000	Special Assistant to AAG, Tax Division, 1963-64	No	No
Easterbrook, Frank H.	7	1985	Assistant to the SG, 1974-77; Deputy SG, 1978-79	No	Yes
Fisher, Raymond C.	9	1999	Associate Attorney General, 1997-99	No	No
Flaum, Joel Martin	7	1983	First Assistant U.S. Attorney for the Northern District of Illinois, 1972-1975	No	No
Friedman, Daniel M.	Fed.	1978	Assistant to SG, 1959-62; Second Assistant to SG, 1962-68; First Deputy SG, 1968-78; Acting SG, 1977	No	Yes

Garland, Merrick B.	DC	1997	Special Assistant U.S. Attorney General, 1979-1981; Assistant U.S. Attorney, DC, 1989-1992; Deputy Assistant U.S. Attorney General, Criminal Division, 1993-1994; Principal Associate Deputy U.S. Attorney General, 1994-1997	No	No
Ginsburg, Douglas Howard	DC	1986	Deputy Assistant U.S. Attorney General, Antitrust Division, 1983-1984; Assistant U.S. Attorney General, Antitrust Division, 1985-1986	No	No
Guy, Ralph B.	6	1985	Chief Assistant U.S. Attorney, EDMI, 1968-70; U.S. Attorney, EDMI, 1970-76	Yes	No
Hall, Cynthia H.	9	1984	Trial Attorney, Tax Division, 1960-64	Yes	No
Hartz, Harris L.	10	2001	Assistant U.S. Attorney, NM, 1972-75	Yes	No
Hatchett, Joseph	5	1979	Assistant U.S. Attorney, MDL, 1966; First Assistant U.S. Attorney, MDL, 1967-1971	Yes	No
Hawkins, Michael D.	9	1994	U.S. Attorney, AZ, 1977-80	Yes	No
Howard, Jeffrey R.	1	2002	U.S. Attorney for DNH, 1989-1993	No	No
Johnson, Frank M.	5	1979	U.S. Attorney for AL, 1953-55	No	No
Jolly, E. Grady	5	1982	Assistant U.S. Attorney, NDMS, 1964-1967; Trial Attorney, Tax Division, 1967-69	No	No
Jones, Nathaniel	6	1979	Assistant U.S. Attorney DOJ, 1961-67	No	No
King, Robert B.	4	1998	Assistant U.S. Attorney SDWV, 1970-74; U.S. Attorney SDWV, 1977-81	No	No
Krupansky, Robert B.	6	1982	U.S. Attorney, NDOH, 1969-1970	Yes	No
Level, Pierre	2	1993	Assistant U.S. Attorney, SDNY 1964-68	Yes	No
Lewis, Timothy K.	3	1992	Assistant U.S. Attorney, WDPA, 1983-1991	Yes	No
Lipez, Kermit	1	1998	Staff Attorney, Civil Rights Division, USDOJ Honor Program, 1967-1968	Yes	No
Luttig, J. Michael	4	1991	Principal Deputy AAG, OLC, 1989-90; AAG, OLC, 1990-91; Counselor to the Attorney General, 1990-91	No	No
Marcus, Stanley	11	1997	1978; U.S. Attorney SDFL, 1982-1985	Yes	No
Martin, Boyce F.	6	1979	U.S. Attorney WDKY, 1965	Yes	No
McKee, Theodore	3	1994	Assistant U.S. Attorney EDPA, 1977-80	Yes	No

