

Senator Chuck Grassley
Questions for the Record

John W. Dean
Former White House Counsel, President Richard M. Nixon

1. You testified at length that, in your view, appointing Judge Kavanaugh to the Supreme Court would make “the most pro-presidential powers Supreme Court in the modern era.” Please identify all of the legal scholarship on which you relied to reach this conclusion.

ANSWER: The conclusion is mine, and I reached it based on my own years of study. Allow, me however, to correct the basis of your question. I would have liked to have “testified at length” about how Judge Kavanaugh’s appointment will result in “the most pro-presidential powers Supreme Court in the modern era;” in fact, I merely made a passing reference to this fact in my oral and written statements, when lamenting that conservatives no longer seek to restrain presidential powers. More specifically, I testified:

First, if Judge Kavanaugh joins the High Court, it will be the most presidential powers friendly Supreme Court of the modern era. Republicans and conservatives only a few year ago fought the expansion of presidential and executive powers. That is no longer true.

That report was drawn from the more complete statement which I submitted as part of my written testimony to the committee:

If Judge Kavanaugh is confirmed, I submit we will have the most pro-presidential powers Supreme Court in the modern era. I am old enough to remember when conservative orthodoxy fought the expansion of presidential and executive powers. The so-called Imperial Presidency was considered undemocratic. But conservatives have slowly done a one-hundred and eighty degree turn and concocted from whole-cloth what they call “a unitary executive theory,” using the sparse language of Article II of the Constitution to give presidents authority over the entirety of the Executive Branch, including supposedly independent regulatory agencies created by Congress and placed with the Executive Branch. With Judge Kavanaugh on the Court, we should anticipate a majority that will find it increasingly difficult to discover any presidential actions which they do not approve.

Since graduate school (before law school), I have been studying the American presidency – thus, about sixty years. I have an estimated 250 to 300 (if not more) books in my library directly and indirectly addressing presidential powers and I have read hundreds more. When researching the books and articles I have written, many addressing presidential powers, I have read countless law journals and legal opinions on the subject. To prepare my testimony I read news and magazine reports about Judge Kavanaugh, including a few dozen of his legal opinions, and approximately a half dozen speeches and articles he has published, to understand the nature of his thinking. I recall reading an August 21, 2018 *CRS Study*: “Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court,” because I took issue with a couple of items. * The *CRS* report acknowledges the judge leans toward executive power, although not as strongly as some scholars, e.g., Jen Kirby, “7 legal experts on how Kavanaugh views executive power,” *Vox* (Jul 11, 2018), ** which I also read, and it is consistent with my views. One of the legal scholars on our panel, Peter Shane, also stated he concurred with my conclusion, which is obvious.

* <https://fas.org/sgp/crs/misc/R45293.pdf>

** <https://www.vox.com/policy-and-politics/2018/7/11/17551648/kavanaugh-mueller-trump-executive-power-legal>