TESTIMONY OF JOHN W. DEAN BEFORE THE SENATE JUDICARY COMMITTEE HEARINGS ON THE NOMINATION OF JUDGE JOHN ROBERTS TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. Chairman, and members of the committee, thank you for the invitation to appear. I have accepted the invitation for several reasons.

First, I am not here as a partisan on whether Judge Roberts should or should not be confirmed. My partisan days are behind me. I represent no organization or group or cause. Rather than persona or philosophy, I'd like to focus on process. My only interest is in good government, and process is often overlooked.

After forty years of observing the workings of the federal government, as both an insider and outsider, I am startled by the remarkable shift from open government to secret government during the past five years, a shift that has little to do with national security but everything to do with a White House that insists on secrecy. That secrecy is playing out in these hearings.

The Senate is being stonewalled. In fact, the refusal to provide materials from Judge Roberts's days in the office of the Solicitor General is not unlike what occurred during the nomination of the late Chief Justice, William Rehnquist, when he was nominated as an associate justice in 1971.

At that time I thought I knew Bill Rehnquist rather well. I had worked with him for several years. First, as a colleague at the Department of Justice. Then again when I was White House Counsel and he was the Assistant Attorney General in charge of the Office of Legal Counsel, which is sometimes known as "the President's law firm."

Bill Rehnquist had a wonderful droll sense of humor, a powerful work ethic and a remarkable intellect. So at a critical point in the selection process, when President Nixon was searching for a "strict constructionist" to place on the Supreme Court, I recommended Bill Rehnquist. To make that story very short, much to his surprise, Bill Rehnquist learned that he would be appointed to the Supreme Court only hours before the announcement was made.

At that time, in 1971, two people were responsible for vetting Supreme Court nominees: Bill Rehnquist and myself. Bill Rehnquist, however, was never vetted by anyone before his nomination was sent to the Senate in 1971. Nor, it appears, was he vetted when nominated to become Chief Justice in 1986.

Attorney General John Mitchell invoked attorney-client privilege on Rehnquist's work of as an Assistant Attorney General during his 1971 confirmation hearing, and President Reagan invoked executive privilege -- with limited exceptions -- on the same information during the 1986 confirmation. Thus, the Senate twice confirmed a nominee

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they knew little about, and who was not merely less than candid with the committee, but sadly he dissembled.

Please understand that I have not come forward at this time to raise issues when the late Chief Justice cannot defend himself. To the contrary, I first raised these matters while he was very much alive, when I wrote about them in 2001. Because I happened to publish in the immediate aftermath of 9/11, only a few became aware of these charges. To be certain Bill Rehnquist was aware of them, however, I arranged for a copy of my book to be sent to him directly (by my editor). It was my sincere hope that either he, or one of his many able law clerks, would for the sake of history correct or enlighten what I knew about him. Unfortunately, that never happened. While the late Chief Justice's public service was long and distinguished, suffice it to say that for many Americans -- women, Black Americans, and other minorities -- his conservatism was often without conscience.

Why is this relevant to these proceedings?

Regrettably, the judicial confirmation process has increasingly become a "hide and seek" game, particularly when the nominee's public service record is found in government files and archives of the Executive Branch, thus controlled by the president.

Two questions serve as examples to make my point: Would Miguel Estrada be on the D.C. Circuit Court of Appeals today if his records had been made available? Probably. Would Judge Jay Bybee be sitting on the 9th Circuit today if his legal opinion authorizing the use of torture had been available to the Senate? Probably not.

In raising process problems, I would like to suggest a potential solution. A recommendation that I informally conveyed earlier to the committee's counsel. I have never understood why the Senate does not thoroughly cross-examine nominees about what they know of their vetting, particularly any interviews they have given. Occasionally a confirmation hearing can touch on vetting, but to my knowledge the subject does not receive serious attention.

If a nominee has not been properly vetted, then the president does not really know the nominee either, and the Senate should proceed accordingly. And if the nominee has been properly vetted (as should be the case), the Senate is entitled to know everything that nominee has told those in the Executive Branch about his or her thinking and work. A nominee enjoys no privilege in what they have told others involved in their selection process. Based on my experience, I believe questions about vetting could be very revelatory to the Senate.

Thank you.