Jr.	6	1977	U.S. Attorney, MDTN, 1966-1969	No	No
Michael, M. Blane	4	1993	1972; Assistant U.S. Attorney SDNY,	No	No
Michel, Paul R.	Fed.	1988	ADAG, 1978-81	No	No
Newman, Jon O.	2	1979	U.S. Attorney for CT, 1964-69	Yes	No
Poole, Cecil F.	9	1979	U.S. Attorney for the NDCA, 1961-1970	Yes	No
Posner, Richard A.	7	1981	Assistant to the SG, 1965-67	No	Yes
Randolph, A. Raymond	DC	1990	Assistant to SG, 1970-73; Deputy SG, 1975-77	No	Yes
Rogers, Judith Ann Wilson	DC	1993	Assistant U.S. Attorney, DC, 1965-1968; Trial Attorney, Criminal Division, 1969-1971	Yes	No
Rovner, Iiana D.	7	1992	Assistant U.S. Attorney NDIL, 1973-77	No	No
Scalia, Antonin	DC	1982	AAG, OLC, 1974-1977	No	No
Schall, Alvin	Fed.	1992	Assistant U.S. Attorney, EDNY, 1973-78; Trial Counsel, Senior Trial Counsel Civil Division, 1978-87; Assistant to AG, 1988-92	No	No
Schroeder, Mary M.	9	1979	Trial Attorney, Civil Division, 1965-69;	Yes	No
Sentelle, David B.	DC	1987	Assistant U.S. Attorney, NC, 1970-1974	Yes	No
Silberman, Laurence H.	DC	1985	Deputy Attorney General, 1974-1975	No	No
Siler, Eugene E.	6	1991	US Attorney DKY, 1970-75	Yes	No
Smith, Edward Samuel	Fed.	1978	Chief of trial section, Tax Division, 1961; DAAG for civil trials, Tax Division, 1962-63	No	No
Starr, Kenneth Winston	DC	1983	Counselor to the U.S. Attorney General, 1981-1983	No	No*
Stewart, Carl E.	5	1994	Assistant U.S. attorney, WDLA, 1979-1983	Yes	No
Tallman, Richard	9	2000	Trial Attorney, Criminal Division, 1979-80; Assistant U.S. Attorney, WA, 1980-83	No	No
Trott, Stephen	9	1988	U.S. Attorney, C.D. Cal., 1981-83; Assistant Attorney General, Criminal Division, 1983-86; Associate Attorney General, 1986-88	No	No
Wald, Patricia M.	DC	1979	Attorney, Office of Criminal Justice, U.S. Department of Justice, 1967-1968; Assistant Attorney General for Legislative Affairs, 1977-1979	No	No
Walker, John M.	2	1989	Assistant U.S. Attorney, Criminal Division, New York, 1970-1975	No	No
Wilkinson, James H.	4	1983	Deputy AAG, Civil Rights Division, 1982-83	Yes	No

Williams, Ann C.	7	1999	Assistant U.S. Attorney NDIL, 1976-85	Yes	No
Williams, Stephen Fain	DC	1986	Assistant U.S. Attorney, SDNY, 1966-1969	No	No
Wilson, Charles R.	11	1999	U.S. Attorney, MDL, 1994-99	Yes	No
Wood, Diane P.	7	1995	Special Assistant to AAG, 1985-87; Deputy AAG, Anti-Trust and International, Appellate, and Legal Policy Matters, 1993-95	No	No

Name	Circuit	Year	DOJ Positions	Prior Judicial Experience	SG's Office
Merritt, Gilbert Stroud Jr.	6	1977	U.S. Attorney, MDTN, 1966-1969	No	No
Friedman, Daniel M.	Fed.	1978	Assistant to SG, 1959-62; Second Assistant to SG, 1962-68; First Deputy SG, 1968-78; Acting SG, 1977	No	Yes
Smith, Edward Samuel	Fed.	1978	Chief of trial section, Tax Division, 1961; DAAG for civil trails, Tax Division, 1962-63	No	No
Newman, Jon O.	2	1979	US. Attorney for CT, 1964-69	Yes	No
Hatchett, Joseph	5	1979	Assistant U.S. Attorney, MDFL, 1966; First Assistant U.S. Attorney, MDFL, 1967-1971	Yes	No
Johnson, Frank M.	5	1979	U.S. Attorney for AL, 1953-55	No	No
Jones, Nathaniel	6	1979	Assistant U.S. Attorney DOJ, 1961-67	No	No
Martin, Boyce F.	6	1979	Assistant U.S. Attorney WDKY, 1964-65; U.S. Attorney WDKY, 1965	Yes	No
Poole, Cecil F.	9	1979	U.S. Attorney for the NDCA, 1961-1970	Yes	No
Schroeder, Mary M.	9	1979	Trial Attorney, Civil Division, 1965-69;	Yes	No
Wald, Patricia M.	DC	1979	Attorney, Office of Criminal Justice, U.S. Department of Justice, 1967-1968; Assistant Attorney General for Legislative Affairs, 1977-1979	No	No
Breyer, Stephen G.	1	1980	Attorney General for Antitrust, 1965-1967	No	No
Boochever, Robert	9	1980	Assistant U.S. Attorney, AK, 1946-47	Yes	No
Posner, Richard A.	7	1981	Assistant to the SG, 1965-67	No	Yes
Bork, Robert Heron	DC	1981	SG of the United States, 1973-1977; Acting Attorney General of the United States, 1973-1974	No	Yes
Jolly, E. Grady	5	1982	Assistant U.S. Attorney, NDMS, 1964-1967; Trial Attorney, Tax Division, 1967-69	No	No
Krupansky, Robert B.	6	1982	U.S. Attorney, NDOH, 1969-1970	Yes	No
Scalia, Antonin	DC	1982	AAG, OLC, 1974-1977	No	No
Wilkinson, James H.	4	1983	Deputy AAG, Civil Rights Division, 1982-83	Yes	No
Flaum, Joel Martin	7	1983	First Assistant U.S. Attorney for the Northern District of Illinois, 1972-1975	No	No
Starr, Kenneth Winston	DC	1983	Counselor to the U.S. Attorney General, 1981-1983	No	No*
Hall, Cynthia H.	9	1984	Trial Attorney, Tax Division, 1960-64	Yes	No
Guy, Ralph B.	6	1985	Chief Assistant U.S. Attorney, EDMl, 1968-70; U.S. Attorney, EDMl, 1970-76	Yes	No
Easterbrook, Frank H.	7	1985	Assistant to the SG, 1974-77; Deputy SG, 1978-79	No	Yes

