

**Written Questions from Senator Richard J. Durbin to Judge Brett Kavanaugh
September 10, 2018**

For questions with subparts, please respond to each subpart separately.

1. You worked as White House Staff Secretary from July 2003 through May 2006. You have described this time as “formative” and “most instructive to your judging.” You have said in numerous speeches that your duties as Staff Secretary involved substantive policy work. You said you “participated in the process of putting legislation together,” “identif[ied] potential constitutional issues in legislation,” and “worked on drafting and revising executive orders.” In your 2006 hearing, you told then-Chairman Specter that you gave President Bush advice on signing statements, including “identifying potential constitutional issues in legislation.”

Beginning in 2004, I offered numerous amendments in the Senate to bar cruel, inhuman, or degrading treatment of detainees. Senator McCain picked up the banner and—over a veto threat from the Bush Administration—the Senate passed the McCain Torture Amendment in October 2005 by a 90-9 vote. On December 30, 2005, President Bush issued a signing statement claiming the authority to override the McCain Torture Amendment.

- a. **In my office I asked you about this signing statement and you said you remember seeing it and thinking that Senator McCain wouldn’t be happy. Why did you think Senator McCain wouldn’t be happy?**
 - b. **Did you provide any comments or express any views, verbally or in writing, regarding the December 30, 2005 signing statement on the McCain Torture Amendment, including comments or views on “potential constitutional issues”?**
 - c. **If so, what comments or views did you provide?**
 - d. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the December 30, 2005 signing statement?**
2.
 - a. **Did you provide any comments or express any views, either verbally or in writing, about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**
 - b. **If so, what comments or views did you provide?**
 - c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**

3. On October 18, 2004, then-OMB Director Josh Bolten and then-National Security Advisor Condoleezza Rice sent a letter stating the Administration's objection to an earlier version of the McCain Torture Amendment which was included as a provision in the 9/11 Commission Intelligence Reform legislation. The provision was removed because of the Administration's objections.
 - a. **Did you review or provide comments or views, either verbally or in writing, on this letter?**
 - b. **If so, what comments or views did you provide?**
 - c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this letter?**
4. On October 5, 2005, just prior to the Senate vote on the McCain Torture Amendment, then-White House spokesperson Scott McClellan issued a veto threat, saying the amendment "would limit the president's ability as commander-in-chief to effectively carry out the war on terrorism."
 - a. **Were you involved in any discussions about this veto threat?**
 - b. **Did you review the language of this veto threat and/or provide comments or views, either verbally or in writing, on the language?**
 - c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this veto threat?**
5. Three Office of Legal Counsel memos issued in May 2005 by Steven Bradbury concluded that waterboarding and other abusive techniques do not constitute torture or cruel, inhuman or degrading treatment. You were not asked at your 2006 hearing about the Bradbury torture memos because their existence had not been publicly revealed yet. I asked you in my office if you were involved in any discussions on the Bradbury memos. You said that you did not remember discussions on the Bradbury memos but that you wouldn't rule anything out.
 - a. **Did you have any involvement with these Bradbury memos during your tenure as Staff Secretary?**
 - b. **Did you participate in any discussions or review any documents regarding these Bradbury memos during your tenure as Staff Secretary?**
 - c. **Can you state with certainty that there are no documents in the National Archives regarding the Bradbury torture memos that you wrote, edited, reviewed, or approved while you were Staff Secretary?**
6. The Committee has been denied access to any documents from the National Archives from your tenure as Staff Secretary, leaving a 35-month black hole in your record. Numerous

issues you were involved with as Staff Secretary have not come before you as a judge. So we do not have any insight from your judicial record about your views on those issues.

Do you believe the American people should, at minimum, be permitted to see documents from your Staff Secretary tenure regarding issues that have not come before you in any case since you were appointed to the D.C. Circuit?

