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Judiciary on the Nomination of Brett Kavanaugh for Associate
Justice of the U.S. Supreme Court**

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Testimony of Rebecca Ingber
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Before the United States Senate Committee on the Judiciary
On the Nomination of Brett Kavanaugh for Associate Justice of the U.S. Supreme Court

September 7, 2018

Chairman Grassley, Ranking Member Feinstein, and Members of the Committee: thank you for the invitation to testify as you consider the nomination of Judge Brett Kavanaugh to the Supreme Court.

I am an associate professor at the Boston University School of Law, where I write and teach about executive power, international law, and national security, and a Senior Fellow at The Center on Law and Security at NYU School of Law. Previously, I served for several years in the U.S. government as an attorney-adviser in the U.S. Department of State Office of the Legal Adviser, where I advised the State Department and worked with colleagues at the Departments of Justice and Defense, in the intelligence community, and at the White House, on issues of international law and the President's war powers.

I am honored to speak to the committee about these matters as you consider Judge Kavanaugh's nomination to the Supreme Court. Judge Kavanaugh has had an exceptional career, and has many obvious strengths. Nevertheless, I believe there are concerns his jurisprudence raises that should be addressed before final consideration of his nomination. My testimony will focus on two: First, I will discuss Judge Kavanaugh's reluctance to impose checks on the President in the national security realm, and the harms in undue deference for national security decision-making and government accountability. Second, I will address Judge Kavanaugh's unusually dismissive views on the role of international law in the U.S. domestic system, and in particular, international law's role in constraining the limits Congress sets on the President's authority. Taken together, should they be adopted by the Supreme Court, these approaches could result in a President wielding essentially unfettered power at the mere invocation of war or national security. Both put him at odds with the judicial philosophy of Justice Kennedy, whom Judge Kavanaugh has been nominated to replace. The difference in their judicial approaches is stark and significant, both to the separation of powers and to the United States' reputation on the world stage. Should he be confirmed, Judge Kavanaugh may be in a position for decades to restrict the ability of courts and Congress to check the President, and to shape how the United States engages with and defines international law.

National Security Deference to the President

I will turn first to Judge Kavanaugh's approach to deference to the President in the national security sphere, and the consequences of such deference for the national security decision-making of the executive branch. I spent several years working in the government on the receiving end of this deference, as an attorney within the executive branch working on national security matters under two presidential administrations. During that time, I had a front row seat to how the executive branch grapples with national security litigation, and my experience from my government service informs my views on these matters.

Judge Kavanaugh’s opinions reveal that he is exceedingly reluctant to impose checks on the President in the national security sphere, including by declining to impose congressional limits on Presidential action. He has referred generally to his approach as deference toward the political branches—the President and Congress—*together*, and indeed he has expressed in his scholarship the view that Congress has a strong constitutional role to play in war powers decisions. But his judicial opinions suggest that he is not inclined to take a neutral position as between Congress and the President even in the face of congressional legislation. In fact, Judge Kavanaugh has set an extremely high bar for finding that Congress has spoken to constrain the President’s war powers or where the President invokes national security.¹ And he has set a low bar for finding that Congress has empowered the President.² Furthermore, Judge Kavanaugh has suggested that the President holds significant Constitutional authority to act *unilaterally* in wartime, without Congress, and that as a result, courts must broadly construe any statutory grant of power to the President in this area.³ The result is that—in stark contrast to Justice Kennedy, who regularly authored or joined opinions upholding limits on the President’s wartime powers—Judge Kavanaugh has almost never found occasion for constraining the President in the national security space.

It is therefore worth reflecting on what this level of extraordinary deference to the government in the national security sphere looks like, and the effect it has on government decision-making and on the rights of the individuals affected by these decisions.

In this section, I will first discuss why judicial review is so important to Presidential accountability on matters of national security specifically. Second, I will address some of the myths surrounding national security decision-making and beliefs about the necessity for aggressive deference from the courts. Third, I will discuss why the particularities of executive branch decision-making in litigation make it critical that national security adjudication have real teeth, and not just be a rubber stamp on the positions the government pursues zealously in the context of defensive litigation.

