

STATEMENT OF JOHN W. DEAN BEFORE THE SENATE JUDICIARY COMMITTEE  
HEARINGS ON THE NOMINATION OF JUDGE BRETT KAVANAUGH TO BE  
AN ASSOCIATE JUSTICE ON THE U.S. SUPREME COURT

SEPTEMBER 7, 2018

Mr. Chairman, Ranking Member, and Members of the committee, thank you for the invitation to appear. I've accepted the invitation for the same reason I accepted the invitation to testify at the September 2005, hearings on Judge John Roberts nomination to be Chief Justice. I represent no organization or group or cause. My only interest is in good government, and more specifically, the operations of the institutions of government where I once served, which I have continued to study and write about – namely the Congress and the Presidency.

In nominating Judge Brett Kavanaugh President Trump like many of his Republican predecessors has selected, as he did with his prior nominee Justice Neil Gorsuch, a sitting federal appellate judge with something of a shrink-wrapped judicial philosophy making it rather predictive of how his nominee will respond to most issues that come before the Court. While no president can be certain how a nominee will decide cases once seated on the Court, knowingly or unknowingly, it can almost be guaranteed that Judge Kavanaugh (like Gorsuch and other conservatives selected by Republican Presidents on the Court) will not drift to the center or the left, which I will explain in a moment.

President Trump, like several of his Republican predecessors, selected a judge with high-level Executive Branch experience. One of the most distinctive features of Judge Kavanaugh's background is his extensive Executive Branch experience. From 1992-93, Kavanaugh was an attorney in the Office of the Solicitor General at the Justice Department. From 1994 to 1997, and during a period in 1998, Kavanaugh was an Associate Counsel in the Office of Independent Counsel Kenneth Starr. Finally, he served in the Bush II White House for some five years. From 2001 to 2003, he was an Associate Counsel and later Senior Associate Counsel in the White House Counsel's office; and from July 2003 to May 2006 he was an Assistant to the President, and Staff Secretary to the President.<sup>1</sup>

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<sup>1</sup> With his extensive executive experience, Judge Kavanaugh will be joining a Court that is already top-heavy with justices sharing significant Executive Branch experiences. For example (and listed by seniority), Chief Justice John Roberts served for two years at the Justice Department as a Special Assistant to the Attorney General (1981-82), then four years in the Reagan White House Counsel's office (1982-86); and another four years at the Justice Department as the Principal Deputy Solicitor General (1989-93) – some ten-years total. Justice Clarence Thomas served two years as Assistant Secretary for Civil Rights at the U.S. Department of Education (1981-82), and then almost eight years as Chairman of the U.S. Equal Employment Opportunity Commission (1982-90). Justice Stephen Breyer spent two years as a Special Assistant to the Assistant U.S. Attorney General for Antitrust (1965-67), he spent a year as an Assistant Watergate Special Prosecutor (1973) and he is something of an exception in having some Legislative Branch experience as a special counsel (1974-75) and chief counsel (1979-80) to this committee. Justice Samuel Alito spent four years as an Assistant U.S. Attorney in New Jersey (1977-81), two years as a Deputy Assistant Attorney General at the Justice Department (1985-87) and three years as U.S. Attorney in New Jersey (1987-90) – almost a decade with the U.S. Department of Justice. Justice Elena Kagan served for four years at the Clinton White House as an Associate Counsel (1995-96) and Deputy Assistant to the President for Domestic Policy

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.

A Supreme Court that is decidedly pro-presidential power is deeply troubling with the contemporary Republican controlled Congress, which has shown no interest in oversight of a Republican president, Republicans are now creating a Supreme Court that will be a weak check, at best, on presidential powers. There is much to fear from an unchecked president who is inclined to abuse his powers. That is a fact I can attest to from personal experience. For example, the executive branch has been created by thousands of acts of Congress, many of which have been tested in the federal courts. Yet President Nixon planned to totally reorganize the executive branch in a manner which would have insulated the president and his staff, though the use (better stated as the abuse) of executive privilege, which would be used to block Congressional oversight. Nixon, leaning on his Justice Department, was getting legal opinions to support his radical changes in the executive branch. Needless to say, this is only one example, but I believe it is one of the reasons Congress sought to control Nixon with the Watergate investigations, which of course revealed even more abuses.

Justices with extensive executive experience are important for another reason. Republican appointed justices – and apparently only Republican High Court appointees – with such executive experience do not grow more moderate on the Court, rather just the opposite. Cornell Law Professor Michael Dorf, a former U.S. Supreme Court law clerk, and a serious scholar of the Court, discovered that executive experience is predictive of performance on the Court. Professor Dorf, originally writing in 2007 for the *Harvard Law & Policy Review*, reported: “For nearly four decades, one single factor has proven an especially reliable predictor of whether a Republican nominee will be a steadfast conservative or evolve into a moderate or liberal: experience in the executive branch of the federal government.” Dorf found that between 1969 and 2007, the Senate had confirmed twelve Supreme Court nominees from Republican presidents. The six justices with executive experience remained solid conservatives (Burger, Rehnquist, Scalia, Thomas, Roberts and Alito); while the six without such backgrounds became moderates and even liberal (Blackmun, Powell, Stevens, O’Connor, Kennedy and Souter).<sup>2</sup> In short, it is more likely than not that if Judge Kavanaugh is confirmed, he will remain every bit as conservative as he is today, as will his brethren with executive experience.