7. Last week, in a response to a question from Senator Tillis about your record on LGBTQ issues, you noted that you have not been involved in any cases concerning LGBTQ issues on the D.C. Circuit. However, you have acknowledged that you worked on these issues during your service in the White House Counsel's Office and as Staff Secretary.

For example, we know from news reports that you met with a delegation of Log Cabin Republicans in 2003. You told Senator Tillis last week that you were there as a representative of the Bush White House and discussed judicial nominations and "other issues." But no documentation related to this meeting has been provided to the Committee from your White House records.

In fact, the only public document we've received through the Burck production process that touches on LGBTQ rights appears to be an email with a subject line reading "Gay marriage issues." However, the only email text included in the document was a reply from Alberto Gonzales to you, asking if you were interested in playing a round of golf at Andrews Air Force Base with Jim Haynes. The Committee did not receive any other emails from this chain.

Additionally, when we met in my office, you acknowledged that during your time as Staff Secretary, you "would have been involved in the process" related to President Bush's endorsement of a constitutional amendment to ban same-sex marriage in 2004. You also said that you did "help implement" the President's conclusion to support the amendment. The Committee has not received any documents related to your work and opinions on the amendment.

- a. **During your time in the White House, did you express any views, either verbally or in writing, on whether or not same-sex marriage is a right guaranteed by the Constitution? If so, please describe the views you expressed.**
- b. **Is it possible that there are documents containing your views on whether or not same-sex marriage is a right guaranteed by the Constitution in the National Archives?**
- c. **During your time in the White House, did you offer any advice or analysis, either verbally or in writing, related to President Bush's 2004 endorsement of a constitutional amendment to ban same-sex marriage? If so, please describe the advice or analysis you offered.**

- d. **Is it possible that there are documents containing your advice or analysis related to President Bush's 2004 endorsement of a constitutional amendment to ban same-sex marriage in the National Archives?**
 - e. **During your time in the White House, did you express any views, either verbally or in writing, on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans? If so, please describe the views you expressed.**
 - f. **Is it possible that there are documents containing your views on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans in the National Archives?**
 - g. **Is it possible that there are documents in the National Archives that contain your advice, analysis, or opinions on any other issues involving the rights of LGBTQ Americans?**
8. You told me in my office that the Partial Birth Abortion Ban Act of 2003 would have come across your desk as Staff Secretary.
- a. **While you were Staff Secretary, did you write, edit, review or approve any documents, emails, or speeches regarding this legislation? If so, please describe them.**
 - b. **You testified in 2006 that your work as Staff Secretary included "identifying potential constitutional issues in legislation." Did you provide comments or views regarding potential constitutional issues with this legislation?**
 - c. **During your time in the White House, did you ever provide comments or views on the constitutionality of abortion or legislative restrictions on abortion?**
 - d. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the constitutionality of abortion or of legislation restricting abortion?**
9. While you were Staff Secretary:
- a. **Did you write, edit, review or approve any documents, emails or speeches regarding the war in Iraq? If so, please describe all of your involvement in this issue.**
 - b. **Did you provide any comments or views on the factual predicate or legal authorization for the war in Iraq? If so, please describe your comments or views.**

- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the factual predicate or legal authorization for the war in Iraq?**

10. While you were Staff Secretary:

- a. Did you write, edit, review or approve any documents, emails, or speeches regarding the abuse of detainees at Abu Ghraib prison? If so, please describe all of your involvement in this issue.**
- b. Did you ever provide comments or views, verbally or in writing, on the abuse of detainees at Abu Ghraib prison? If so, please describe these comments or views.**
- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the abuse of detainees at Abu Ghraib prison?**

11. When we met in my office you told me that it is already public record that President Bush consulted you on his choices for Supreme Court nominees. On July 9, *The New York Times* reported that in 2005 you participated in some of the sessions preparing Supreme Court nominee Harriet Miers for her confirmation process. (Peter Baker, “A *Conservative Court Push, Decades in the Making, With Effects for Decades to Come*,” July 9, 2018.) According to the *Times*, you were “[a]mong those who argued against her nomination from within the White House.” The *Times* said “Mr. Kavanaugh instead favored the selection of Justice Alito, then an appeals judge and a known and trusted figure within the conservative legal community.”