Anderson, Stephen H.	10	1985	Trial Attorney, Tax Division, 1960-64	No	No
Silberman, Laurence H.	DC	1985	Deputy Attorney General, 1974-1975	No	No
Archer, Glenn L.	Fed.	1985	AAG, Tax Division, 1981-85	No	No
Boggs, Danny J.	6	1986	Assistant to the SG, 1973-75	No	Yes
Ginsburg, Douglas Howard	DC	1986	Deputy Assistant U.S. Attorney General, Antitrust Division, 1983-1984; Assistant U.S. Attorney General, Antitrust Division, 1985-1986	No	No
Williams, Stephen Fain	DC	1986	Assistant U.S. Attorney, SDNY, 1966-1969	No	No
Sentelle, David B.	DC	1987	Assistant U.S. Attorney, NC, 1970-1974	Yes	No
Trott, Stephen	9	1988	U.S. Attorney, C.D. Cal., 1981-83; Assistant Attorney General, Criminal Division, 1983-86; Associate Attorney General, 1986-88	No	No
Michel, Paul R.	Fed.	1988	ADAG, 1978-81	No	No
Cyr, Conrad	1	1989	Assistant U.S. Attorney, Maine, 1959-1961	Yes	No
Walker, John M.	2	1989	Assistant U.S. Attorney, Criminal Division New York, 1970-1975	No	No
Alito, Samuel A. Jr.	3	1990	1981-85; Deputy Assistant Attorney General, 1985-87; Assistant U.S. Attorney, 1977-81; U.S. Attorney DNJ,	No	Yes
Randolph, A. Raymond	DC	1990	Assistant to SG, 1970-73; Deputy SG, 1975-77	No	Yes
Luttig, J. Michael	4	1991	AAG, OLC, 1990-91; Counselor to the	No	No
Siler, Eugene E.	6	1991	U.S. Attorney DKY, 1970-75	Yes	No
Boudin, Michael	1	1992	Trust, 1987-89; Acting AAG, 1989;	Yes	No
Lewis, Timothy K.	3	1992	1991	Yes	No
Rovner, Iiana D.	7	1992	Assistant U.S. Attorney NDIL, 1973-77	No	No
Schall, Alvin	Fed.	1992	Trial Counsel, Senior Trial Counsel Civil	No	No
Level, Pierre	2	1993	Assistant U.S. Attorney, SDNY 1964-68	Yes	No
Michael, M. Blane	4	1993	Special Assistant U.S. Attorney NDWV, 1972; Assistant U.S. Attorney SDNY, 1971-72	No	No
Daughtrey, Martha C.	6	1993	Assistant U.S. Attorney, MDTN 1968-69	Yes	No
Rogers, Judith Ann Wilson	DC	1993	Assistant U.S. Attorney, DC, 1965-1968; Trial Attorney, Criminal Division, 1969-1971	Yes	No

McKee, Theodore	3	1994	Assistant U.S. Attorney EDPA, 1977-80	Yes	No
Stewart, Carl E.	5	1994	Assistant U.S. attorney, WDLA, 1979-1983	Yes	No
Hawkins, Michael D.	9	1994	U.S. Attorney, AZ, 1977-80	Yes	No
Bryson, William Curtis	Fed.	1994	Assistant to the SG (1978-79); Chief, Appellate Section, Criminal Division, 1979-1982; Special Counsel, Organized Crime and Racketeering Section, Criminal Division, 1982-1986; Deputy SG, 1986-1994; Deputy Associate Attorney General (Acting Associate U.S. Attorney General), 1994	No	Yes
Cole, R. Guy	6	1995	Trial Attorney, Civil Division, 1978-80	Yes	No
Wood, Diane P.	7	1995	Special Assistant to AAG, 1985-87; Deputy AAG, Anti-Trust and International, Appellate, and Legal Policy Matters, 1993-95	No	No
Briscoe, Mary Beck	10	1995	Assistant U.S. Attorney, DKS, 1974-84	Yes	No
Marcus, Stanley	11	1997	Assistant U.S. Attorney, EDNY, 1975-1978; U.S. Attorney SDFL, 1982-1985	Yes	No
Garland, Merrick B.	DC	1997	1979-1981; Assistant U.S. Attorney, DC,	No	No
Lipez, Kermit	1	1998	Staff attorney, Civil Rights Division, USDOJ Honor Program, 1967-1968	Yes	No
King, Robert B.	4	1998	Assistant U.S. Attorney SDWV, 1970-74; U.S. Attorney SDWV, 1977-81	No	No
Barry, Maryanne	3	1999	Attorney, U.S. Attorney's Office, NJ, 1974-1983; Assistant U.S. Attorney, Civil Division, 1974-1975; Deputy Chief, Appeals Division, 1976-1977; Chief, Appeals Division, 1977-1982; Executive Assistant U.S. Attorney, 1981-1982; First Assistant U.S. Attorney, 1981-1983	Yes	No
Williams, Ann C.	7	1999	Assistant U.S. Attorney NDIL, 1976-85	Yes	No
Bye, Kermit E.	8	1999	Assistant U.S. Attorney, DND, 1966-1968	No	No
Fisher, Raymond C.	9	1999	Associate Attorney General, 1997-99	No	No
Wilson, Charles R.	11	1999	U.S. Attorney, MDFL, 1994-99	Yes	No
Tallman, Richard	9	2000	Trial Attorney, Criminal Division, 1979-80; Assistant U.S. Attorney, WA, 1980-83	No	No