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(1997-99). And Justice Neil Gorsuch who served as a Principal Deputy Associate Attorney General at the Justice Department (2005-06).

<sup>2</sup> Michael C. Dorf, “Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices ‘Evolve’ and others Don’t?” Legal Studies Research Paper Series, at <http://ssrn.com/abstract=2240505>.

Because I am submitting this written statement several days before I testify, I am hopeful that by the time I appear before the committee we all will have a better understanding of Judge Kavanaugh's positions on executive and presidential powers, for he has taken inconsistent positions in the past. For example, Judge Kavanaugh set forth his thinking in a 2009 law journal article in *Minnesota Law Review* – innocuously titled “Separation of Powers During the Forty-fourth Presidency and Beyond.” More accurately, much of this article is a repudiation of the hyper-aggressive tactics that Kavanaugh launched against the presidency of Bill Clinton in his role as an assistant to Independent Counsel Kenneth Starr from 1994 to 1998, an undertaking that is as close to a real “witch hunt” as anything in American politics since Senator Joe McCarthy roamed the country with his bogus lists of communist traitors in our midst. Kavanaugh writes he believed in the 1980s and 1990s “that the President should be required to shoulder the same obligations that we all carry. But in retrospect, that seems a mistake.”<sup>3</sup> The judge is not claiming he and others were over-zealous, or that the Supreme Court got it wrong in accepting Starr's argument in *Clinton vs. Jones*, 520 US 681 (1997), that a sitting president has no immunity from civil litigation for acts done before taking office and unrelated to the office. Rather Judge Kavanaugh tellingly blames it all on the Independent Counsel Act, under which they were operating. Accordingly, he merely hints *Clinton vs. Jones* in the *Minnesota Law Review* that the case may have been wrongly decided, saying it was “beyond the scope of [his] inquiry.” As has been discussed before this committee, he goes on to recommend that Congress immunize sitting presidents from both civil and criminal liability. In short, under Judge Kavanaugh's view, even if a president shot someone in cold-blood on 5<sup>th</sup> Avenue, that president could not be prosecuted while in office. And based on Judge Kavanaugh's thinking at the time, he would give a president plenty of time to destroy the evidence.

Earlier, in a 1999 roundtable discussion with other lawyers, before arriving on the bench Judge Kavanaugh suggested that *U.S. vs. Nixon* may have also been wrongly decided. More specifically, he stated:

But maybe Nixon was wrongly decided – heresy though it is to say so. Nixon took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implication to this day that most people do not appreciate sufficiently.... Maybe the tension of the time led to an erroneous decision....

This is from a transcript of the discussion published in the January-February 1999 issue of the *Washington Lawyer*.<sup>4</sup>

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<sup>3</sup> Brett M. Kavanaugh, “Separation of Powers During the Forty-Fourth Presidency and Beyond,” *Minn. Law Review* (2009) 1460.

<sup>4</sup> Mark Sherman, “Kavanaugh: Watergate tapes decision may have been wrong,” AP (July 18, 2018) at [https://apnews.com/amp/3ea406469d344dd8b2527aed92da6365?\\_\\_twitter\\_impression=true](https://apnews.com/amp/3ea406469d344dd8b2527aed92da6365?__twitter_impression=true)

By 2016 Judge Kavanaugh, however, was praising *U.S. v. Nixon*, placing it in the company of several of the Court's most cherished landmark holdings,<sup>5</sup> and asserting (much as he has during these hearings, though falling short of agreeing that the case was correctly decided):

As a judge, you must, when appropriate, stand up to the political branches and say some action is unconstitutional or otherwise unlawful. Some of the greatest moments in American judicial history have been when judges stood up to the other branches, were not cowed, and enforced the law. That takes a backbone, or what some call judicial engagement. To be a good judge and a good umpire, you have to possess strong backbone.<sup>6</sup>

If Judge Kavanaugh has not sorted out his positions on these key matters of executive power by the time I appear before the committee, I am happy to share with the committee what I believe would have happened during Watergate had the Supreme Court ruled for the President in *U.S. vs. Nixon* – for history would have been very different. I am also happy to share with the committee my understanding of why the Office of Legal Counsel of the Department of Justice issued its opinion in 1973 that a sitting president could not be indicted, and if Judge Kavanaugh's position has not been resolved on the Constitutional issues on indicting a sitting President. Indeed, I believe it has been resolved by two scholars: former Deputy Solicitor General Philip Lacovara, and the Constitutional scholar that Independent Counsel turned to on this issue the late Professor Ronald Rotunda – these scholars represent political philosophies from left to right.

