United States Senate Judiciary Committee Hearing:
The Nomination of Brett Kavanaugh
to be an Associate Justice of the Supreme Court of the United States

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Prepared Statement of
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Mr. Chairman, Ranking Member Feinstein, and members of the Committee, thank you for giving me the opportunity to testify before you today. I have been asked to testify about the law governing administrative agencies. I will discuss Judge Kavanaugh's views on the independence of administrative agencies, agencies' discretion to interpret the laws they implement, and the purposes agencies are bound to serve.

The opinions that Judge Kavanaugh has written in his twelve years as a judge make clear that, as a justice, he would unsettle the independence, legal authority, and protective missions of administrative agencies. He would do so by discarding legal precedents that have long allowed Congress to structure our government and to address the pressing problems of the day without undue interference from unelected judges. He would work in the name of a cramped and skewed "liberty" that, in his hands, amounts to a freedom to harm other people with minimal government constraint. In Judge Kavanaugh's ideal world, we would witness a massive reallocation of power from Congress to the president and from Congress to the courts, with the president exercising dominion over the administrative agencies that do much of the work of government today and with the courts presiding over this transfer of power. In each of the legal contexts I discuss here, Judge Kavanaugh has staked out a more extreme position than Justice Kennedy, whom he would replace, and thus would change the balance of power on the Supreme Court.

These legal issues can sound quite abstract; they might even seem unconnected to people's daily lives. But the Supreme Court's approach to these questions has a profound effect on our everyday lives. One can name any problem that matters – environmental destruction, workplace hazards, sexual harassment, inadequate health care, financial fraud, food safety, and on down the line – and one will find that the day-to-day work of addressing that problem is done by an administrative agency. In each case, Congress will have made a judgment about the degree of independence the agency needs to do the job. Congress will also have given the agency instructions, some clear and some unclear, about how the agency should go about its work. Subjecting these agencies to more political meddling from the president, as Judge Kavanaugh thinks we should, would make these agencies more likely to work in the service of the privileged few rather than in the service of the broad public. Stripping them of legal authority to address the major

issues we face, such as climate change and governance of the Internet, would leave us unprotected against new threats and new problems. The legal issues may seem abstract, but the tangible consequences are profound.

Independence

Judge Kavanaugh believes that the basic problem with the structure of government today is that the president has too little power. His theory of the "unitary executive" holds that the president alone is entitled to wield all of the executive power that the federal government has. His theory would give courts free rein to force a reallocation of the power that has long belonged to Congress – power, through legislation, to define the scope, mission, and configuration of administrative agencies – and hand much of that power over to the president. The result would be a super-powerful president, a diminished Congress, and a corrosion of the checking and balancing that the Constitution contemplates.

Judge Kavanaugh believes that one of the constitutionally guaranteed powers of the president is to fire agency officials without cause, even where Congress has made a different choice. Yet longstanding Supreme Court precedent confirms Congress's constitutional power to create agencies that are relatively independent from the president. Judge Kavanaugh's approach to this precedent has been to treat it grudgingly, read it narrowly, and ultimately rewrite it altogether. Once on the Supreme Court, Judge Kavanaugh would be able to join his new, likeminded colleagues in casting this precedent aside, and, in doing so, restructure modern government.

In *Humphrey's Executor v. United States*,[1] the Supreme Court held that Congress had acted within its constitutional power in providing that the president could fire members of the Federal Trade Commission only for "inefficiency, neglect of duty, or malfeasance in office." The president could not, in other words, fire a commissioner simply because the commissioner disagreed with the president on a point of policy.

Humphrey's Executor is the bête noire of the unitary executivists. They believe it has empowered what they call a "headless fourth branch of government" that unconstitutionally drains power from the president. They argue that Congress has no power to decide that certain agencies, faced with certain kinds of problems, require a buffer from the capricious demands of presidential politics.

Judge Kavanaugh has addressed this settled law by inveighing against it and refusing to condone new agency structures that are not identical to the structures of traditional independent agencies like the Federal Trade Commission. In a case challenging the structure of the Consumer Financial Protection Bureau (CFPB), Judge Kavanaugh worked hard to distinguish *Humphrey's Executor*.[2] He asserted that the CFPB was different from all other independent agencies because it was headed by a single official rather than by multiple officials. He thought that the director of the CFPB was,

[1] 295 U.S. 602 (1935).
[2] PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016).

for purposes of the separation of powers, simply too powerful; indeed, he claimed, the CFPB's director was, within the domain of consumer finance, "the single most powerful official in the entire U.S. government."