Dyk, Timothy	Fed.	2000	Special Assistant to AAG, Tax Division, 1963-64	No	No
Hartz, Harris L.	10	2001	Assistant U.S. Attorney, NM, 1972-75	Yes	No
Howard, Jeffrey R.	1	2002	U.S. Attorney for DNH, 1989-1993	No	No

Name	Circuit	Year	DOJ Positions	Prior Judicial Experience	SG's Office
Merritt, Gilbert Stroud Jr.	6	1977	U.S. Attorney, MDTN, 1966-1969	No	No
Friedman, Daniel M.	Fed.	1978	Assistant to SG, 1959-62; Second Assistant to SG, 1962-68; First Deputy SG, 1968-78; Acting SG, 1977	No	Yes
Smith, Edward Samuel	Fed.	1978	Chief of trial section, Tax Division, 1961; DAAG for civil trials, Tax Division, 1962-63	No	No
Johnson, Frank M.	5	1979	US. Attorney for AL, 1953-55	No	No
Jones, Nathaniel	6	1979	Assist US Attorney DOJ, 1961-67	No	No
Wald, Patricia M.	DC	1979	Attorney, Office of Criminal Justice, U.S. Department of Justice, 1967-1968; Assistant attorney general for legislative affairs, 1977-1979	No	No
Breyer, Stephen G.	1	1980	Special assistant to assistant U.S. attorney general for antitrust, 1965-1967	No	No
Posner, Richard A.	7	1981	Assistant to the SG, 1965-67	No	Yes
Bork, Robert Heron	DC	1981	SG of the United States, 1973-1977; Acting Attorney General of the United States, 1973-1974	No	Yes
Jolly, E. Grady	5	1982	Assistant U.S. attorney, NDMS, 1964-1967; Trial Attorney, Tax Division, 1967-69	No	No
Scalia, Antonin	DC	1982	AAG, OLC, 1974-1977	No	Yes
Flaum, Joel Martin	7	1983	First assistant U.S. attorney for the Northern District of Illinois, 1972-1975	No	No
Starr, Kenneth Winston	DC	1983	Counselor to the U.S. attorney general, 1981-1983	No	Yes
H.	7	1985	1978-79	No	Yes
Anderson, Stephen H.	10	1985	Trial attorney, Tax Division, 1960-64	No	No
Silberman, Laurence H.	DC	1985	Deputy attorney general, 1974-1975	No	No
Archer, Glenn L.	Fed.	1985	AAG, Tax Division, 1981-85	No	No
Boggs, Danny J.	6	1986	Assistant to the U.S. SG, 1973-75	No	Yes
Ginsburg, Douglas Howard	DC	1986	Deputy assistant U.S. attorney general, Antitrust Division, 1983-1984; Assistant U.S. attorney general, Antitrust Division, 1985-1986	No	No
Williams, Stephen Fain	DC	1986	Assistant U.S. attorney, SDNY, 1966-1969	No	No
Trott, Stephen	9	1988	U.S. Attorney, C.D. Cal., 1981-83; Assistant Attorney General, Criminal Division, 1983-86; Associate Attorney General, 1986-88	No	No