The Importance of Judicial Review of National Security Decisions

The importance of judicial review of the President’s national security decisions comes down to this: litigation is one of the very few lawful vehicles that provides a check on the President’s power, and accountability for harms to individuals who typically have no other recourse, ideally divorced from partisan politics.

¹ See, e.g., *Rattigan v. Holder*, 689 F.3d 764 (2012) (Kavanaugh, J., dissenting) (arguing that the court should not review claims under the Civil Rights Act where the alleged retaliation involved reporting security concerns); *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 858 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) (“courts must be cautious about interpreting an ambiguous statute to constrain or interfere with the Executive Branch’s conduct of national security or foreign policy”).

² See, e.g., *Ali v. Obama*, 736 F.3d 542 (2013) (finding that the 2001 AUMF grants the President to detain individuals who—in the words of Judge Edwards’ concurrence—“is not someone who transgressed the provisions of the AUMF or the NDAA.”) Judge Edwards thus argued that Judge Kavanaugh’s opinion and the precedents he had joined “stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings ... are functionally useless.” *Id.*

³ *El-Shifa, supra*, at 858-59 (Kavanaugh, J., concurring) (“The Executive plainly possesses a significant degree of exclusive, preclusive Article II power in both the domestic and national security arenas.”)

Judicial review of the President's actions is not some modern contrivance, but is rather a fundamental component of the separation of powers established by the Framers. It is a necessary means of checking the President, and it is also a means of addressing individual rights and harms, particularly when the affected individuals do not have powerful political allies, or when protecting those individuals does not play well in the political moment. In the national security context, in particular, the individuals whose rights are at stake often have the least political power to remediate their harms in any way other than through the courts.

Moreover, judicial review is all the more critical in the national security space because so much of what the executive branch does in this sphere takes place in secret. But secret or not, these actions often have a direct impact on real people's lives. When a judge says that a matter is not for courts to decide but should instead be left to the accountable branches, we need to then ask, how precisely—and by whom—is this branch being held accountable? One way we hold these branches accountable is through public scrutiny. And yet public scrutiny is often impossible when so many of the government's actions are taken in secret.

Thus, one of the few tools available for holding the executive branch accountable for actions taken in the name of national security is lawsuits brought by people who feel they have been harmed by the government's policies, which can then be litigated in a non-politicized forum.

This is not to say that we have to attribute bad faith to executive branch actors in order to deem judicial review important. In my experience there is a great deal of thoughtful decision-making that happens inside the executive branch national security apparatus. There is often significant, robust process and debate that accompanies major decisions, and executive actors grapple with legal rules that they interpret to constrain themselves even in areas where the courts may never tread, and even when the legal rules or interpretations are those that the executive branch has itself established.

But sometimes, even a robust process can lead to Presidential overreach. After all, the premise of the separation of powers is that each branch will seek to enhance its own authority, and the other branches (including the courts) are there to impose limits. And sometimes the process itself is lacking. Mistakes happen. Bad decisions may come about through incompetence, insufficiency of facts, exigency, and even, yes, through the intentional abuse of power.

The executive branch, in short, has to be held to account, and it must be held to account by some source outside itself: by the courts, by Congress, and by civil society. Even for officials acting with the best intentions, the fire drill of government life at the highest levels means that officials will not always have or take the opportunity to revisit decisions, even poorly or insufficiently processed decisions, unless forced to do so by some external trigger. And litigation is one of the few available triggers for doing so. But litigation is not costless, even for actors seeking to hold the government accountable, and it can in fact have perverse effects when litigation occurs in a context in which judges are not inclined to impose real checks on the President. I will discuss below the effect of litigation on impelling an aggressively defensive posture in executive branch decision-making, which makes it critical that judicial review have real teeth.

Myths Surrounding Judicial Review of National Security Issues

Before I turn to that, I will first address the arguments that tend to underlie deference to the President on matters of national security, and that animate much judicial deference in this realm, including in Judge Kavanaugh's own decisions. These arguments focus on institutional competence: that national security matters are somehow different than other areas, and that the President is best placed to make expedient, expert decisions on matters that require immediate attention and could affect the safety of citizens and residents of this country or the use of force abroad.