Judge Kavanaugh concluded that Congress had violated the Constitution by creating an independent agency headed by just one person. Yet in choosing the single-director form of leadership for the CFPB, Congress had made a judgment about the degree of political independence necessary for an agency charged with addressing the ever-shifting misconduct of the supremely well-heeled and well-connected consumer finance industry. In casting aside Congress's judgment, Judge Kavanaugh not only rolled his eyes at longstanding legal precedent, but also favored his own judgment about the appropriate limits of the CFPB director's power over Congress's judgment about these limits. The D.C. Circuit as a whole has rejected Judge Kavanaugh's legal theory,[3] but challenges to the constitutionality of the CFPB's structure continue to make their way through the lower courts and may eventually land on the Supreme Court's doorstep.[4]

Judge Kavanaugh also came up with a new legal theory in arguing that the structure of the Public Company Accounting Oversight Board (PCAOB) was unconstitutional.[5] The members of this Board were removable only for cause by the members of the Securities and Exchange Commission, who in turn were removable only for cause by the president. Judge Kavanaugh concluded that this "double for-cause removal restriction" went further than *Humphrey's Executor* and other relevant precedent had gone and therefore was unlawful. Judge Kavanaugh claimed that, given the uniqueness of the PCAOB structure, "a judicial holding invalidating it would be uniquely limited to the PCAOB." The Supreme Court ultimately embraced Judge Kavanaugh's theory and invalidated the structure of the PCAOB.[6] In dissent, Justice Breyer warned that administrative law judges, and even ordinary civil servants, also enjoyed a double layer of job protection. He worried that the Court's theory of the case could come to cover these employees as well.[7] The majority brushed past these concerns,[8] as had Judge Kavanaugh in propounding this theory in the D.C. Circuit.[9]

Predictably, Judge Kavanaugh's theory challenging double layers of job security has not remained confined to the rather obscure PCAOB. On the contrary, his idea has encouraged a stream of litigation with a surprising central claim: that the administrative

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[3] PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc).
[4] In *CFPB v. All American Check Cashing, Inc.*, the Fifth Circuit has accepted for interlocutory review a district court decision rejecting a constitutional challenge to the independence of the CFPB. The district court's decision is reported at 2018 U.S. Dist. LEXIS 131595 (S.D. Miss. 2018). In *Collins v. Mnuchin*, the Fifth Circuit found that the Federal Housing Finance Agency was unconstitutionally structured based, in part, on Judge Kavanaugh's reasoning regarding the CFPB. 896 F.3d 640 (5th Cir. 2018).
[5] Free Enterprise Fund v. PCAOB, 537 F.3d 667 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).
[6] Free Enterprise Fund v. PCAOB, 561 U.S. 477 (2010).
[7] *Id*. at 542-43.
[8] *Id.* n. 10.
[9] *PCAOB,* 537 F.3d at 699 n. 8.

law judges who adjudicate individual cases for the independent agencies are too removed from presidential politics. The same structure that characterized PCAOB's relationship to the president also characterizes the relationship of administrative law judges to the president: they, too, enjoy a double layer of job security. Administrative law judges may be removed "only for good cause established and determined by the Merit Systems Protection Board,[10] and the members of the Merit Systems Protection Board may be removed only for "inefficiency, neglect of duty, or malfeasance in office."[11] Last Term, the Supreme Court held that the administrative law judges of the Securities and Exchange Commission are "officers" within the meaning of the Constitution, and thus must be appointed by the heads of the agencies they serve.[12] The Court left for another day the question whether the job protection Congress has given to these judges unconstitutionally intrudes upon the president's power, but its opinion already has brought administrative law judges closer to presidential politics than they were before.

Not that long ago, the important constitutional question about administrative law judges was whether they could be impartial *enough*, given that they lack the lifetime tenure enjoyed by federal court judges appointed under Article III of the Constitution.[13] Now, thanks to theories propounded by unitary executivists like Judge Kavanaugh, we find ourselves in the remarkable position of asking whether these judges are, in effect, *too* impartial, and must be moved a step closer to presidential politics to satisfy constitutional demands.