Michel, Paul R.	Fed.	1988	ADAG, 1978-81	No	No
Walker, John M.	2	1989	Assistant US Attorney, Criminal Division, New York, 1970-1975	No	No
Alito, Samuel A. Jr.	3	1990	Assistant to the U.S. solicitor general, 1981-85; Deputy assistant U.S. attorney general, 1985-87; Assistant US Attorney, 1977-81; US Attorney DNJ, 1987-90	No	Yes
Randolph, A. Raymond	DC	1990	Assistant to SG, 1970-73; Deputy SG, 1975-77	No	Yes
Luttig, J. Michael	4	1991	AAG, OLC, 1990-91; Counselor to the Attorney General, 1990-91	No	No
Rovner, Iiana D.	7	1992	Assist US Attorney NDIL, 1973-77	No	No
Schall, Alvin	Fed.	1992	Assist US Attorney, EDNY, 1973-78; Trial Counsel, Senior Trial Counsel Civil Division, 1978-87; Assist to AG, 1988-92	No	No
Michael, M. Blane	4	1993	Special Assist US Attorney NDWV, 1972; Assist US Attorney SDNY, 1971-72	No	No
Bryson, William Curtis	Fed.	1994	Assistant to the SG (1978-79); Chief, Appellate Section, Criminal Division, 1979-1982; Special counsel, Organized Crime and Racketeering Section, Criminal Division, 1982-1986; Deputy U.S. SG, 1986-1994; Deputy associate U.S. attorney general (acting associate U.S. attorney general), 1994	No	Yes
Wood, Diane P.	7	1995	Special Assist to AAG, 1985-87; Deputy AAG, Anti-Trust and International, Appellate, and Legal Policy Matters, 1993-95	No	No
Garland, Merrick B.	DC	1997	Special assistant U.S. attorney general, 1979-1981; Assistant U.S. attorney, DC, 1989-1992; Deputy assistant U.S. attorney general, Criminal Division, 1993-1994; Principal associate deputy U.S. attorney general, 1994-1997	No	No
King, Robert B.	4	1998	Assist US Attorney SDWV, 1970-74; US Attorney SDWV, 1977-81	No	No
Bye, Kermit E.	8	1999	Assistant U.S. Attorney, DND, 1966-1968	No	No
Fisher, Raymond C.	9	1999	Associate Attorney General, 1997-99	No	No

Tallman, Richard	9	2000	Trial Attorney, Criminal Division, 1979-80; Assistant U.S. Attorney, WA, 1980-83	No	No
Dyk, Timothy	Fed.	2000	Special Assistant to AAG, Tax Division, 1963-64	No	No
Howard, Jeffrey R.	1	2002	U.S. Attorney for DNH, 1989-1993	No	No

Charnes, Adam

From: Charnes, Adam
Sent: Monday, September 30, 2002 3:00 PM
To: Brett M. Kavanaugh (E-mail); Dinh, Viet
Cc: Benczkowski, Brian A; Sales, Nathan; Keefer, Wendy J; Koebele, Steve
Subject: Estrada SG documents letter.doc
Attachments: Estrada SG documents letter.doc

Viet/Brett, attached is a draft of the letter for your review.

007104-002208

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Saturday, September 28, 2002 2:53 PM
To: Charnes, Adam
Cc: Dinh, Viet
Subject: Holmstead info
Attachments: ATTACHMENT.TXT

This is excerpt from letter to Jeffords last July that gives you the basic info:

We have received your July 20 letter requesting access to 41 files of Jeffrey Holmstead from the time that he worked as an Associate Counsel to President George H.W. Bush. As we informed Senator Reid on July 9, in response to a similar request, we respectfully decline your request for these records. Mr. Holmstead was a White House advisor and attorney for President George H.W. Bush when the documents in question were created and received. The documents therefore will fall, almost by definition, within the deliberative process, presidential communications, and government attorney-client and work product protections, all of which ensure that high-level Presidential advisors and attorneys can and do provide candid advice to the President.

Your letter also indicates a specific concern about Mr. Holmstead

007104-002209

's

testimony before the Committee with respect to the WEPCo matter. In order to allay that concern and to accommodate the Committee's interests, we authorized two members of the Committee's staff to review certain specific records pertaining to that matter, with appropriate guarantees of confidentiality and without waiving privileges that apply to those records. That review has now occurred, and we understand that it has alleviated concern with respect to that matter.

Sales, Nathan

From: Sales, Nathan
Sent: Wednesday, September 25, 2002 7:40 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Miguel report

Try my cell. (b) (6)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, September 25, 2002 7:34 PM
To: Sales, Nathan
Subject: RE: Miguel report

will call you in 20 minutes; what number?

(Embedded
image moved "Sales, Nathan" <Nathan.Sales@usdoj.gov>
to file: 09/25/2002 07:12:45 PM
pic14530.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, Mercedes M. Viana/WHO/EOP@EOP, Leonard B. Rodriguez/WHO/EOP@EOP

cc:
Subject: RE: Miguel report

Any comments? Sorry to be a pest, but we'd like to have this thing finalized so we can put it on the web page first thing in the morning.

-----Original Message-----
From: Sales, Nathan

007104-002211

From: Sales, Nathan

Sent: Wednesday, September 25, 2002 6:14 PM

To: 'Mercedes_M._Viana@who.eop.gov'; 'Leonard_B._Rodriguez@who.eop.gov'

Subject: FW: Miguel report

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

From: Sales, Nathan

Sent: Wednesday, September 25, 2002 6:07 PM

To: Brett Kavanaugh (E-mail)

Subject: Miguel report

Brett,

Here's our proposed MALDEF response. (b) (5)

(b) (5)

Gracias!

