

From: "Kavanaugh, Brett M."
To: <Kristi.L.Remington@usdoj.gov>
Subject: Re: Kennedy Q's
Received(Date): Fri, 19 Nov 2004 09:55:31 -0500

Thanks.

P6/b(6)

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

From: Kristi.L.Remington@usdoj.gov <Kristi.L.Remington@usdoj.gov>
To: Kavanaugh, Brett M. <Brett_M_Kavanaugh@who.eop.gov>
Sent: Fri Nov 19 09:36:42 2004
Subject: Kennedy Q's

If this helps, I've gone through and corrected all typos. There are several typos that were in the Kennedy original -- if you see a typo, assume it was their mistake.

I. FOLLOW-UP ON QUESTIONS AT THE HEARING

A. THE DEMOCRATIC COMPUTER FILES

As you know, the questions surrounding the improper access to and dissemination of the Senate Democratic computer files have been referred for investigation by a special prosecutor. Since your office worked directly with both a key perpetrator and with other individuals and groups who appear to have received materials from the files, on the very subject of most of the files known to have been downloaded, it is to be expected that you and your office will be subjects of this investigation. We therefore need to be as sure as we can, before processing your nomination, that we have all of the information regarding your possible involvement in or knowledge of the matters under investigation.

You were asked a number of questions regarding this matter by Senators from both parties (see, e.g., pages 35-37, 97-100, 112-114 of the Transcript of the Hearing on the Nomination of Brett M. Kavanaugh, "hearing transcript"). In some cases the questions as asked were framed, or your answers were framed, in ways that restricted or limited them in some way, either by time frame (e.g., past, present, at, before or after a certain time), particular person (e.g., Rushton, Gray, Daly), a qualifier (e.g., "usually," "documents" vs. "information") or an ambiguous description (e.g., "that matter"), or otherwise. In some cases your answers were unresponsive even to the questions as asked.

Would you kindly review all of your testimony on this subject, and amplify each of your answers to provide and make clear that you are providing all of the information you have on the entire subject without regard to any restrictions or limitations or qualifiers in the original questions or your answers. In addition, where, on review you see that your answers were not fully responsive or were misleading in any way in view of your entire knowledge of the subject at any point in time, please provide fully responsive answers.

For example, when you were asked about the circumstances of your meetings with Manuel Miranda, you responded with what they "usually" were. In such a case, you should provide what the circumstances were in all instances, whether usual or unusual.

Similarly, you were asked two questions about whether you received documents or information that "appeared" to come from or that "you believed or were led to believe" came from Democratic files. Both answers were in the

negative but were explained by almost identical statements, not responsive to the questions, that you were "not aware of that matter until I learned of it in the media." For present purposes you should consider that you were asked: "Did Mr. Miranda (or anyone else) ever share, reference or provide you with any documents (or other facts, schedules, positions, plans or other information)

That appeared to you (then or at any subsequent time, especially after you had become aware of the Republican access to Democratic files and had seen the files posted on the web or provided to the media and to groups or persons with whom you were in touch) to have been drafted or prepared by (or obtained or derived from the files, emails or other communications of) Democratic staff members of the Senate Judiciary Committee?

Similarly, you should re-frame your answer to the second question on page 37 of the hearing transcript to read its reference to "Associate White House Counsels" as including any interested White House staff, such as those in the Public Liaison or Legislative Affairs offices, to remove your own limitation to whether they were "aware" of the source of the materials and instead respond to the question asked, i.e., did they have access to the materials (or information), whether or not they were "aware" of the source.

As another example, you should review your answers to the questions regarding Boyden Gray on pages 113-114 of the hearing transcript, and remove your repeated limitation to "since I have been staff secretary," providing detailed information on your relationship to Mr. Gray throughout your White House employment.