On this, I think it's important to pull away the veil of mystery draped over national security law. First, when national security matters receive a heightened level of deference to the executive, this incentivizes the President to classify more and more activity as coming within the national security ambit. "National security" is often an overbroad, malleable term. For example, does addressing the abuse alleged in the *Meshal* case, of an American citizen by FBI agents overseas, demand a different set of rules than other cases of abuse, simply because the government asserts "national security" concerns?⁴ Should the President's claim of national security prerogative change the U.S. citizen's rights or remedy? If so, why? Crafting a deference policy that is triggered whenever the President cites national security or foreign actions is not merely a neutral policy of waiting for the political branches to weigh in. In practice, it can mean casting aside normal process and established rights in favor of the executive branch, at the utterance of the magic words "national security" or "war." And yet, despite government claims to the contrary, very few—if any—activities for which the President claims national security deference involve matters where the nation's security will actually turn on whether the President's actions are reviewable in court, or whether remedies are provided for abuses and overreach.

Second, while some national security actions obviously do require expedience, many do not. Expedience is an argument that the executive branch often uses to stave off interference from the courts, but it is not otherwise a common feature of executive branch action. We were told that battlefield exigencies necessitated holding detainees as combatants without judicial review. Ultimately, detainees at Guantanamo (many of whom were not in fact captured on a battlefield) did receive review, some in multiple fora, and the sky did not fall. We were told that military commissions were necessary to try the 9/11 attackers in order to bring them to justice quickly. A decade and a half later, we are still waiting for that military commission to get off the ground. And we are told time and again that the exigencies of war demand that the President have urgent flexibility in determining the scope of the conflict, and thus do not permit him to return to Congress to update the now seventeen-year-old use of force statute, each time he intends to bring a new group into its ambit. ISIS, which we are currently fighting, did not exist at the time that Congress enacted that 2001 statute, but the President tells us it must come within its scope. The President is as we speak detaining a U.S. citizen under this theory. We have been fighting ISIS now for over four years. We have been holding this U.S. citizen for a year. There has been time to review this decision in court, and there has been time for the President to go to Congress.

Finally, and perhaps most importantly, arguments about national security deference focus on the executive branch's unique expertise. Here, I think there is a great deal of truth to the argument.

⁴ *Meshal v. Higgenbotham*, 804 F.3d 417, 429-30 (2015) (Kavanaugh, J., concurring)(arguing against the application of a *Bivens* remedy to a case where a U.S. citizen alleged abuse in detention by FBI officers abroad, based on "extraterritoriality and national security," and because such extension would render "U.S. officials undoubtedly ... more hesitant in investigating and interrogating suspected al Qaeda members abroad.")

The executive branch as a whole—operating as it does the war machinery of the state, intelligence collection and analysis, diplomacy and foreign policy, not to mention the system of classification keeping so much of this operation secret—surely holds within it a significant advantage in expertise over the courts on matters of national security. But this, too, can be overstated. The courts deal with many complicated and sensitive issues—consider mob trials, or terrorism trials in Article III courts, which have as yet been quicker and more successful than military commissions—and the three branches have found ways to accommodate judicial review in these contexts.

Executive Positions in National Security Litigation

Moreover—and this caveat may swallow the government’s expertise-related advantages—this wealth of national security expertise is not necessarily responsible for any given position the executive branch takes in court.

What do I mean by this? As I mention above, litigation forces the government to revisit its prior acts. But once the government is facing a legal challenge, it does not revisit those acts in a vacuum, in which it seeks the “best view” of the law or policy that it might have taken in advance of the challenged conduct. Instead, once the executive branch faces a lawsuit, all forces—down to which officials within the executive branch draft the argument or hold decision-making authority—align to shape the government’s legal position from a defensive crouch.