Nathan

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, September 25, 2002 8:46 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: thanks for message

what message? don't know what you're talking about!

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, September 24, 2002 7:14 PM
To: Dinh, Viet
Subject: thanks for message

007104-002213

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, September 24, 2002 3:51 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Williams, Paula; 'MEstrada@gibsondunn.com'
Cc: Benczkowski, Brian A; Charnes, Adam
Subject: RE: another time change for Sen. Feinstein...

(b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, September 24, 2002 2:46 PM
To: Williams, Paula; MEstrada@gibsondunn.com
Cc: Benczkowski, Brian A; Charnes, Adam; Dinh, Viet;
Brett_M._Kavanaugh@who.eop.gov
Subject: Re: another time change for Sen. Feinstein...

(b) (5)

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

From:<MEstrada@gibsondunn.com>
To:<Paula.Williams@usdoj.gov>
Cc:<adam.charnes@usdoj.gov>,
<viet.Dinh@usdoj.gov>,
<Brian.A.Benczkowski@usdoj.gov>,
Brett M. Kavanaugh/WHO/EOP@EOP
Date: 09/24/2002 02:40:05 PM
Subject: RE: another time change for Sen. Feinstein...

I am supposed to have an all morning meeting tomorrow with the folks at OLP.
What do you guys think?

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

From: Williams, Paula [mailto:Paula.Williams@usdoj.gov]
Sent: Tuesday, September 24, 2002 2:34 PM
To: Estrada, Miguel A.
Subject: another time change for Sen. Feinstein...

For the moment, her scheduler has asked if you can meet in the morning at 10:30 a.m. Does this work for you? Thanks, Paula

007104-002214

=====

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

=====

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, September 24, 2002 3:49 PM
To: Benczkowski, Brian A; Sales, Nathan; Charnes, Adam; 'Kavanaugh, Brett'
Subject: FW: Judiciary Committee meeting this morning on Ideology on DC Circuit

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

From: James Lindgren [mailto:jlindgren@nwu.edu]
Sent: Tuesday, September 24, 2002 3:21 PM
To: Matthew Harrington; bushcheney-I
Subject: RE: Judiciary Committee meeting this morning on Ideology on DC Circuit

There is a classic article on ideology in judicial selection by Ray Solomon in the 1982? ABF Research Journal. He looked at US court of appeals judgeships in the first half of the last century. He found that some presidents appointed lions of the bar and senatorial favorites. Others nominated politicos, those who would forward the administration's agenda.

As I recall, both Roosevelts started out appointing lions of the bar, but fairly quickly switched to politically sympathetic sorts. Wilson started appointing pro-regulation types from the beginning. I think that the others between the Roosevelts favored competence over politics.

As for politicizing the judiciary, in my lifetime it started with the Warren Court or the reaction to the Warren Court. The next stage was Bork and the People for the American Way; then the Republican escalation and refusal to hold hearings during the Clinton administration, and now the absolute disaster we have.

Jim Lindgren
Northwestern

At 03:07 PM 9/24/2002 -0400, you wrote:

>I hesitate to raise this, but I wonder just when was it the case that
>ideology
>did not come into play?

007104-002216

Sales, Nathan

From: Sales, Nathan
Sent: Friday, September 20, 2002 10:25 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian
A; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: Re: PRLDEF Correspondence

Did (b) (5) ?

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

From: Estrada, Miguel A. <MEstrada@gibsondunn.com>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>; Sales, Nathan <Nathan.Sales@USDOJ.gov>; Charnes, Adam <Adam.Charnes@USDOJ.gov>; Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>; /DDV=Ryan_Higginbotham@judiciary.senate.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/ </DDV=Ryan_Higginbotham@judiciary.senate.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/>; Rena M. Johnson (E-mail) <rena_johnson@judiciary.senate.gov>; Brett M. Kavanaugh Esq. (E-mail) <Brett_M._Kavanaugh@who.eop.gov>
Sent: Fri Sep 20 21:13:33 2002
Subject: PRLDEF Correspondence

(b) (5)

007104-002217

(b) (5)

(b) (5)

=====

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=====

Joy, Sheila

From: Joy, Sheila
Sent: Friday, September 20, 2002 1:27 PM
To: Dinh, Viet; Charnes, Adam; Willett, Don; Keefer, Wendy J; Remington, Kristi L; Sales, Nathan; Benedi, Lizette D; Benczkowski, Brian A; Loughlin, Ann L (OLP); Hall, William; 'H._Christopher_Bartolomuci@who.eop.gov'; 'Bradford_A._Berenson@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; Scottfinan, Nancy
Subject: Prep Session and Hearing

Group prep session for next week's hearing: Wednesday, 9/25, at 2:00 pm, OLP Conference Room 4237