Judge Kavanaugh prides himself on being a neutral "umpire," blandly calling balls and strikes in the cases before him. But his umpiring with respect to the independence of agencies has unleashed a theory that may make political actors out of judges, politicizing administrative law judges by bringing them closer to political actors when they are hired, when they are removed, and presumably at all stages in between. The Supreme Court has long paid special respect to the necessity of independent adjudicators deciding individual cases. In *Wiener v. United States*,[14] the Court held that "the nature of the function that Congress vested in" the tribunal at issue there – a function that entailed adjudicating disputes over compensation for wartime injuries at the hands of the enemy in World War II – required denial of unlimited presidential removal power. In propounding his views on the constitutional dangers of double layers of protection for agency officials, Judge Kavanaugh cited the unanimous decision in *Wiener* only to report that its rationale "seems questionable."[15]

Judge Kavanaugh's approach to the separation of powers says as much about his approach to settled precedent as it does about his views on congressional and presidential power. As a lower court judge, he has unilaterally decided to limit *Humphrey's Executor* to its facts. He has ignored *Wiener* altogether. And, even without a case in front of him,

[10] 5 U.S.C. § 7521(a)-(b).
[11] 5 U.S.C. § 1202(d).
[12] Lucia v. Securities and Exchange Commission, 138 S.Ct. 2044 (2018).
[13] Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986).
[14] 357 U.S. 349 (1958).
[15] *PCAOB*, 537 F.3d at 695 n. 5.

he has already announced that he would "put the final nail in" *Morrison v. Olson*, the Court's decision upholding the independent counsel law.[16]

Judge Kavanaugh's views on separation of powers would cut deep into the structure of the government. He has announced that he will not extend *Humphrey's Executor* beyond its four corners, and he has made good on this vow by voting to strike down agency structures that are in any way novel. I do not believe he will stop at the Consumer Financial Protection Bureau and the Public Company Accounting Oversight Board. Given the breadth and fervor of his attack on independent agencies, I believe he will, when the occasion arises, vote to overrule *Humphrey's Executor*, and in the process restructure the federal government and reallocate power from Congress to the president and the courts. That restructuring will take as its central premise the surprising idea that the problem with our government today is that the president has too little power and the courts must give him more.

Judge Kavanaugh nowhere grapples with the extreme concentration of power that his theory would achieve. Executive power can be at once unitary and vast; indeed, in his opinions on the separation of powers, Judge Kavanaugh has distinguished the *unitariness* of executive power from the *scope* of that power.[17] Under Judge Kavanaugh's theory of the unitary executive, the president would be able to exercise undiluted control over all of the entities in the government that exercise executive power, even if the degree of policy discretion Congress gave to these entities was calibrated based on the degree of independence it had conferred on them. Ironically, Judge Kavanaugh has taken an instrument aimed at checking concentrated power – the separation of powers – and turned it into in an instrument calibrated to increase the power of the already-most-powerful person in our government.

Legal Authority

Judge Kavanaugh has created a theory of statutory interpretation that holds that an agency may not issue a rule that has great political and economic significance without a precise and crystalline instruction from Congress. This interpretive approach would, perversely, disable agencies in the very circumstances in which we need them the most. It would skew statutory interpretation against agencies' power to undertake protective regulatory programs that run counter to Judge Kavanaugh's own political preferences. And it demands a legislative clarity that Judge Kavanaugh himself has said is well nigh impossible to achieve.

Judge Kavanaugh would disempower agencies from issuing what he regards as "major rules" unless Congress has clearly given them authority to do so. Agencies could, in his framework, issue "ordinary" rules without clear statutory authority, but they could not issue rules raising questions of major political and economic significance without such clarity. He has described his new interpretive principle in this way: "For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute

[16] 487 U.S. 654 (1988).
[17] *PCAOB*, 537 F.3d at 689 n. 2.

only *ambiguously* supplies authority for the major rule, the rule is unlawful."[18] To put the principle another way, highlighting its subtle but profound reallocation of power from Congress to the courts: for Congress to empower an agency to issue a major rule, Congress must satisfy the courts that it has spoken with crystalline clarity and problem-specific precision.

Judge Kavanaugh would distinguish "major" rules from "ordinary" rules by considering "the amount of money involved for regulated and affected parties, the overall effect on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[19] Where these factors are present, Judge Kavanaugh would hold that an agency may not take a regulatory action at all without a clear legislative go-ahead. Judge Kavanaugh would, in other words, disable agency action in precisely the circumstances where it is most important. He has already announced that rules governing the Internet and regulating greenhouse gases are off-limits under his theory.[20] Given Judge Kavanaugh's criteria for identifying "major" rules, it is hard to imagine any significant regulatory proceeding that could not be subject to his new, power-stripping interpretive theory.