In short, whether or not you believe the questions as asked should have elicited this information at the hearing, please fully disclose now, without standing on semantic limitations in the original questions or in this submission, everything you know, or in retrospect now realize or believe, about the circumstances surrounding the access to the Democratic files, the use and dissemination of the content or information derived from these files, and the availability of that content or information to you or anyone else in the White House, the Justice Department, the groups supporting the President's nominations, or anyone else outside the Democratic offices of the Judiciary Committee.

If this request is any way unclear, or leaves open any basis on which you might think that you need not provide everything you know on the entire subject, please let us know promptly, and we will clarify the request.

In addition to the above:

1. Please provide your own conclusions as to the validity of Mr. Miranda's public statements as to his justification for his actions, their compliance with his ethical obligations, and the fact that he was operating in the interests of those who supported the nominations.
2. Since Boyden Gray has been publicly identified as a supporter of and spokesman for the White House on subjects relating to judicial nominations, please state whether you agree with his public defenses of Mr. Miranda, whether you or anyone at the White House have indicated to him that since he is so identified with the White House, he should desist from defending Mr. Miranda.
3. In view of Mr. Gonzales' refusal to investigate the subject, please state whether your (expanded) answer to the question on page 37 about whether "any other Associate White House Counsels had access" to the materials at issue is based on your own affirmative knowledge of what other White House staff knew or on your lack of knowledge of what other staff knew.
4. Please state whether Mr. Miranda was ever involved in any of the moot courts or other meetings, conference calls, or conversations to prepare nominees for their hearings. If so, which ones?
 - a. Did you ever meet with a nominee together with Mr. Miranda to prepare the nominee to testify before the Senate Judiciary Committee? If so, please describe that preparation and Mr. Miranda's role in it.

b. Did Mr. Miranda ever directly or indirectly convey to any nominee, or to anyone involved in preparing any nominee, whether orally or in writing, any questions or areas of questioning that he suggested the nominee might be asked by any member of the Senate Judiciary Committee? If so, please describe the circumstances in which this occurred, and identify each nominee as to whose nomination Mr. Miranda's suggestion was made.

5. Please describe any efforts you made, before or after your hearing, to review the materials and information you received from Mr. Miranda, other White House staff, the Justice Department, Mr. Gray, Mr. Rushton, Ms. Daly, or anyone else involved in judicial nominations, to determine whether anything they provided may have derived from the accessed Democratic files.

6. Did Mr. Miranda ever tell you, suggest, or hint in any manner that he had a "source" or "mole" or other means of obtaining non-public information from the Democratic side? Did you ever hear that there was a disaffected Democratic staffer member or similar source providing such information?

B. FEDERALIST SOCIETY

In response to questions about the heavy tilt toward Federalist Society members on the Administration's judicial nominations, you characterized the Society as "a group that brings together lawyers for conferences and legal panels. The Federalist society does not take a position on issues. It does not have a platform." You said you were a member because it puts on "conferences and panels" where you can learn about issues and meet colleagues.

No reasonable person could think the Society is just a meeting place for lawyers. The Society's own website is much more candid than you were, describing it as "a group of conservatives and libertarians interested in the current state of the legal order." The Society decries, without attributing it to anyone in particular, the "orthodox liberal ideology which advocates a centralized and uniform society" and in pursuit of its goals has "created a conservative and libertarian intellectual network that extends to all levels of the legal community."

If, as a judge, your opinions merely followed and implemented the goals of the Society, would you still assert that you would not be "taking a position on issues" and not pursuing "a platform"?

C. PRYOR NOMINATION

Since responding to the questions on the Republican Attorneys General Association issue, have you reviewed your records and refreshed your recollections as to your role in preparing the nominee for questions on that subject? Please describe your role in more detail.

1. You did not answer the questions I asked you on pages 134-135 of the hearing transcript, as to what, if anything was done, after the revelations in the media about the RAGA issue. Please do so in full now. Did you or anyone else in the White House or Justice Department check the issue out in more detail, have it investigated further, question the nominee about it, or otherwise follow up on the issue? Did any of you check with the RNC to determine who had the records on the matter, talk to those involved, or ask to see the records that the nominee said they had? Please provide details on what was done, the results of any inquiry, and who received those results.

