

**Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
Hearing on the Nomination of Judge Brett M. Kavanaugh to be an Associate Justice of the U.S.
Supreme Court
September 4, 2018**

One of the Senate's most solemn constitutional duties is to provide advice and consent to the President on his nominations of Supreme Court justices.

We are here this week to hear from Brett Kavanaugh, to hear about his exceptional qualifications, his record of dedication to the rule of law, and his demonstrated independence and his appreciation of the importance of the separation of powers.

Indeed, to protect individual liberty, the Framers designed a government of three co-equal branches, strictly separating the legislative, executive and judicial powers. The Framers intended for the Judiciary to be immune from the political pressures the other two branches face. That is so that judges would decide cases according to the law and not according to popular opinion.

Now, 230 years after ratification, our legal system is the envy of the world. It provides our people stability, predictability, protection of our rights and equal access to justice. But this is only possible when judges are committed to the rule of law.

Our legal system's success is built on judges accepting that their role is limited to deciding cases and controversies. A good judge exercises humility and makes decisions according to the specific facts of the case and according to the law.

A good judge never bases decisions on his preferred policy preferences.

A good judge also has courage, recognizing that we have an independent judiciary to restrain government when it exceeds its lawful authority.

As President Andrew Jackson said, "All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."

Confirmation hearings for Supreme Court nominees are an important opportunity to discuss the appropriate role of judges. As I see it, and I expect many of my colleagues will agree, the role of the judge is to apply the law as written, even if the legal result is not one the judge personally likes.

As Justice Scalia was fond of saying, if a judge always likes the outcomes of cases he decides, he is probably doing something wrong. I don't want judges who always reach a "liberal" result or a "conservative" result; I want a judge who rules the way the law requires.

Judges must leave the lawmaking to Congress.

Now, some have a very different view of what a judge's role should be. According to this view, judges should decide cases based on a particular outcome in order to advance their politics. But the American people don't want their judges to pick sides before they hear a case. They want a judge who rules based upon what the law commands.

This is the reason why all Supreme Court nominees since Ginsburg have declined to offer their personal opinions on the correctness of precedent. Seeking assurances from a nominee on how he will vote in certain cases or how he views certain precedent undermines judicial independence and essentially asks for a promise in exchange for a confirmation vote. It's unfair and unethical. Indeed, what litigant could expect a fair shake if the judge has already pre-judged the case before the litigant even enters the courtroom?

I expect Judge Kavanaugh will follow the example set by Ginsburg, and all the nominees that followed her, that a nominee should offer "no hints, no forecasts, no previews" on how they will vote.

Justice Kagan, when asked about *Roe v. Wade*, said the following: "I do not believe it would be appropriate for me to comment on the merits of *Roe v. Wade* other than to say that it is settled law entitled to precedential weight. The application of *Roe* to future cases, and even its continued validity, are issues likely to come before the Court in the future." Senators were satisfied with these answers on precedent. They should be satisfied if Judge Kavanaugh answers similarly.

This is my fifteenth Supreme Court confirmation hearing since I joined the Committee in 1981. Thirty-one years ago, during my fourth Supreme Court confirmation hearing, liberal outside groups and their Senate allies engaged in an unprecedented smear campaign against Judge Robert Bork.

As Mark Pulliam said in an op-ed over the weekend, "The borking of Robert Bork taught special-interest groups that they could demonize judicial nominees based solely on their worldview. Worse, character assassination proved an effective tactic, nearly sinking Justice Clarence Thomas's appointment four years later."

But he also said, "By confirming Judge Kavanaugh, the Senate can go some way toward atoning for its shameful treatment of Robert Bork 31 years ago."

Judge Kavanaugh is one of the most qualified nominees – if not the most qualified nominee – I have seen. Judge Kavanaugh is a graduate of Yale Law School. He clerked for three federal judges, including the man he is nominated to replace. He spent all but three years of his career in public service and has served as a judge for twelve years on the D.C. Circuit – the most influential federal circuit court. He has one of the most impressive records for a lower court judge in the

Supreme Court. In at least a dozen separate cases, the Supreme Court adopted positions advanced by Judge Kavanaugh.

The American Bar Association, whose assessment Democratic leaders have called the “gold standard” of judicial evaluations, rated Judge Kavanaugh unanimously well-qualified.

A review of Judge Kavanaugh’s extensive record demonstrates a deep commitment to the rule of law. He has written eloquently that both judges and federal agencies are bound by the laws Congress enacts. And he has criticized those who substitute their own judgments about what a statute *should* say for what the statute *actually* says.

After the President nominated Judge Kavanaugh, I said this would be the most thorough and transparent confirmation process in history. It has proven to be. Judge Kavanaugh has a twelve-year record on the D.C. Circuit, where he authored 307 opinions and joined hundreds more—amounting to more than 10,000 pages.

He submitted more than 17,000 pages of speeches, articles, and other material to the committee, along with his 120-page written response to the Senate Questionnaire—the most robust ever submitted to a Supreme Court nominee. These add up to more than 27,000 pages of Judge Kavanaugh’s record already available to the American people.