I would like to close with a very important process matter. It is my understanding that the Trump White House is withholding a massive collection of documents relating to Judge Kavanaugh's work at the Bush II White House, and who knows what else they are hiding. The Ranking Member, California Senator Dianne Feinstein, stated on the morning of September 4, 2018 – just before the Kavanaugh hearings began – that after participating in nine Supreme Court confirmation hearings, it had never been so difficult to get access to the background documents relating to a nominee. Senator Feinstein stated that some ninety-three percent of Kavanaugh's records from his years at the Bush II White House remained "hidden," including over one-hundred thousand documents from his work in the White House Counsel's office. Senator Feinstein further noted that never has executive privilege been invoked by a White House for a candidate nominated to the Supreme Court, although the Reagan White House wanted to do so when elevating Justice Rehnquist to be Chief Justice.

These hearings began on September 4, 2018 with an effort by the minority to postpone the hearings until all the requested documents were provided. The chairman declined to consider a motion that would make such a review of the Kavanaugh documents possible. In short, notwithstanding the number of documents that have been provided, Judge Kavanaugh has, in fact, not truly been fully vetted given the fact vast numbers of documents have been withheld, estimated at only ten percent of the relevant material, yet it appears highly likely he will be

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<sup>5</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

<sup>6</sup> Brett M. Kavanaugh, "The Judge as Umpire: Ten Principles," *Catholic University Law Review* (Spring 2016) 683.

confirmed to take a seat on the Court. Based on personal experience with the confirmation of William Rehnquist, and studying the confirmation of Clarence Thomas, I can state that the failure to fully vet a nominee can haunt that person's career on the Court, damage the notion of justice, hurt the Court, and harm the American people. Because of the potential negative impact of a failure to fully vet Judge Kavanaugh, a man who knows the history of High Court confirmations, he should follow the request of Senator Durbin and demand that the hearings remain open until every piece of paper he has generated, or handled, has been reviewed carefully and fully by both the majority and minority of this committee. Let me explain why, using the examples of William Rehnquist and Clarence Thomas, both of whom went to the Court with clouds questioning their honesty and integrity hanging over them.

When writing *The Rehnquist Choice*, I explained how Rehnquist was selected by President Nixon for one of the two openings on the Court in 1971. I also reported discovering that Rehnquist had dissembled during his confirmation proceeding to become an associate justice when first claiming he was not a poll-watcher in Arizona during the 1964 presidential election and later when sending a letter to the then chairman of the Senate Judiciary Committee James Eastland to deny additional reports relating to his poll watching activities which had arisen after his confirmation hearing ended. Rehnquist was charged with employing Jim Crow like tactics in his native Arizona during the 1964 election. Eastland used Rehnquist's false statements in his letter to end the floor debate and get him confirmed successfully. When President Ronald Reagan nominated Rehnquist in 1986, again he was not vetted, and he was confronted not only with the charge he had falsely explained his conduct during the 1964 election but in addition that he had made false statements about his role in writing a memorandum as a law clerk to Justice Robert Jackson, and falsely claiming that Justice Jackson was opposed to *Brown vs. Board of Education*. As I note in the book, all the Court scholars who have looked at this situation have found clear and convincing evidence that Rehnquist was untruthful in his two confirmation proceedings, and that he hurt himself and the Court with these actions.

Because Justice Clarence Thomas was not fully vetted his career on the Court has been under a cloud that has had a conspicuous impact on him and the Court. Thomas's truthfulness vis-à-vis Professor Anita Hill's claims of sexual harassment have never been fully resolved, nor has the controversy ended. A definitive study of this controversy was undertaken in 1994 by journalists Jane Mayer and Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* (Graymalkin Media, 2017 edition). Mayer and Abramson found that the preponderance of evidence supported Anita Hill's claims. This controversy has received renewed attention with the Me Too Movement (or #MeToo Movement), which is growing stronger and it is not going to disappear. In fact, it is a current issue for Justice Thomas because this year's mid-term election congressional candidate Barbara L'Italien, a Massachusetts Democrat, has made the impeachment of Justice Thomas for his false statements during his confirmation one of the planks of her campaign.<sup>7</sup>

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<sup>7</sup> Stephanie Murray, "Massachusetts Democrat calls for Clarence Thomas impeachment," *Politico* (Aug. 29, 2018) at <https://www.politico.com/story/2018/08/29/barbara-litalien-clarence-thomas-impeachment-801680>

Judge Kavanaugh's nomination to the Supreme Court, is in one regard like the Rehnquist nomination to be Chief Justice, for he arrives with a question about his truthfulness during his confirmation hearings to the D.C. Circuit Court of Appeals. It is doubtful his answers have resolved doubts. If these hearings do nothing else they should establish beyond a reasonable doubt, if possible, that another cloud regarding truthfulness of another justice does not cast doubt on the Court. This is the reason Judge Kavanaugh should want every document he has ever touched reviewed by the committee, unless he has some he wants hidden.

Thank you, I am available to answer your questions.