2. At any time before February 20, 2004, were you aware that Mr. Pryor was being considered for a recess appointment to the 11th Circuit? Were you aware that the recess which was going to be used was an intra-session recess of five business days surrounding a three-day holiday weekend? Were you aware that the appointment was to be made on the afternoon of the last business day of the recess? Were you aware that the shortest prior recess used for appointment of an Article III judge during an intra-session recess was a recess of 35 days? Did you express an

opinion to anyone at the White House as to the validity or advisability of making such an unprecedented appointment? If so, without asking what your advice was, is there any reason we cannot assume that your advice had to have been either (a) that the appointment should be attempted, or (b) not followed.

3. At your nomination hearing, I asked whether you assisted in preparing William Pryor to testify before the Senate Judiciary Committee. At that time, you indicated that you may have participated in a "moot court" session to prepare Mr. Pryor, but that you could not recall. Now that you have had additional time to review your work on nominations matters, please clarify whether you did in fact participate in a moot court preparation of Mr. Pryor.

4. As you know, after William Pryor was nominated to the U.S. Court of Appeals for the Eleventh Circuit, several members of the Senate and the public expressed concern about extreme statements that Mr. Pryor had made, including his description of *Roe v. Wade* as "the worst abomination of constitutional law in our history." Do you agree with Mr. Pryor that *Roe v. Wade* is an "abomination of constitutional law"?

5. The Constitution gave the Senate a co-equal role in appointing federal judges to guarantee that the judiciary is independent, and does not simply reflecting the political views of a particular President. The idea that federal judges should be independent of the other two branches of government is one of the most important aspects of our democracy. As I mentioned during your confirmation hearing, after the Supreme Court's 5 to 4 decision in *Bush v. Gore*, William Pryor stated that he had wanted the decision to be decided 5 to 4, so that President Bush "would have a full appreciation of the judiciary and judicial selection, so we can have no more appointments like Justice Souter." If all judges followed Mr. Pryor's view, the courts would be little more than an arm of the Executive branch. Do you believe this is an appropriate view for a nominee to a federal court? Do you agree with Mr. Pryor's view about the role of federal judges?

D. LEGAL EXPERIENCE AND ROLE IN JUDICIAL NOMINATIONS

1. During your April 27, 2004, nomination hearing, you testified about your role in judicial nominations during the current Bush Administration and stated that you focused on "certain circuit court nominations" and on nominees from particular parts of the country.

a. Please note the month and year when you first began working in matters related to judicial nominations and, if it you no longer have any role in matters related to nominations, the date on which your involvement in such matters ceased.

b. Which nominees did you work on, in any capacity?

c. With respect to each of the nominees listed in response to 3.a., above, please describe your role in selecting, vetting, or recommending them for nomination to the federal courts of appeals, and please describe the role you played in their preparation for testimony or responses to written questions.

2. During the hearing on your nomination, I asked what experience if any, you have in labor law matters. Your answer noted that you have held several government positions, but did not identify whether you have any experience in labor law. Please clarify whether you worked on any cases or legal matters involving labor law claims, and if so, please identify the case and describe the nature of your work.

3. Please describe any legal experience you have involving the Americans with Disabilities Act. Please also describe any legal experience you may have involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act or any aspect of environmental law. In responding to this question, please identify the cases or legal matters on which you worked, and any role you played in drafting submissions or presenting oral argument to a court on these issues.

4. In response to a question from Senator Schumer during the hearing on your nomination, you stated that you believed that you had attended a fund raiser for the Committee for Justice on at least one occasion. You could not recall whether you made a donation at that event, but indicated that you would check to confirm this fact.

a. Please indicate whether you have ever attended a fundraiser for the Committee for Justice, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.

b. Please state whether you have attended a fundraiser for the Coalition for a Fair Judiciary, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.