Hearing is at 10:00 am on Thursday, 9/26, with Senator Schumer as Chair for the following nominees:

Miguel Estrada	DC Circuit
Linda Reade	IA,N
James Hovland	ND
Stan Chesler	NJ
Freda Wolfson	NJ
Ed Kinkeade	TX,N

Sheila C. Joy
Office of Legal Policy
USDOJ, Rm 4229
202 514-1607

007104-002220

Sales, Nathan

From: Sales, Nathan
Sent: Thursday, September 19, 2002 4:23 PM
To: 'Estrada, Miguel A.'; Benczkowski, Brian A; Charnes, Adam; 'Brett M. Kavanaugh Esq. (E-mail)'; 'H. Christopher Bartolomucci (E-mail)'
Subject: RE: Can you meet with Sen. Feinstein

I found a report on the need for more hispanic judges.

<http://www.prldef.org/lib%5CJudges2000.pdf>

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

From: Estrada, Miguel A. [mailto:MEstrada@gibsondunn.com]
Sent: Thursday, September 19, 2002 4:21 PM
To: Benczkowski, Brian A; Sales, Nathan; Charnes, Adam; Brett M. Kavanaugh Esq. (E-mail); H. Christopher Bartolomucci (E-mail)
Subject: FW: Can you meet with Sen. Feinstein

FYI.

On another subject, I have a message from Tony Mauro who wants to talk to me about a "report" that the Puerto Rican Legal Defense and Education Fund has put out on my nomination. This is the first I have heard of it. Do you have a copy?

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

From: Williams, Paula [mailto:Paula.Williams@usdoj.gov]
Sent: Thursday, September 19, 2002 4:14 PM
To: Estrada, Miguel A.
Subject: Can you meet with Sen. Feinstein

on Wednesday, Sept. 25 at 2:45 p.m.?

Thanks, Paula

=====

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

007104-002221

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, September 17, 2002 1:43 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Charnes, Adam
Cc: 'Timothy_E._Flanigan@who.eop.gov'
Subject: RE: AG Letter re New Judgeships

We checked with OLA and for some reason they do not think this goes through the A-17 process, but I completely agree with you (b) (5)

(b) (5)

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

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, September 17, 2002 1:40 PM
To: Charnes, Adam
Cc: Dinh, Viet; Timothy_E._Flanigan@who.eop.gov
Subject: Re: AG Letter re New Judgeships

Looks great in concept. I will make specific suggestions (if I have any) later today. On process, I assume (b) (5)

(b) (5)

(Embedded
image moved "Charnes, Adam" <Adam.Charnes@usdoj.gov>
to file: 09/17/2002 01:29:16 PM
pic04224.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, Timothy E. Flanigan/WHO/EOP@EOP

cc: "Dinh, Viet" <Viet.Dinh@usdoj.gov>
Subject: AG Letter re New Judgeships

007104-002223

Next Tuesday, the AG will be speaking to the semi-annual meeting of the Judicial Conference and issuing a public statement afterwards. He will be urging swifter confirmation of the President's nominees and endorsing the Judicial Conference's request for 54 new judgeships. Attached is a draft letter to Congress on both subjects. Please let us know your thoughts, edits, etc.

Thanks very much.

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, September 17, 2002 1:42 PM
To: Charnes, Adam; 'Brett M. Kavanaugh (E-mail)'; 'Timothy E. Flanigan (E-mail)'
Cc: Bryant, Dan
Subject: RE: AG Letter re New Judgeships

Brett and Tim,

This follows up on Brett's request (b) (5)

(b) (5)

thanks much.

Viet

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

From: Charnes, Adam
Sent: Tuesday, September 17, 2002 1:29 PM
To: Brett M. Kavanaugh (E-mail); Timothy E. Flanigan (E-mail)
Cc: Dinh, Viet
Subject: AG Letter re New Judgeships

Next Tuesday, the AG will be speaking to the semi-annual meeting of the Judicial Conference and issuing a public statement afterwards. He will be urging swifter confirmation of the President's nominees and endorsing the Judicial Conference's request for 54 new judgeships. Attached is a draft letter to Congress on both subjects. Please let us know your thoughts, edits, etc.

Thanks very much.