- a. Please describe all of your involvement in Harriet Miers’ Supreme Court nomination.**
- b. Did you participate in sessions to help prepare Ms. Miers for her confirmation process? If so, please describe each session in which you participated.**
- c. Did you write, edit, review or approve any documents, emails, or speeches regarding the nomination of Ms. Miers to the Supreme Court? If so, please describe them.**
- d. Did you ever provide comments or views, verbally or in writing, raising concerns about Ms. Miers’ nomination, advocating for then-Judge Samuel Alito’s nomination, or comparing Ms. Miers to then-Judge Alito? If so, please describe your comments or views.**
- e. What were your concerns about Ms. Miers’ nomination?**
- f. Is it possible that there are documents containing your comments or views raising concerns about Ms. Miers’ nomination, advocating for then-Judge**

Samuel Alito's nomination, or comparing Ms. Miers to then-Judge Samuel Alito in the National Archives?

- g. Did you favor nominating then-Judge Alito over Ms. Miers?**
 - h. Were you involved in editing, writing or reviewing Ms. Miers' October 27, 2005 statement announcing her decision to withdraw her nomination or President Bush's statement that same day announcing his acceptance of her withdrawal? If so, please describe your involvement in detail.**
12. Please describe the full extent of your involvement in each of these litigation matters while you were working in the White House, including whether you participated in any discussions or wrote, edited, reviewed or approved any documents, emails or speeches regarding these matters:
- a. The Supreme Court's *Roper v. Simmons* decision and associated lower court litigation.**
 - b. The Supreme Court's *U.S. v. Booker* decision and associated lower court litigation.**
 - c. The Supreme Court's *Hamdi v. Rumsfeld* decision and associated lower court litigation.**
 - d. The Supreme Court's *Rasul v. Bush* decision and associated lower court litigation.**
 - e. Is it possible that there are documents containing your comments or views on these litigation matters in the National Archives?**
- 13.
- a. Please describe the full extent of your involvement in questions about warrantless surveillance of Americans while you were working in the White House.**
 - b. Can you state with certainty that there are no documents in the National Archives that contain your comments, views, or correspondence about warrantless surveillance?**
14. On May 10, 2006, you responded to a written question I sent you about your legal experience. Your response discussed policy issues you worked on as Staff Secretary. You said:

The President has given numerous speeches on energy policy, labor policy, communications policy, and environmental policy since I became Staff Secretary. The President has also made a variety of public decisions and policy proposals related to those subjects that

also have come through the Staff Secretary's office for review and clearance.

- a. **What specific energy policy matters did you work on while you were Staff Secretary?**
 - b. **What specific labor policy matters did you work on while you were Staff Secretary?**
 - c. **What specific communications policy matters did you work on while you were Staff Secretary?**
 - d. **What specific environmental policy matters did you work on while you were Staff Secretary?**
 - e. **Is it possible that there are documents containing your work product, comments or views on these policy issues in the National Archives?**
15. **If there are documents in the National Archives that contain your comments or views about the matters discussed in questions 1 through 14, do you agree that the American people should be allowed to review any such documents prior to a Senate vote on your nomination?**
16. On May 10, 2006 you submitted written responses to written questions that Senator Feingold and I sent you for your D.C. Circuit confirmation hearing. You provided the following commitment to me in response to one of my written questions: "If confirmed, I would follow all binding Supreme Court precedent, including *Brown v. Board*, *Miranda v. Arizona*, and *Roe v. Wade*." **Will you make this same commitment now, as you seek confirmation to the Supreme Court?**
17. **Do you agree with President Trump's statement to Bloomberg News on August 30 that Special Counsel Mueller's investigation is "an illegal investigation"?**
18. **Should a president comply with a grand jury subpoena?**
19. Your 2009 Minnesota Law Review article represents a dramatic evolution of your views on presidential investigations since your days working for Independent Counsel Ken Starr. **How often do your views evolve, and are there other contexts where your views have evolved since earlier in your career?**
20. **What does the Constitution say on the question of whether a sitting president can be indicted?**
21. **Can members of the President's immediate family be indicted?**

