

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
290 Russell Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Dear Senators Graham and Feinstein:

We write as constitutional law scholars who specialize in separation of powers. The Attorney General is the most important official in the executive branch for interpreting both the scope of presidential power and the authority of Congress to hold presidents accountable. As the President's chief legal adviser outside the tight political orbit of the White House, it is the Attorney General who is chiefly responsible within the executive branch for the conscientious interpretation of separation-of-powers and checks-and-balances principles, including their application to conflicts with Congress. From this perspective we are profoundly troubled that, in both his public and private roles, Attorney General nominee William P. Barr has staked out extreme positions about both the scope of the president's unilateral powers and the limitations on Congress's authorities with regard to executive accountability. Mr. Barr's extreme views are evident from his recent writings as well as his work in the George H.W. Bush Administration as Attorney General and as head of the Office of Legal Counsel (OLC), the Justice Department's key division in elaborating the executive branch's positions on constitutional doctrine.

As head of OLC and as Attorney General, William Barr promoted an extreme form of what scholars call the "unitary executive theory" – a constitutional theory that the Supreme Court has repeatedly rejected. Adherents of this version of the unitary executive theory believe that the Constitution grants the President complete policy control over all discretion that Congress vests in the executive branch to implement federal law and, additionally, implicitly guarantees presidents the power to fire at will any federal functionary who is an officer of the United States.

Barr's extreme views on the unitary executive theory were perhaps most evident in the June 8, 2018 memorandum he wrote to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel entitled "Mueller's 'Obstruction' Theory". In that memo Barr wrote:

The Constitution itself places no limit on the President's authority to act on matters which concern him or his own conduct. On the contrary, the Constitution's grant of law enforcement power to the President is plenary. Constitutionally, it is wrong to conceive of the President as simply the highest officer within the Executive branch hierarchy. He alone is the Executive branch.¹

¹ June 8, 2018 memorandum to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel entitled, "Mueller's 'Obstruction' Theory," at unnumbered page 10,

As a starting point, this is a bizarre statement for a constitutional textualist given that Article II explicitly anticipates that the executive branch will comprise “Departments” that Congress will create and to which Congress will assign “duties.” Lest there be any doubt, however, that Mr. Barr believes his theory applies to criminal prosecution, he adds: “[T]he full measure of law enforcement authority is placed [by the Constitution] in the President’s hands, and no limit is placed on the kinds of cases subject to his control and supervision.”² It is unclear why, and under what circumstances, Mr. Barr felt compelled to write this memo. What is clear is that it stakes out an extreme view on executive power beyond Congress’ administrative control and oversight responsibility.

It is not only, however, on questions of administrative control that Mr. Barr’s positions outrun existing separation of powers law. He has also championed extreme positions on Congress’s entitlement to subpoena information from the executive branch. This is most evident in a July 27, 1989 OLC memorandum he prepared for the Bush Administration’s “General Counsel’s Consultative Group,” entitled “Congressional Requests for Confidential Executive Branch Information.”³ The 1989 OLC memo effectively creates a presumption against cooperation with congressional oversight. It repeats a Reagan Administration position that “the interest of Congress in obtaining information for oversight purposes is . . . considerably weaker than its interest when specific legislative proposals are in question.”⁴ Indeed, the memo contends that “the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances.”⁵

These propositions represent a profoundly one-sided over-reading of the cases on which they purport to rely. The case on which the memo relies to establish Congress’s alleged duty to point to a specific legislative decision that cannot be made without access to the materials it demands is *Senate Select Committee on Presidential Campaign Activities v. Nixon*.⁶ That decision of the D.C. Circuit rejected a Senate committee demand for the Nixon tapes, in large part because the material under subpoena was already in the possession of the House Judiciary Committee. The text immediately following the sentence excerpted in the OLC memo states that the court’s most fundamental concern about the Senate subpoena was not a failure to name a specific legislative decision that would be illuminated by the tapes. Its concern was enforcing unnecessarily a subpoena for tapes already in the possession of another House of Congress:

More importantly, perhaps, insofar as such ambiguities [in existing transcripts] relate to the President’s own actions, there is no indication that the findings of the House

<https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf>.

² Id.

³ https://www.justice.gov/sites/default/files/olc/opinions/1989/06/31/op-olc-v013-p0153_0.pdf.

⁴ Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 160 (1989).

⁵ Id. at 160.

⁶ 498 F.2d 725 (D.C. Cir. 1974).

Committee on the Judiciary and, eventually, the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own.⁷

A final area of separation of powers law that might well concern the Senate in their advice and consent role is the Constitution's allocation of responsibilities regarding U.S. foreign policy. Article II explicitly assigns to the President a variety of incontestably important foreign affairs roles, most notably, those of receiving ambassadors and negotiating treaties. From these, both Congress and the judiciary have inferred that the President enjoys certain implicit powers, as well, such as the power of recognition and of serving as the authoritative communicator of U.S. foreign policy to other nations. Mr. Barr, however, has gone beyond recognition of these explicit powers to write: "It has long been recognized that the President, both personally and through his subordinates in the executive branch, *determines* and articulates the Nation's foreign policy."⁸

To be fair, Mr. Barr's claim that the President "determines" foreign policy is built on a long-held myth advanced by the Department of Justice, which is built on a vast over-reading of dicta in *United States v. Curtiss-Wright Export Corp.*⁹ The Supreme Court however in *Zivotofsky ex rel. Zivotofsky v. Kerry* recently and emphatically rejected *Curtiss-Wright* as recognizing a broad, undifferentiated, exclusive presidential power to determine foreign policy.¹⁰ We are not aware of whether Mr. Barr has commented on the Court's decision in *Zivotofsky*. However, given his prior extreme statements and the differences over foreign policy likely to emerge between the President and Congress it is especially important to explore Mr. Barr's current views on these issues.

We know that you take your constitutional advise-and-consent role very seriously. As constitutional law scholars who specialize in separation of powers we would be deeply troubled by any nominee who exhibited Mr. Barr's overbroad views on executive powers. Indeed, in our view Mr. Barr's diminished view of the constitutional role that Congress is entitled and expected to play in its oversight capacity threatens the rule of law. It is our belief that in performing your constitutional advise-and-consent role you should ask Mr. Barr to clarify his views on the unitary executive theory and related separation of powers concerns. In this connection, we believe that a review of the relevant records during his tenure in the Department of Justice as well as the outside advice he has provided to the Trump Administration is imperative.

⁷ Id. at 733.

⁸ Memorandum Opinion for the General Counsels' Consultative Group re: Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248, 256 (1989) (emphasis added), <https://www.justice.gov/file/24286/download> (hereafter, the "Encroachment Memo").

⁹ 299 U.S. 304 (1936).

¹⁰ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015).

Sincerely,

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***All signatories represent their views as individuals and do not sign on behalf of any law school or organization.*