What this means in practice is that the government’s legal position in national security litigation will be aggressively protective of the government’s prior decisions and actions. Defensive litigation over the President’s national security policies is not an area where the government is inclined to give any ground. Department of Justice litigators who take the lead in these cases view their role in narrow terms: their job, as they see it, is to protect executive power and flexibility for the policy-makers, and refuse to concede an inch, even if the policymakers themselves do not support the underlying policies or would not take the underlying actions were the decision to come to them anew.

Accordingly, what judges tend to view as the executive’s well-considered legal position is often instead not the result of an expert-led robust process to come to the “best view” of the law, but instead simply a zealously-pursued litigation position, heavily shaped by litigators.

Moreover, much as Judge Kavanaugh views deference to the executive as pursuing a limited role for judges in the national security space, the reality is that the executive branch looks to the *courts* to understand the parameters of its authority. Once a court defers to the President in a given case, the argument that the executive branch had made before the court that the court finds sufficient becomes baked into the executive branch’s understanding of the law, even if the court only intended to defer to the executive’s power to define those parameters itself. The court’s deference thus has the effect of a merits decision, which becomes the law for the executive branch going forward. When a judge weighing whether the government has met its burden in that regard rules that, for example, staying at a particular guest house in Afghanistan, at which the government claims certain members of al Qaeda resided, is “overwhelming” evidence,⁵ he may intend merely that this is enough to permit the government to go ahead and make its own unilateral determination about the individual’s proper status. But the government is likely to read this not as mere deference but as a status determination itself, and moreover, as an assessment of the necessary facts to make that status

⁵ *Al-Bibani v. Obama*, 590 F.3d 866 (2010).

determination going forward. In other words, there is a tendency in the government to see judicial ratification of the principle that staying at this guest house or one similarly situated as sufficient to make someone an enemy combatant. The results of such a status? For many in the executive branch, that would mean that the President could not only detain such a person—indefinitely, for now, as there does not seem to be an end in sight to the conflict—but also target and kill him.

What this “limited role” for courts in the national security realm means in practice is that the court defers to the government’s aggressive litigation position, crafted to maximally protect presidential power, which then becomes the judicially-ratified law that the government follows going forward. If the courts never push back—and under Judge Kavanaugh’s preferred approach, but contrary to Justice Kennedy’s, such pushback would be exceedingly rare—the result will be an ever-ratcheting up of executive power, both vis-à-vis the other branches and as against individuals.

One might respond to this reality in a few ways. First, one might seek to do away with litigation entirely and leave the executive branch to decide these matters through internal processes without judicial intervention. But as I note above, the government does make mistakes that impose genuine harm on individuals, it makes them in secret, it does not often revisit them, and there are few lawful processes outside of litigation to check the President. Second, this suggests that Congress itself needs to act more assertively to create clear checks on the President for the courts to uphold. (Congress does grant power to the President against a backdrop of constraints, in particular constraints based in international law, but as I will describe in the second section below, Judge Kavanaugh has dismissed these as a check on the President.) In any event, litigation shines a spotlight on government action that almost no other mechanisms can match.

Thus, the third option—which to my view is essential alongside Congressional engagement—is for judicial review to have real teeth, and for judges to see the government as a litigant in a genuine adversarial process, where the President has a real prospect of losing.

This is the crux of the matter when considering extremely deferential judicial leanings in this space. For national security litigation to operate as a real check on the President, it is not enough to simply bring the parties into court and rubber stamp the executive branch’s litigation position. In fact, extreme deference to the executive branch is often—for the reasons I discuss above—worse than no judicial review at all.

International Law as United States Law

Next, and relatedly, I would urge the committee to consider the positions that Judge Kavanaugh has taken seeking to dismiss or severely limit the role of international law in the U.S. legal system. Judge Kavanaugh’s position on the limited role for courts in considering international law is highly relevant to his position on the limited role for courts in checking the President. In wartime, international law—law that the United States itself played an outsized role in crafting and convincing other nations to adopt—often provides the most important set of clear rules checking the President’s legal authority. It has been the longstanding approach of all three branches of government that statutes must be construed in light of international law—including international law limits on the President’s wartime conduct—and it is the approach the Supreme Court takes to this day, and which Justice Kennedy has consistently adopted. If the Court were instead to adopt Judge Kavanaugh’s approach rejecting such limits, the courts would have little recourse for interpreting the limits of the President’s power in wartime.