22. Last year you gave a speech at the American Enterprise Institute about Chief Justice Rehnquist, whom you described as a “judicial hero.” You said during the question-and-answer session that: “[O]ne of the things people recognized about Rehnquist was he played the long game. He saw where he wanted the law to go, and he was willing to make incremental steps to try to convince his colleagues so he could get five justices to that position.”
- a. Is it appropriate for a Supreme Court Justice to play the long game to move the law where the Justice wants it to go?**
 - b. Is a Supreme Court Justice serving as a neutral umpire if the Justice sees where he or she wants the law to go and is willing to make incremental steps to try to convince his or her colleagues to get to that position?**
 - c. Is it judicial activism for a Supreme Court Justice to see where he or she wants the law to go and make incremental steps to try to convince his colleagues to get to that position?**
 - d. Have you ever seen where you wanted the law to go and made incremental steps to get your colleagues to that position? If so, please provide examples.**
 - e. When discussing Chief Justice Rehnquist’s dissent in *Roe v. Wade*, you said in your speech that he was “stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” In your view, which rights fall into this “general tide of freewheeling judicial creation”?**
23. You gave a speech on February 1, 2018, to the Heritage Foundation in which you criticized the use of canons of statutory interpretation when judges find text to be ambiguous. You noted that because Chief Justice Roberts in *NFIB v. Sebelius* found the Affordable Care Act’s individual mandate to be ambiguous, he applied the constitutional avoidance canon to uphold the ACA as a tax. You said in your speech, “a case of that magnitude should not turn on such a question.”

You repeatedly told the Committee that it is inappropriate for you to opine on matters that could come before you. However, you felt perfectly comfortable signaling to President Trump that you disagreed with Chief Justice Roberts, even though more challenges to the Affordable Care Act are pending.

- a. Why do you believe Chief Justice Roberts was wrong to apply the constitutional avoidance canon in upholding the Affordable Care Act’s constitutionality in *NFIB v. Sebelius*?**
- b. Why was it appropriate for you to express this opinion in your speech to the Heritage Foundation in February?**

- c. **More challenges to the constitutionality of the Affordable Care Act are likely to come before the Supreme Court soon. How can we trust you to approach these cases with an open mind when you've already made clear your opposition to applying the constitutional avoidance canon in cases of this magnitude?**
- 24. **According to your originalist understanding of the Constitution, does the Second Amendment provide for a fundamental right to self-defense outside of the home? To be clear, I am asking what your understanding is of the original meaning of the Constitution on this matter.**
- 25. As we discussed at your hearing, when President Trump announced your nomination at the White House, the first thing you said in your statement was: "Mr. President, thank you. Throughout this process, I have witnessed firsthand your appreciation for the vital role of the judiciary."
- Prior to your making this statement, were you aware that:

 - a. **President Trump had claimed that there should be no judges and no due process for asylum seekers at the border?**
 - b. **President Trump had criticized a federal judge for jailing Paul Manafort for witness tampering?**
 - c. **President Trump had repeatedly criticized federal judges who ruled against him in litigation over his travel ban?**
 - d. **President Trump had made racist comments about a federal judge's Mexican heritage?**
 - e. **In 2017 then-Judge Gorsuch called President Trump's treatment of federal judges "demoralizing"?**
- 26. **How do you square your statement about President Trump's "appreciation for the vital role of the judiciary" with President Trump's routine disparagement of the role of the federal judiciary?**
- 27. In the *White Stallion* case you claimed that the word "appropriate" required consideration of industry costs because "that's just common sense and sound government practice." **How can someone who claims to be a textualist use their subjective view of "common sense and sound government practice" to define a word?**
- 28.
 - a. **While you were working in the White House, did you ever express a view that particular Supreme Court precedents ought to be overturned?**

