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Co-Presidents

May 16, 2006

The Honorable Bill Frist, M.D.
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Harry Reid
Minority Leader
United States Senate
528 Hart Senate Office Building
Washington, DC 20510

RE: The Opposition of the Society of American Law Teachers (SALT) to the Nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit

Dear Senators Frist and Reid:

On behalf of the Society of American Law Teachers (SALT), we write to express our strong opposition to the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia.

SALT is the largest organization of law professors in the United States. Representing more than 900 law professors from over 160 law schools, SALT is committed to improving the integrity, quality, and fairness of the administration of justice. Confirming Mr. Kavanaugh to a federal appellate judgeship would disserve those interests. The D.C. Circuit is generally recognized as the second most powerful federal court after the Supreme Court, with a uniquely important role in reviewing federal agency action. Mr. Kavanaugh's relative lack of experience and extreme partisanship make him unsuited for appointment to this important court.

As a 1990 graduate of Yale Law School, Mr. Kavanaugh has had a relatively brief legal career. Most of it has been spent advocating for partisan politics in Kenneth Starr's Office of the Independent Counsel or in the White House, where he has served in the Office of the White House Counsel and as Assistant to the President and Staff Secretary. Mr. Kavanaugh has virtually no courtroom experience and has never tried a case to verdict or judgment. Nor is he a prolific or significant legal scholar. This stands in marked contrast to the D.C. Circuit judges previously appointed by presidents of both parties, many of whom had been sitting judges, high-ranking Justice Department attorneys, or distinguished professors. Mr. Kavanaugh's resumé pales in comparison to these others.

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Equally troubling is the extreme, partisan nature of most of Mr. Kavanaugh's legal career, which calls into question his ability to be a fair and independent judge. He spent five years as part of Kenneth Starr's Office of Independent Counsel, participating in investigations concerning the conduct of President Clinton. The investigation culminated with the release of the Starr Report, of which Mr. Kavanaugh was co-author.¹ Starr's tactics were so extreme as to alienate many Republicans. A number of prominent Republicans, including Senators Arlen Specter and John McCain, criticized Starr for being too aggressive in the course of his investigation.² The report offered a detailed chronology of President Clinton's sexual escapades. There appeared to be no legal purpose for such disclosures except to embarrass and undermine the President. Mr. Kavanaugh has vigorously defended the Starr report.³

As Associate Counsel to the President from 2001-2003, Mr. Kavanaugh was Alberto Gonzalez' main deputy in charge of judicial nominees⁴ and served on the Administration's Judicial Selection Committee, which has been responsible for the selection of judicial nominees.⁵ He played a key role in administration efforts to remake the judiciary by appointing judges with extreme right-wing records who would strip the federal government of much of its authority and embody an antipathy towards individual and civil rights. Mr. Kavanaugh praised these nominees in terms of their excellence, integrity, and credentials. Mr. Kavanaugh's praise of such nominees and his participation in selecting them reflects his own extreme, right-wing, partisan views.

Mr. Kavanaugh's willingness to twist the law in support of his partisan agenda is best illustrated by his changing views on Presidential privilege. While working with Kenneth Starr, Mr. Kavanaugh was directly involved in a number of cases intent on diminishing presidential power and privilege. These cases supported a broad right to obtain information about the government and government leaders, including the President. However, upon assuming the position of Associate General Counsel in the Office of White House Counsel, one of Mr. Kavanaugh's first acts was to develop Executive Order No.13233, which eviscerated the Presidential Records Act (PRA).⁶ The Executive Order protects from disclosure, in perpetuity, documents, including those containing confidential advice a president received from his advisors ("P-5" documents), if the President refuses to

¹David Margolick, Bush's Court Advantage, *Vanity Fair*, Dec. 2003, at p. 162.

²Howard Kurtz, Starr is Urged to Curtail Inquiry, *Washington Post*, Mar. 2, 1998; Dan Carney and Carol J. Doherty, GOP Struggles to Find Strategy to Deal with Starr Fallout, *CNN*, Mar. 14, 1998, available at cnn.com

³*See, e.g.*, Brett M. Kavanaugh, Op-Ed, We All Support Kenneth Starr, *Washington Post*, July 1, 1999.

⁴Jeffrey Toobin, Advice and Dissent, *The New Yorker*, May 26, 2003.

⁵Sheldon Goldman, W. Bush Remaking the Judiciary: Like Father Like Son?, *Judicature* (May-June, 2003) at p. 284.

⁶Dana Milbank, Whitewater Lawyer Turns Proponent of Presidential Power, *Washington Post*, October 15, 2002.

Brent M. Kavanaugh
May 16, 2006
Page Three

disclose them. Previous law required their disclosure twelve years after an administration's end. In the course of his tenure with the White House Counsel's Office, Mr. Kavanaugh zealously pressed for other enormous expansions of executive privilege that would threaten government openness. This is of particular concern for a nominee to the D.C. Circuit, which often considers such issues.

Throughout Mr. Kavanaugh's career, he has shown a commitment to an extreme right wing agenda that would undermine the federal government and the freedoms and rights of its citizens. We urge the Senate to reject the nomination of Brett M. Kavanaugh to the United States Court of Appeals for the District of Columbia Circuit.

Yours very truly,

Professor Eileen Kaufman
Professor Tayyab Mahmud

Co-Presidents