This is not an area where Judge Kavanaugh has merely followed precedent with his hands tied. Rather, he has gone to great lengths to dismiss the role of international law as a legal constraint even on the President's war powers, in the face of longstanding precedents to the contrary, and even where the majority of his colleagues have found his position unnecessary to the merits of the case. I will focus in particular here on Judge Kavanaugh's dismissal of the role of international law in shaping the courts' and the political branches' interpretation of statutes generally, and the President's war powers specifically.

Under longstanding precedent, even those international law norms that are not judicially enforceable in the first instance as a rule of decision form the backdrop against which courts must engage with statutes, and this is all the more true for statutes governing the President's war powers. For more than 200 years, under what is known as the *Charming Betsy* canon of construction, it is a well-established rule – as Justice Scalia reiterated in his dissent in *Hartford Fire* – that in the absence of a clear statement by Congress to the contrary, the courts will assume that Congress intended for the United States to comply with its international law obligations, rather than read a statute to violate international law.⁶ Judge Kavanaugh has written that he would reject that rule, and would instead hold that courts have *no role* in interpreting an ambiguous statute with reference to international law unless Congress makes a clear statement that they *must*.⁷

This position is all the more untenable in the war powers context, where all three branches of government have looked to international law to define war powers over the entire course of this nation's history.⁸ The concept of "war" itself, and thus the Constitution's allocation of war powers, have always been understood against the backdrop of what war and force mean on the international plane. When Congress authorizes the President to use all "necessary and *appropriate*" force, it does so against the backdrop of that history. Indeed, Presidents have consistently interpreted their war powers in line with international law, and the Supreme Court has ratified this understanding repeatedly, including in opinions that Justice Kennedy joined.⁹

Perhaps because these rules have always guided our understanding, international law is one of the *only* tools the courts and the political branches have for interpreting war powers. This means that international law is often the only limiting principle for interpreting the outer bounds of the President's wartime authorities.

This is not only a matter of *constraint* on the President. The use of international law as an interpretive tool to shape Constitutional or statutory powers can have both constraining and permissive effects on the President's powers. The President and the Supreme Court both have long looked to international law to construe the outer limits of the President's wartime authority expansively as well as narrowly, and even to override what would otherwise be the normal operation of other domestic constitutional or statutory protections. For example, in *Hamdi v. Rumsfeld*, a case involving a U.S. citizen detained by the U.S. government on U.S. soil, the government argued that

⁶ *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C. J.); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting)

⁷ *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

⁸ See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Prize Cases*, 67 U.S. (2 Black) 635 (1863).

⁹ *Hamdi v. Rumsfeld*, 542 US 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

the President's wartime detention authority derived from both the U.S. constitution and statute, and was non-reviewable.¹⁰ The Supreme Court disagreed with that overly aggressive position, but nevertheless found that the President's authority to use force under a congressional statute—the 2001 Authorization for the Use of Military Force, which did not mention detention—implicitly granted the President authority to detain U.S. citizens. The Court read this implicit authority to detain into the statute even though a prior statute—the Non-Detention Act of 1971—prohibited detention of citizens without a clear act of Congress, and even though the Constitution calls for specific processes to be followed before the government may restrict an individual's liberty. The Court nevertheless held, in a plurality opinion joined by Justice Kennedy, that the 2001 AUMF authorized detention by looking to the international laws of war, which both recognizes detention as incident to war *and which imposes constraints on that power to detain*. Justice Kennedy joined the *Hamdi* Court in incorporating these international law constraints—such as that detention may last only until the end of hostilities—into what the statute means when it authorizes “appropriate” uses of force.

When the President uses force in wartime, he or she is acting outside the normal operation of domestic law in numerous ways. But once the courts accept that the law is different in war or “armed conflict,” and that the President has a prominent role in discerning the line between war and not-war, it is critical to identify limiting principles on what the President can do.