- b. **If so, when and to whom did you express these views and regarding which precedents did you express them?**
 - c. **Did you ever debate whether Supreme Court nominees who you were vetting (John Roberts, Harriet Miers, Samuel Alito) might seek to overrule precedents? Is it possible that there are documents in the National Archives that might reflect this?**
29. **Are children seeking asylum entitled to a hearing, due process, and legal representation? Or is President Trump correct that sending children fleeing persecution back to their home countries without a hearing before a judge is the appropriate outcome?**
30. In a 2010 speech, you said that while you were working as Staff Secretary, “I saw regulatory agencies screw up. I saw how they might try to avoid congressional mandates. I saw the relationship between independent agencies and executive agencies and the President and White House and OMB.” **What specifically did you see as Staff Secretary that shaped your views on independent agencies? Are there documents in the National Archives regarding what you saw that shaped your views?**
31. Business and labor both seem to agree that if you are confirmed to the Supreme Court, you would tilt the Court even further in a pro-business direction.

The Chamber of Commerce has urged your swift confirmation. The White House said, “Judge Kavanaugh protects American businesses from illegal job-killing regulation.” Shortly after your nomination, the employer-side law firm Fisher Phillips put out a legal alert saying, “If confirmed, will Justice Kavanaugh be kind to employers? The answer: you may rely on it.”

AFL-CIO Richard Trumka said about you, “Judge Kavanaugh routinely rules against working families, regularly rejects employees’ right to receive employer-provided health care, too often sides with employers in denying employees relief from discrimination in the workplace and promotes overturning well-established U.S. Supreme Court precedent.”

You have a track record of favoring corporations in cases involving safe working conditions, unions, worker privacy, and consumer protections. There may be outlier cases in your record, which is to be expected given you have taken part in over 2,700 cases. But both business and labor think you’re a safe bet to be sympathetic to the positions of businesses over workers.

- a. **Are you proud of your pro-business reputation?**
- b. **How do you square your pro-business reputation with the claim that you are an originalist and textualist who is a neutral umpire, not a judicial activist?**

32. **Do you agree that nominees who claim to be textualists and originalists should be able to explain the textual meaning and originalist understanding of constitutional provisions in response to confirmation hearing questions?**
33. The Foreign Emoluments Clause in Article I, Section 9, Clause 8 of the Constitution provides that “...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”
- a. **What does the text of this clause mean, and what was the Framers’ originalist understanding of it?**
 - b. **Even though there is current litigation about the Emoluments Clause, do you agree that such litigation should not preclude a nominee from explaining the text and original understanding of the Clause, which have not changed since the Founders’ time?**
- 34.
- a. **Did Judge Kozinski ever send you emails to your White House email address?**
 - b. **Did Judge Kozinski ever send you emails with sexually inappropriate jokes or pictures?**
 - c. **Do any of the 102,000 pages of documents over which Mr. Bill Burck has attempted to claim “constitutional privilege” contain correspondence between you and Judge Kozinski?**
 - d. **Have you referred any clerks to Judge Kozinski or advised any individuals to apply for clerkships with Judge Kozinski? If so, how many and when?**
35. **Should judges who engage in the kind of sexually harassing behavior that Judge Kozinski allegedly engaged in resign?**
36. The Supreme Court established the exclusionary rule more than a century ago in the 1914 *Weeks* decision. In 1961, in the landmark case *Mapp v. Ohio*, the Court held that the exclusionary rule applies to the states. The Court said, “the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments.” It is no exaggeration to say that the 4th Amendment rights of all Americans would be endangered without the exclusionary rule because if there is no consequence for an illegal search, there is no deterrent to violating the 4th Amendment.