<< File: New Judgeships letter.doc >> << File: hist. comparison chart (DRW 9-16-02).doc >>

007104-002225

APPENDIX

Judicial Appointments Historical Comparison: First Two Years of a Presidency

President	Nominations Submitted	Nominees Confirmed	Percentage of Nominees Confirmed	Circuit Court Nominations Submitted	Circuit Court Nominees Confirmed	Circuit Court Percentage of Nominees Confirmed
G.W. Bush (as of 9-13-02)	127	775	61%	32	13	41%
Clinton	140	126	90%	22	19	86%
George H.W. Bush	74	70	95%	23	22	96%
Reagan	88	87	99%	20	19	95%

Last Confirmation: September 13, 2002

Dinh, Viet

From: Dinh, Viet
Sent: Monday, September 16, 2002 8:41 AM
To: Koebele, Steve; 'brett_m._kavanaugh@who.eop.gov'; Charnes, Adam; Benczkowski, Brian A
Cc: Willett, Don; Keefer, Wendy J
Subject: R (b) (5)

(b) (5)
[REDACTED]. thanks

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

From: Koebele, Steve
Sent: Friday, September 13, 2002 2:04 PM
To: 'brett m. kavanaugh@who.eop.gov'; Charnes, Adam; Benczkowski, Brian A
Cc: Dinh, Viet; Willett, Don; Keefer, Wendy J
Subject: (b) (5)

Following up to our afternoon conference call and the potenti (b) (5), attached below is the link to Chief Justice Rhenquist's year end report (issued January 1, 2002) in which he says:

"It is becoming increasingly difficult to find qualified candidates for federal judicial vacancies. This is particularly true in the case of lawyers in private practice."

"The federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice." (identifies and describes Justices Brandeis, Harlan, Hand, White, Murrah, Marshall, Brown, Rives, Tuttle, and Wisdom).

The link...

<http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>

Thank you, Steve.

007104-002227

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, September 17, 2002 4:56 PM
To: Dinh, Viet; Charnes, Adam
Cc: Timothy_E._Flanigan@who.eop.gov
Subject: RE: AG Letter re New Judgeships

Adam and Viet: I just FAXed some suggested changes. Looks great and good timing. Many thanks.

Sales, Nathan

From: Sales, Nathan
Sent: Thursday, September 12, 2002 3:19 PM
To: 'Estrada, Miguel A.'; Benczkowski, Brian A; Charnes, Adam; 'Brett M. Kavanaugh Esq. (E-mail)'; 'H. Christopher Bartolomucci (E-mail)'
Subject: RE: Letter to Leahy

One nitpick: in the first para, you state that you served in the Clinton Administration from 1993-1994. Shouldn't that be 1993-1997?

I also have a more general comment: (b) (5)

(b) (5)

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

From: Estrada, Miguel A. [mailto:MEstrada@gibsondunn.com]
Sent: Thursday, September 12, 2002 1:59 PM
To: Sales, Nathan; Benczkowski, Brian A; Charnes, Adam; Brett M. Kavanaugh Esq. (E-mail); H. Christopher Bartolomucci (E-mail)
Subject: Letter to Leahy

<<70210599_1_.doc>> Please let me know of any changes that you think might be advisable. I would like to send the materials up soonish.

=====

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

=====

007104-002229

Sales, Nathan

From: Sales, Nathan
Sent: Thursday, September 12, 2002 10:42 AM
To: Joy, Sheila; Dinh, Viet; Charnes, Adam; Willett, Don; Keefer, Wendy J; Remington, Kristi L; Benedi, Lizette D; Benczkowski, Brian A; Loughlin, Ann L (OLP); Hall, William; Koebele, Steve; Sutton, Jason; Coehins, Bridget C; 'H._Christopher_Bartolomuci@who.eop.gov'; 'Bradford_A.Berenson@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'; 'Kyle_Sampson@who.eop.gov'; Scottfinan, Nancy
Subject: RE: Judicial Hearing Prep Session and Hearing notice

[Didn't we schedule a prep session for Estrada at the same time?](#)

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

From: Joy, Sheila
Sent: Thursday, September 12, 2002 10:40 AM
To: Dinh, Viet; Charnes, Adam; Willett, Don; Keefer, Wendy J; Remington, Kristi L; Benedi, Lizette D; Sales, Nathan; Benczkowski, Brian A; Loughlin, Ann L (OLP); Hall, William; Koebele, Steve; Sutton, Jason; Coehins, Bridget C; 'H. Christopher Bartolomuci@who.eop.gov'; 'Bradford A.Berenson@who.eop.gov'; 'Brett M. Kavanaugh@who.eop.gov'; 'Kyle Sampson@who.eop.gov'; Scottfinan, Nancy
Subject: Judicial Hearing Prep Session and Hearing notice

Judicial hearing prep session is scheduled for Tuesday, 9/17, at 2:00 pm in OLP Conference Room, 4237, in connection with the noticed hearing for 9/18, at 10:00 am in 226 Dirksen for the following nominees:

Michael McConnell	10th Circuit
Jeffrey White	California Northern
Kent Jordan	Delaware
Bill Martini	New Jersey
Tom Phillips	Tennessee, Eastern
Alia Ludlum	Texas, Western

Brad/Brett:

If there are other WH staff members who need to be made aware of the prep session, please let them know. Thanks

Sheila C. Joy
Office of Legal Policy
USDOJ, Rm 4229
202 514-1607

007104-002230