One of the only limiting principles that the executive branch itself has advanced time and again, as a means of reassuring both the courts and Congress that his authority in this realm is not entirely unfettered, is compliance with the international laws of war. These rules do not hamper the President's ability to fight a war, but rather prohibit conduct that centuries of experience dictates falls outside of what humanity will tolerate. And they are not rules imposed by some outside source. They are instead rules states have agreed to be bound by, specifically in wartime. Rules prohibiting torture. Rules prohibiting the detention of individuals after hostilities have ended. Rules prohibiting the intentional targeting of civilians. And the United States in particular has always played an outsized role in shaping these rules. We do not agree and have not agreed to rules for war that do not serve our interests, and that we do not intend to follow.

Judge Kavanaugh would have courts ignore these rules in interpreting the President's wartime statutory (and constitutional) authority. He views them as merely precatory—important for the President to follow, perhaps, as a matter of good policy, but not commitments with the force of judicially enforceable law. What is more, he would have the courts ignore these rules even in considering the otherwise open-ended “necessary and appropriate force” Congress generally authorizes the President to use in war. The result, should the Supreme Court adopt Judge Kavanaugh's approach, would be virtually no limiting principles on what the President can do in war, at least as far as the courts are concerned.

Yet it is the province of the courts to say what the law is. The question is not whether international law is binding law on the United States, which it unarguably is and will always be. The question is whether the U.S. Supreme Court will continue to play a role in interpreting that international law and the President's war powers against the backdrop of those rules, as it always has. Judge Kavanaugh's opinions suggest that the United States need not honor these commitments as law, and that Congress does not presumptively intend to ensure U.S. compliance with such law, but that they are merely political promises that can be ignored as political realities demand.

¹⁰ *Hamdi v. Rumsfeld*, 542 US 507 (2004).

It is essential, especially today, that the United States present a strong message to the world: we honor our legal commitments. The Supreme Court is a key player in this arena, and Judge Kavanaugh's opinions on international law going forward will have real salience on the world stage. Despite the Judge's limited view of the judicial role in this sphere, the reality is that all three branches have a role to play in matters of international law. The Supreme Court is frequently taken to speak for the United States when it issues pronouncements on international law, which are then understood as the U.S. position by international tribunals and foreign courts looking for evidence of *opinio juris*. And the Supreme Court's opinions on the domestic status of our international obligations have a significant effect on the extent to which the United States is able to honor those commitments. For all of these reasons, the Supreme Court's pronouncements on the role of international law in the U.S. domestic system have real effects internationally, and may cause states to question the extent to which the United States is able to keep its promises. Should he be confirmed, Judge Kavanaugh's positions on international law will have a world audience. I would therefore urge the committee to consider and to impress upon Judge Kavanaugh the importance of upholding the *Charming Betsy* canon and the well-established role of international law in interpreting war powers as longstanding precedent against which this body legislates, as well as the rhetorical importance of the Supreme Court's jurisprudence in demonstrating to the world the United States' commitment to the rule of law.

Conclusion

This is a dangerous time for the separation of powers. Many are looking to the courts as the last bulwark against a President who often shows a casual disregard for the rule of law and the longstanding norms that represent good government. This Committee should ask Judge Kavanaugh to make clear that, should he be confirmed, he will hold the President accountable for his national security decisions that violate the Constitution or statutory constraints. Congress, too, should assertively legislate clear constraints in this arena. Judge Kavanaugh has in his scholarship exhibited support for some role for Congress in national security, as long as congressional statutes are loud and clear. We also know that he sees constitutional limits to Congress's ability to constrain the President in this space, and we do not know where he would draw that line, although his jurisprudence suggests it will favor the President.¹¹ I would urge that the Committee seek to assure itself in this regard that Judge Kavanaugh would support congressional checks on Presidential power should he be confirmed to the Supreme Court. And then I would urge you to consider legislative means for checking the President where the courts, under Judge Kavanaugh's approach, may otherwise step aside.

¹¹ *El-Shifa, supra*, at 858 (“if a statute were passed that clearly limited the kind of Executive national security or foreign policy activities at issue in these cases, such a statute as applied might well violate Article II”).