But in a 2017 speech at the American Enterprise Institute, you praised Justice Rehnquist’s opposition to the exclusionary rule and his call to overrule *Mapp v. Ohio*. While you did not explicitly call for eliminating the exclusionary rule, your speech makes clear that you approved of Justice Rehnquist, who, in your words, “righted the ship of constitutional jurisprudence.”

Was it appropriate for you, as a lower court judge, to show support for overruling *Mapp v. Ohio* – a landmark Supreme Court precedent for more than half a century?

37. On July 22, 2013, in the case *Abdal Razak Ali v. Obama*, a Guantanamo detainee seeking habeas relief filed a motion asking you to recuse yourself, stating: “Judge Kavanaugh has created the appearance of impropriety with respect to the adjudication of issues concerning Guantanamo detainees (and in particular, issues which bear directly on Petitioner’s present circumstances) because of his prior government employment as a legal advisor in the White House which may have direct bearing on the circumstances of this case.” This recusal motion was denied the next day, in a one sentence order stating: “Upon consideration of appellant’s motion for recusal pursuant to 28 U.S.C. § 455(a), it is ordered that the motion be denied.”

a. Question 14 in your Senate Judiciary Questionnaire asked you to “Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte.” You were then asked to identify each such case, and for each case provide “your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.” Why did you fail to include the *Abdal Razak Ali v. Obama* recusal motion in your answer to question 14 of your Questionnaire?

b. Have you omitted any other motions to recuse you on any other case from your Senate Judiciary Questionnaire?

c. Why did you decline to recuse yourself in this case?

38. You were also asked in Question 14(b) of your Senate Judiciary Questionnaire to state: “Whether you will follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court. If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.”

You chose to simply ignore that question, so I will ask again now.

a. Do you believe Supreme Court Justices are governed by disqualification standards in 28 United States Code, Section 455?

b. Do you believe Supreme Court Justices are governed by disqualification standards in the Code of Conduct for United States Judges?

c. Will you follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court? If not, please

explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.

39. In 2003, I introduced S. 1709, the SAFE Act, bipartisan legislation to reform the Patriot Act, particularly the controversial Section 215. On January 28, 2004, then-Attorney General John Ashcroft sent a letter to then-Senate Judiciary Committee Chairman Orrin Hatch stating, “If S.1709 is presented to the President in its current form, the President’s senior advisers will recommend that it be vetoed.”

a. Please describe your involvement in this veto threat.

b. Is it possible that there are documents containing your comments or views on this veto threat in the National Archives or in the possession of other federal agencies?

40. In 2005, when the Patriot Act was up for reauthorization, I negotiated with then-Senate Judiciary Committee Chairman Arlen Specter a new standard for Section 215 orders to protect innocent Americans while giving the government broad authority to obtain information connected to suspected terrorists or spies. The Republican-controlled Senate approved this reform on a unanimous vote, but it was removed in conference due to the Bush Administration’s objections.

a. Please describe with specificity your involvement in the Patriot Act reauthorization.

b. Is it possible that there are documents containing your comments or views on Patriot Act reauthorization in the National Archives?

c. In the 2015 D.C. Circuit case *Klayman v. Obama*, several U.S. citizens filed a lawsuit alleging that the Section 215 program, which was being used for the NSA’s bulk collection of innocent Americans’ telephone data, was illegal. The program was enjoined by the district court. Some of the plaintiffs were denied standing to sue, and they filed a petition for the D.C. Circuit to re-hear the case en banc. The D.C. Circuit denied the petition in a one-sentence order.

You felt compelled to write a lengthy concurrence arguing that the NSA program was constitutional, even though that question was not before the court. You argued that the bulk collection of telephone data served a “critically important special need – preventing terrorist attacks on the United States.” This was despite a Privacy and Civil Liberties Oversight Board report that said: “we have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation.”

Why did you feel the need to go out of your way to write this concurrence?

