

**Senator Dick Durbin**  
**Hearing on the Supreme Court Nomination of Brett Kavanaugh**  
**Opening Statement**  
**September 4, 2018**

Thank you Mr. Chairman. Judge Kavanaugh it is good to see you again and I thank the members of your family who are weathering this hearing. Thank you very much for being here today.

This is a different hearing for the Supreme Court than I have ever been through. It is different in what has happened in this room just this morning. What we have heard is the noise of democracy. This is what happens in a free country when people can stand up and speak and not be jailed, imprisoned, tortured, or killed because of it. It is not mob rule. There have been times [during the hearing] when it is uncomfortable. I'm sure it was for your children. I hope you can explain this to them at some point, but it does represent what we are about in this democracy.

Why is this happening for the first time in the history of this Committee? I think we need to be honest about why it is happening. I think it is the same reason why when I go to Illinois after being in this public service job for over 30 years, I hear a question that I have never ever heard before, repeatedly. As people pull me to the side and say, "Senator, are we going to be alright? Is America going to be alright?" They are genuinely concerned about the future of this country. You come to this moment in history, in a rare situation. You are aspiring to be the most decisive vote on the Supreme Court on critical issues, Justice Kennedy did that for 12 years, and you are called to that responsibility and we realize the gravity of that opportunity and that responsibility.

Secondly, of course, your record and the statements of others suggest that there is real genuine concern about changing life and death values in this country, because you see things differently. We've heard that over and over again and I think you must understand the depth of feeling about that possibility.

And third, try as they might, I'm afraid the majority just cannot get beyond the fact that there are parts of your public life that they want to conceal. They don't want Americans to see it. I think that is a serious mistake and I will make a suggestion at the end of my remarks. But over and above all of those things is this, you are the nominee of President Donald John Trump. This is a President who has shown us consistently that he is contemptuous of the rule of law. He has said and done things as President, which we have never seen before in our history. He has dismissed the head of the Federal Bureau of Investigation when he would not bend to his will. He harasses and threatens his own Attorney General on almost a daily basis, in the exercise of his office. And I did not vote for Jeff Sessions, but I have to tell you there should be some respect at least for the office that he serves in. It is that President, who has decided you are his man. You are the person he wants on the Supreme Court. You are his personal choice.

So, are people nervous about this? Are they concerned about it? Of course they are.

I am sure there will be a shower of tweets some time later in the day, harassing people in the Cabinet, people in the White House, maybe even dismissing them. Maybe he will go after me

again. Be my guest. But the point I'm getting to, is that if you wonder why this reaction is taking place, it is because of what is happening in this country.

There are many of us who are concerned about the future of this country. And the future of democracy. And you are asking for a lifetime appointment to the highest court in the land, where you will make decisions, the deciding vote, on things that will decide the course of history and where we are headed.

The Senate has a constitutional responsibility to evaluate your nomination. We do know that before you became a judge, you were faithfully advancing the Republican Party agenda. I jokingly said in in of your previous appearances that you are like Forest Gump of Republican politics. You always show up in the picture. Whether is the Ken Starr investigation, Bush v. Gore, the Bush White House, you have been there. We also know that before even naming you, President Trump made it clear, that he would only appoint Justices to the Supreme Court only to overturn Roe v. Wade and the Affordable Care Act. Those were his litmus test. Now, He didn't ask you the question. What he did was delegate this responsibility to two special interest groups, The Federalist Society and the Heritage Foundation. And the other groups that are spending millions of dollars in support of your candidacy. They are confident that you will favor the interest of corporations over workers and give the President wide berth when it comes to executive authority. Your own law clerks, men and women you choose and wrote the words that had your signature at the bottom of the page, have told us what they think of you.

One wrote, in an article entitled, "Brett Kavanaugh said Obamacare was Unprecedented and Unlawful." That's from one of your Clerks. Another wrote that when it comes to, quote, "enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh."

Big Corporate interest are solidly behind your nomination. Chamber of Commerce, full support. And President Trump, whose lawyers say that they will fight any effort to subpoena or indict him all the way to the Supreme Court, that President seems personal eager to have you confirmed as quickly as possible.

Why are your supporters so confident that you will rule on these issues, as they wish?

Why do they think you are such a sure bet to take their side? In the words of one of your former clerks, "This is no time for a gamble".

Unfortunately, I don't think you are going to tell us much this week. It is interesting to me that people in your position write all these law review articles, make all these speeches, and come to this room and clam up. They do not want to talk about any issues. But that is what I expect. Instead, we will be asked to trust that if you are confirmed, you will have an open mind. That you will follow the law rather than move the law in the direction of your views. I would like to trust you, but I agree with President Ronald Reagan: "Trust, but verify."