5. You have testified that, as part of your work on judicial nominations, you coordinated with the White House Press Office and with outside organizations regarding nominees. As you know, Democrats who raised concerns about some of the Administration's most controversial nominees have been called anti-Black, anti-Latino, anti-Southern and anti-Catholic by some of these outside organizations.

a. Did you play any role in encouraging conservative organizations and conservative media in these characterizations of senators who opposed judicial nominees?

b. Do you agree that such characterizations are unacceptable and mislead the public about the judicial nominations process?

c. What if anything did you do to stop these White House supported organizations and surrogates from continuing to make these changes?

II. OTHER ISSUES

The Office of the Counsel to the President plays a major role in decision-making with respect to access to Executive Branch materials and inquiries into allegations of improper activities by White House staff. Please provide a detailed description of your role in those activities, and specific responses to the questions below, answering any "yes" or "no" questions with a "yes" or "no" before providing any explanations. If any of your answers are classified, please separate the classified portions to the maximum extent possible, and provide a classified and unclassified version of such answers.

A. CIA LEAK INVESTIGATION

1. Did you have any role in any activity relating in any way to the leak of information regarding Valerie Plame? If so, please detail your role.

2. Did you personally question staff members or receive, review, or become familiar with evidence relating in any way to this matter? If so, please provide the details of what you did.

3. Have you been questioned by the Special Prosecutor, the FBI, or anyone else about this matter?

4. Were you involved in any internal investigation within the Executive Branch as to this matter? If so, please provide the details of what you did.

5. As a result of anything you did, saw, read or heard, do you know who the person(s) was (were) who communicated information about Ms. Plame to the media? If so please provide the details of what you know.

6. To the best of your knowledge, what efforts were made by your office or any other office in the White House to determine who disclosed the Plame information? Were you satisfied that all possible efforts were made to discover the facts? What other steps could have been taken that were not taken? Did you attempt to take those steps?

7. Did you participate in the screening process conducted by the Counsel's office before materials on this subject requested by the Department of Justice were provided to the Department? Please describe that process and your role in detail.

8. What steps do you believe should have been or should be taken against anyone involved in disclosing the Plame information? Do you know whether such steps have been taken? If so, please provide the details of what steps have been taken and what other steps you believe should be taken.

B. BARRIERS TO ACCESS TO 9/11 INFORMATION

1. Did you or anyone else in your office or, to the best of your knowledge, elsewhere in the White House, have any contact in 2001 or 2002 with (a) any member or staff of the Senate Judiciary Committee, or (b) any other Senator or Senate staff, with respect to the Committee's desire to investigate issues relating to the 9/11 attacks? If so, please provide details of what you did and what you know. What do you know about the efforts to deny authorization or funding for that investigation? What was your role and that of your office? If your office had nothing to do with that matter, who handled it for the White House?

2. Did you or anyone else in your office or, to your knowledge, elsewhere in the White House have any role in the denial, delay or limitation of access to the materials and information requested by the Joint Intelligence Committees for their inquiry into 9/11 as described in the Appendix to their Report? In particular, did you or your office participate in any way in the decision to classify the fact that the President had received the PDB dated August 6, 2001? If either answer is yes, please provide details of what you know and what you did.

3. Did you or your office have a role (a) in formulating or implementing the white House opposition to the establishment of the 9/11 Commission before September 2002, (b) in negotiating the details of the legislation establishing the Commission's mandate and structure once the White House agreed to its establishment, or (c) in considering, determining, and negotiating with regard to the White House responses to requests from the Commission for materials, interviews and information? Please describe your own role in detail.

4. Were you in any way responsible for the White House statements that it was impermissible for Ms. Rice to testify and for the White House to release the August 6, 2001 PDB? If so, please describe your role in detail.

5. Do you see any meaningful distinctions between President Ford's public testimony before a House subcommittee in 1974 and President Bush's appearance before the 9/11 Commission which justify his refusal to testify in public?