41. On April 13, 2016 you took part in a panel discussion at Marquette Law School. You discussed a proposal you worked on in the Bush White House for judicial nominees to get a vote within 180 days of their nomination. You said, “I’m a little biased on this because I helped work on it.”

It is perhaps understandable that a person would be biased in support of a proposal that he or she worked on. However, if a sitting judge admits to even a little bias regarding matters the judge worked on before becoming a judge, it raises concerns about the judge’s impartiality on such matters. This further demonstrates the need to disclose your full White House record.

In order to alleviate concerns about such bias, please provide a list of all proposals you helped work on while you were at the Bush White House.

42. **Prior to your hearing, were you shown any documents that had been designated by Chairman Grassley as “committee confidential” (a designation to which Committee Democrats never agreed)? If so, please identify each specific document you were shown and the date on which you were shown it.**
43. **How many times in 2018 did you communicate with Bill Burck or with a person acting on Burck’s behalf for purposes of producing documents for your confirmation process? Please list the dates, participants, and contents of each such communication.**
44. **Which Senators helped you prepare for your Supreme Court confirmation hearing by participating with you in moots or other practice sessions?**
45. You cited the so-called “Ginsburg Rule” multiple times during your hearing to explain why you insisted on limiting your substantive answers to our questions. However, at her nomination hearing, Justice Ginsburg answered many questions with candor.

For example, in response to a question about abortion rights, Justice Ginsburg said this:

But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

And in response to a question on the Equal Rights Amendment, Justice Ginsburg responded with the following:

I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter. I know what the history was. I would like the legislators of this country and of all the States to stand up and say we know what that history was in the 19th century; we want to make a clarion

announcement that women and men are equal before the law, just as every modern human rights document in the world does, at least since 1970. I would like to see that statement made just that way in the U.S. Constitution. But that women are equal citizens and have been ever since the 19th Amendment was passed, I think that is the case.

- a. Do you think that those responses were improper under judicial canons?**
- b. If the first response was not improper, do you agree with Justice Ginsburg's statement that the decision of whether or not to bear a child is a decision that a woman must make for herself?**
- c. If the second responses was not improper, do you agree with Justice Ginsburg's statement that the Equal Rights Amendment should be added to the U.S. Constitution?**

46. As a judge on the D.C. Circuit, you are bound to follow the Code of Conduct for United States Judges. As you know, the Code is made up of a number of canons. These canons include upholding the integrity and independence of the Judiciary; avoiding impropriety and the appearance of impropriety in all activities; performing the duties of the office fairly, impartially, and diligently; engaging in extrajudicial activities that are consistent with the obligations of judicial office; and refraining from political activity.

The Supreme Court has refused to formally adopt the Code of Conduct for United States Judges or promulgate its own ethics code.

According to Chief Justice Roberts' 2011 annual year-end report, in 1991, the Supreme Court justices did adopt "an internal resolution in which they agreed to follow the Judicial Conference regulations [on gifts and outside income] as a matter of internal practice." While this was an encouraging step, the lack of transparency and enforcement is troubling.

- a. Will you commit that, if confirmed to the Supreme Court, you will continue to follow the Code of Conduct for United States Judges?**
- b. Do you believe that the Supreme Court should adopt an official code of conduct?**

47. In 2014, Justice Kennedy testified to Congress that "solitary confinement literally drives men mad." He raised the issue again in a powerful concurring opinion in the 2015 *Davis v. Ayala* case, which involved an inmate who had been on California's death row for 25 years. He noted the following:

Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price.

He went on to note that “the judiciary may be required... to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”

What is your reaction to Justice Kennedy’s statements about solitary confinement?

48. In the 2012 *South Carolina v. United States* case, you were on a three-judge panel considering a preclearance challenge to a new, expanded South Carolina voter ID law. As you know, prior to 2013, preclearance was the process that the Department of Justice used to review changes to voting laws in certain jurisdictions with a history of voting discrimination.