I wanted to trust you the last time you testified before this committee in 2006. But, after you were confirmed at the D.C. circuit, reports surfaced that contradicted your sworn testimony

before this Committee. You said to me unambiguously under oath the following: “I was not involved and am not involved in the questions about the rules governing detention of combatants.” But later, just a week or so ago, you acknowledged in my office that you were involved. For twelve years, you could have apologized and corrected this record, but you never did. Instead, you and your supporters have argued that we should ignore the simple declarative sentence which you spoke and somehow conclude your words means something far different. You are a committed textualist, Judge Kavanaugh. If you’re going to hold others accountable for their words, you should be held accountable for your own words. So after my personal experience, I start these hearings with a question about your credibility as a witness. I know from my history with you that things you said need to be carefully verified.

That brings us to a major problem. I will not retread the ground about all the documents that are being withheld. But I will show you a little calendar here that’s interesting. There is a thirty-five month black hole in your White House career where we have been denied access to any and all documents. Thirty-five months in the White House. And I asked you in my office, during that period of time, President Bush was considering same-sex marriage, an amendment to ban it, abortion, executive power, detainees, torture, Supreme Court nominees, warrantless wiretapping. One of these issues bears special mention, as we mourn the passing of John McCain. In 2004 and 2005, I joined John McCain when he led the effort to pass an amendment affirming that torture and cruel and inhumane and degrading treatment would be illegal in America. As a survivor of unspeakable torture, John McCain spoke with powerful moral authority about American values during the time of war. You were in the Bush White House when that McCain amendment passed. The Bush Administration did everything in its power to stop John McCain’s torture amendment. Then after we pass it 90-9, a veto-proof margin, President Bush issued a signing statement asserting his right to ignore the law that John McCain had just passed in Congress. When we met in my office, you acknowledged that you worked on that signing statement. Yet we have been denied any documents disclosing your role or your advice to President Bush. I asked you if you wrote, edited, or approved documents about these and other issues while you were Staff Secretary. Time and again, you said, “I can’t rule it out”. Judge Kavanaugh, America needs to see those documents. We cannot carefully review, advice, and decide whether to consent to your nomination without clarity on the record.

The period of time when you worked in the Republican White House led to a change in position on an issue which we have to address directly. Your views on executive power and accountability have changed dramatically. When you worked for Special Counsel Ken Starr in the late 1990s, you called him, quote, an “American hero” for investigating President Bill Clinton, and you personally urged Starr to be aggressive, confrontational, and even graphic in his questions. We have seen your memo on that one. But a few years later, after working in a Republican White House, you totally reversed your position and argued the president should be above the law and granted a free pass from criminal investigation while in office.

What did you see in that Bush White House that dramatically changed your view? What are your views about presidential accountability today?

Judge Kavanaugh, at this moment in our nation’s history, with authoritarian forces threatening our democracy, with the campaign and administration of this President under federal criminal

investigation, we need a direct credible answer from you: Is this president, or any president, above the law? Equally important: Can this president ignore the Constitution in the exercise of his authority?

You dissented in the *Seven Sky* case when the D.C. circuit that upheld the Affordable Care Act's constitutionality. You criticized the law—the law which this President has said many times he wants to ignore and abolish—and you said, quote, “the President may decline to enforce a statute that regulates private individuals when the President deems—when the President deems---that statute unconstitutional even if a court has held or would hold the statute constitutional.” This statement by you flies in the face of *Marbury v. Madison*. Our North Star are the separation of powers. It gives license to this President, Donald John Trump, or any president who chooses to ignore the Constitution, to assert authority far beyond that envisioned by our Founding Fathers.

There are many people who are watching carefully. I am going to make a suggestion to you today and it won't be popular on the other side of the aisle. If you believe your public record is one you can stand behind and defend, I hope at the end of this you will ask this committee to suspend until we are given all the documents, until we have the time to review them. And then we resume this hearing. What I'm saying to use is basically this: if you will trust the American people, they will trust you. But if your effort today continues to conceal and hide documents, it raises a suspicion.

I'll close Mr. Chairman, I know you're anxious. When I was a practicing lawyer, a long time ago in trial, and the other side either destroyed or concealed evidence I knew that I was going to be able to have a convincing argument to close that case. What were they hiding? Why they won't let you see the speed tape on that train or the documents that they just can't find? You know that presumption now is against you because of all the documents they've held back. For the sake of this nation, for the sanctity of the constitution we both honor, step up. Ask this meeting, this gathering, to suspend until all the documents of your public career are there for the American people to see.