As Judge Kavanaugh himself has recognized, moreover, the notion of what constitutes a "major" agency decision has "a bit of a 'know it when you see it' quality."[21] In fact, an agency decision can be shifted from minor to major status simply by changing the frame of reference for evaluating that decision. Judge Kavanaugh has proved adept at manipulating the frame of reference to make an agency decision appear gigantic when it is actually workaday.

Consider his opinion in *SeaWorld of Florida v. Perez*.[22] In this case, Judge Kavanaugh dissented from a panel decision upholding a $7,000 fine against SeaWorld for "exposing its trainers to recognized hazards when working in close contact with killer whales during performances." The panel majority affirmed the finding of the Occupational Safety and Health Administration (OSHA) that SeaWorld had violated the Occupational Safety and Health Act's "general duty" clause, which requires "[e]ach employer" to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[23] Following an evidentiary hearing, an administrative law judge had found that SeaWorld violated this provision when, on February 24, 2010, a killer whale mutilated and killed the trainer Dawn Brancheau during

[18] United States Telecom Assn. v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (emphasis in original).
[19] *United States Telecom,* 855 F.3d at 422-23.
[20] *Id.* at 422-24 (net neutrality); Coalition for Responsible Regulation v. EPA, 2012 U.S. App. LEXIS 25997 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc) (greenhouse gases).
[21] *United States Telecom*, 855 F.3d at 423.
[22] SeaWorld of Florida, LLC v. Perez, 748 F.3d 1202, 1216-22 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).
[23] 29 U.S.C. § 654(a)(1).

a public performance, after SeaWorld had failed to take precautions following similar prior attacks.

SeaWorld adjudicated a dispute involving one company's failure to provide a safe working environment on one day. Miraculously, however, Judge Kavanaugh transformed the case into one justifying his "major" decisions treatment. He insisted that if OSHA reprimanded SeaWorld for failing to protect its trainers against its killer whales, then OSHA could not condone punt returns in NFL football or speeding in NASCAR (hypothetical situations that not even SeaWorld had raised in its defense). Once he had blown up this single enforcement action against a theme park into a frontal assault on NFL football and NASCAR races, it was easy enough for Judge Kavanaugh to find that the case involved a question of major "economic and political significance." And once he found that the case was "major," he no longer asked whether the statute's plain language covered the factual situation presented (which it clearly did). Instead, Judge Kavanaugh looked for some additional sign from Congress – beyond the plain language that he, unfathomably, characterized as legislative "silen[ce]" – that it had specifically intended to take on "America's sport and entertainment behemoth." Not finding the sign he was looking for, Judge Kavanaugh would have denied OSHA the legal authority to take action against SeaWorld.

If an agency decision can be transformed into a "major" one based on this kind of logical manipulation, there is no limit to the damage Judge Kavanaugh's "major" decisions theory can do to agencies' legal authority to take on the problems Congress has charged them with addressing.

Equally troublingly, Judge Kavanaugh's new spin on statutory interpretation is structurally designed to favor deregulation and inaction over affirmative regulatory initiatives. Indeed, it is quite clear that Judge Kavanaugh does not intend to apply his concept of "major" decisions to agencies' deregulatory or non-regulatory decisions. This is not a neutral choice. It is as if an umpire, before calling a ball or strike, redefined the strike zone.

Consider Judge Kavanaugh's opinion in *Coalition for Responsible Regulation v. EPA.*[24] Judge Kavanaugh dissented from the denial of rehearing en banc in this case, which challenged an Environmental Protection Agency (EPA) rule requiring permitting for greenhouse gas emissions from stationary sources. Uncritically citing the Chamber of Commerce's claim that EPA's rule created "the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency," Judge Kavanaugh argued that the "major consequences" engendered by the rule counseled against reading the Clean Air Act to require permitting for greenhouse gas emissions. The inescapable implication of his opinion is that if EPA had issued a rule interpreting the Clean Air Act *not* to require greenhouse-gas permitting of the relevant sources, Judge Kavanaugh would have upheld it. But that decision would have engaged *exactly the same* "economic and environmental policy stakes" as EPA's decision did; indeed, Judge Kavanaugh

[24] *Coalition for Responsible Regulation*, 2012 U.S. App. LEXIS 25997 (Kavanaugh, J., dissenting from denial of rehearing en banc).

acknowledged that "massive real-world consequences" would have flowed from a decision "in either direction." Judge Kavanaugh's theory on "major rules" thus limits an agency's legal authority only where the agency has made a decision in what Judge Kavanaugh regards as the wrong direction: toward protective regulatory programs and away from deregulation or inaction.