You wrote the opinion, holding that the law was not in violation of the Voting Rights Act (VRA) and that South Carolina could move forward with implementation after the 2012 election.

In your opinion, you noted that “many states—particularly in the wake of the voting system problems exposed during the 2000 elections—have enacted stronger voter ID laws.” However, we’ve also seen that many of these voter ID laws have a concerning, and often discriminatory, impact on voters.

For example, a 2016 analysis of data from the annual Cooperative Congressional Election Study found the following: “The patterns are stark. Where strict identification laws are instituted, racial and ethnic minority turnout significantly declines.” They found that among Latino voters, “turnout is 7.1 percentage points lower in general elections and 5.3 percentage points lower in primaries in strict ID states than it is in other states.”

What is your response to the evidence that strict identification laws harm minority voters?

49. Your colleagues on the panel in the *South Carolina v. United States* case issued a concurrence that discussed the “vital function” that the preclearance process played in this case. The concurrence went on to note the following:

Without the review process... [the law] certainly would have been more restrictive.... The Section 5 [preclearance] process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the law] demonstrates the continuing utility of Section 5 of the Voting Rights act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.

Unfortunately, the Supreme Court gutted the VRA in the 2013 *Shelby County v. Holder* case by striking down the formula that determined which jurisdictions were subject to Section 5 preclearance. However, they did not find the preclearance provision itself to be unconstitutional.

Why did you refrain from joining this concurrence?

50. Was President Trump correct in stating that three to five million people voted illegally in the 2016 election?

51. In *Doe ex rel. Tarlow v. District of Columbia*, you examined the circumstances under which the D.C. Department of Disability Services could approve elective surgeries for a patient with intellectual disabilities who has been found to lack the mental capacity to make healthcare decisions. You held that the Department need not consider the known wishes of a patient, but rather could make a decision in the best interests of the patient.

The Bazelon Center for Mental Health Law has noted that your opinion “raises serious concerns about [your] views on the rights and abilities of people with disabilities to determine the course of their own lives.” The Center went on to note that the opinion “is also inconsistent with the approach required by numerous states and used in many court decisions, which requires some consideration of the individual’s wishes even if the individual is not legally competent to make the decision.”

Why did you decide that the perspectives and wishes of the individuals in this case could be completely ignored by the D.C. government?

52. When we met in my office, we talked about the 2011 *Seven-Sky* case, in which you dissented from a decision upholding the Affordable Care Act. In a footnote, you criticized the ACA and argued that, “Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

This is a truly breathtaking claim of presidential power. I think you recognize that because you told me in our meeting that you “could have been clearer” and “explained it better” in the later *Aiken County* case.

But if you had been writing for the majority in *Seven-Sky*, your opinion would be binding law in the DC Circuit and President Trump would have a free pass to ignore laws that he doesn’t like. For someone like you who claims to be a textualist to be so careless with his words is concerning.

a. Do you understand the consequences of using your words so loosely?

b. Do you stand by your *Seven-Sky* dissent?

53. Last Thursday, when questioned by Senator Leahy about the stolen material you received from Manny Miranda, you said that you “obviously recall the emails—or have seen the emails.”

a. Were you referring to having recently seen emails that were given to the Committee through the Bill Burck production process?

- b. After you were nominated by President Trump, did you receive or review any of the emails or documents that were given to the Committee through the Bill Burck production process? Please describe any instances in which you received or reviewed these emails or documents, other than those instances in which Committee members shared emails or documents with you during their question rounds at the hearing.**

54. Last Wednesday, Senator Booker asked you about an email you sent in which you wrote “the people (such as you and I) who generally favor effective security measures that are race-neutral in fact DO need to grapple—and grapple now—with the interim question of what to do before a truly effective and comprehensive race-neutral system is developed and implemented.”

- a. During your time in the White House, did you ever provide views, verbally or in writing, on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities?**
- b. Is it possible that there are documents (in addition to the email referenced here) containing your views on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities in the National Archives?**