And we received just shy of half a million pages of emails and other documents from Judge Kavanaugh’s service as an executive branch lawyer—which is more than we received for the last five Supreme Court nominees combined. Every one of these more than 483,000 pages of Executive Branch records are available to any senator, anytime, 24/7.

And I pushed for federal officials to significantly expedite the public disclosure process under federal law, so that all Americans have online access to more than 290,000 pages of these records right now on the Judiciary Committee website.

In short, the American people have unprecedented access and more materials to review for Judge Kavanaugh than they ever had for a Supreme Court nominee. And to support the review of Judge Kavanaugh’s historic volume of material, I’ve worked to ensure that more Senators have more access to more material than ever.

Despite this unprecedented transparency, some of my colleagues on the other side have come up with every excuse for resisting this hearing. Indeed, some pledged to oppose Judge Kavanaugh from the moment of announcement.

The Minority Leader said that he would fight Judge Kavanaugh with everything he’s got. And for the most part, his side has tried tactic after tactic to delay and obstruct this process.

One of their tactics was to try to bury this Committee in millions of pages of irrelevant paperwork. Indeed, the Ranking Member even made the unprecedented demand for the search

of every email and every other document from every one of the hundreds of White House aides who came and went during the entire eight years of the Bush Administration. This would have taken months and months to complete. As I have repeatedly stated, I am not going to put the American taxpayers on the hook for the Democratic leaders' fishing expedition.

Democratic leaders made the unprecedented demand for documents from Judge Kavanaugh's time as the White House Staff Secretary, the presidential aide in charge of managing the paper flow to and from the President. These Staff Secretary documents are both the least revealing of Judge Kavanaugh's legal thinking and the most sensitive to the Executive Branch. They're not revealing of his legal thinking because the Staff Secretary's primary responsibility is making sure the President sees advice from *other* advisors, not sharing advice—let alone legal advice—of his own. These documents are the most sensitive to the Executive Branch because they contain advice transmitted directly to the President and are at the heart of executive privilege.

You will hear my Democratic colleagues argue that we are hiding documents—that we have only received 6 percent of Judge Kavanaugh's Executive Branch documents.

This is simply wrong.

They calculate their phony 6 percent figure with two inaccurate numbers. First, their 6 percent figure counts the *estimated* page count by the career archivists at the National Archives, based upon their historical practice, *before* the unprocessed emails and attachments are actually reviewed.

With Judge Kavanaugh's White House emails we have received, the *actual* number of pages ended up being significantly less than the number the National Archives estimated before its processing and review. One reason is because we were able to use technology and cull out the exact duplicate emails. Instead of having to read 13 times an email that Judge Kavanaugh sent to 12 White House colleagues, we only had to read the email once.

Second, the 6 percent figure counts millions and millions of pages of irrelevant Staff Secretary documents that we never even requested nor need.

More importantly, we requested 100 percent of the non-privileged documents from Judge Kavanaugh's time as an Executive Branch lawyer.

As I indicated in my document request, I did not expect to receive privileged documents. Just as we don't ask for staffers' communications with senators when Senate staffers are nominated—Justice Kagan, for example—we shouldn't expect similar communications with the President to be disclosed.

A significant portion of the privileged documents contain deliberations and advice regarding the nomination of judges, and it's critical that these deliberations remain confidential to guarantee that the current and *all future* presidents continue to receive candid advice.

Following the recommendation of former President George W. Bush, the White House claimed a reasonable number of documents as privileged, similar to the number of documents that were privileged during Chief Justice Roberts's confirmation. Then, the Department of Justice informed the Committee that it withheld as privileged roughly 1 in 10 documents sought from the Department.

My document request was modeled after the document request then-Chairman Leahy sent during Justice Kagan's nomination. At that time, he requested a large number, but not all, of her Executive Branch records. Despite Republican questions, he didn't request internal documents from her time as Solicitor General because both sides agreed the documents were too sensitive for disclosure.

If Solicitor General documents were too sensitive to request, then by the same logic, White House Staff Secretary documents are even more sensitive, because they contain candid advice sent directly to the President.

Complaints that the committee's review of an unprecedented volume of documents is somehow insufficient is simply an attempt to distract from Judge Kavanaugh's extensive and very impressive record.

In 2009, then-Chairman Leahy explained that Justice Sotomayor's judicial record "is the best indication of her judicial philosophy. We do not have to imagine what kind of a judge she will be because we see what kind of a judge she has been."

Similarly, we know what kind of judge Kavanaugh will be, because we know what kind of judge he has been for the last twelve years on the most influential circuit court.

Democratic leaders tried their best to stop today's hearing from happening. For all their talk about transparency, what they most feared was a chance for the American people to hear directly from Judge Kavanaugh.

Based on Judge Kavanaugh's extensive record, he is the kind of judge Americans want on the Supreme Court—committed to the rule of law, protective of our constitutional rights, and unfailingly independent.

Welcome, again, Judge Kavanaugh, and congratulations on your nomination.