The degree of clarity that Judge Kavanaugh would require from Congress in order to give agencies legal authority to issue "major rules" is also problematic. The flip side of clarity is ambiguity, and Judge Kavanaugh has admitted that judges have "no definitive guide for determining whether statutory language is clear or ambiguous."[25] Judge Kavanaugh's "major rules" theory would thus free judges to deny legal authority to agencies based on a distinction that he deems unprincipled.

In addition to creating a new theory for how to interpret statutes that lead to "major rules," Judge Kavanaugh has also criticized legal precedent requiring courts to defer to agencies' reasonable interpretations of ambiguous statutes. He has said that his preference would be to abandon interpretive deference, and to put judges in charge of deciding the single best interpretation of a statute.

The legal framework that Judge Kavanaugh would like to discard comes from *Chevron v. NRDC,* the most famous case in all of administrative law. *Chevron* stands for the following principle, known as "*Chevron*" deference: where a statute is ambiguous, courts should defer to the permissible interpretation of the agency charged with implementing the statute.[26] This principle acknowledges that judges are not experts in the complex and technical problems that Congress has instructed agencies to address. Judges also stand aloof from external checks in ways that agencies do not. Agencies are creatures of Congress, and may act only with the authority Congress has given them. Their funding is dependent on Congress and they are subject to Congress's oversight. In addition, they must, in order to take legally binding action, satisfy procedural requirements that require them to hear and to respond to the views of interested parties and then to explain their decisions in reasoned terms.

Judge Kavanaugh has signaled that he would prefer to discard *Chevron* entirely, replacing it with judicial power to interpret the law without deference to agencies' views.[27] Undoing *Chevron* would be a radical departure from the Court's long-settled approach to statutory interpretation. The consequences would include legal uncertainty and disruption, as agencies, affected parties, and courts grappled with the new approach to statutory interpretation. The consequences would also include a large shift in interpretive power away from the expert-driven, externally checked agencies and toward the non-expert, insular courts. Here, too, Congress would be the biggest loser. It would no longer have the power to delegate interpretive authority to agencies on questions that

[25] Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017).
[26] Chevron v. NRDC, 467 U.S. 837 (1984).
[27] Kavanaugh, 92 NOTRE DAME L. REV. at 1912.

it could not resolve, could not foresee, or could not solve given the limits of its expertise. This massive shift in power away from Congress would come not from a constitutional imperative, but from ostensibly tinkering at the margins of the rules of statutory construction.

At least, however, a full-scale retreat from *Chevron* would not favor one political perspective over another. *Chevron* deference itself is, in principle, agnostic about the political valence of an agency decision; it is triggered by the ambiguity of the statute at hand, rather than by the political direction of the agency's choice. The same cannot be said of Judge Kavanaugh's approach to "major rules."

Congress often delegates authority to agencies to address broad problems whose full dimensions and manifestations are not immediately clear. Congress does so in the expectation that agencies will study and monitor the problems and take regulatory action as necessary to address them. Judge Kavanaugh, however, would require linguistic precision from Congress if it wants to authorize an agency to take on a specific new problem. He looked, for example, for such precise language in considering whether EPA could require permits for greenhouse gases and whether OSHA could fine SeaWorld for failing to protect trainers of killer whales against avoidable risks. In doing so, he has simply failed to listen to Congress's instructions to these agencies to continue to investigate and address new problems. Congress has spoken, but Judge Kavanaugh hears only crickets.

Liberty

The touchstone of Judge Kavanaugh's work as a judge is the separation of powers, and the motivating force behind his focus on the separation of powers is the protection of liberty. Unfortunately, however, the "liberty" Judge Kavanaugh embraces is badly skewed, and terribly small: it is the liberty of powerful groups to do their business unhindered by government, rather than the liberty that comes from meaningful government protections against harmful human behavior. In the name of "liberty," Judge Kavanaugh has rejected rules addressing toxic air pollution, climate change, workplace safety, financial fraud, and more – without acknowledging that in such cases, "liberty" sits on both sides of the legal question. There is, on one side, the liberty of regulated groups to go about their business unimpeded by federal law. There is, on the other, the liberty of the rest of us to go about our lives – at home, at school, at work, and in our communities – with a reasonable assurance that the government has our back in protecting us against coming to harm at other people's hands.