QUESTIONS FROM SENATOR LEAHY FOR PROF. NEIL KINKOPF

1. In your written testimony, you expressed your opinion that the Barr Memo argues that "[the President] alone is the Executive branch," which you claim moves the executive from a Unitary Executive to an Imperial Executive.

a. Do you believe Mr. Barr's views on executive power are outside the mainstream of legal thought? Were his view of an "imperial presidency" to come to fruition, what checks would remain on the President's power?

Mr. Barr's view of executive power represents a radical departure from the Constitution's text and structure. It is also deeply incompatible with the constitutional design the Framers themselves expounded.

Under his Imperial Theory of presidential power, the President is free to exercise his vast constitutional authority as he sees fit during his term. The only checks on his exercise of executive power are Congress's power to hold oversight hearings,[1] impeachment, and political considerations.[2] Under this vision, the President and the Administration may exercise their executive powers as they see fit, free from any legal constraint. Here is how the Barr Memo expresses its vision:

> In framing a Constitution that entrusts broad discretion to the President, the Framers chose the means they thought best to police the exercise of that discretion. The Framers' idea was that, by placing all discretionary law enforcement authority in the hands of a single "Chief Magistrate" elected by all the People, and by making him politically accountable for all exercises of that discretion by himself or his agents, they were providing the best way of ensuring the "faithful exercise" of these powers. Every four years the people as a whole make a solemn national decision as to the person whom they trust to make these prudential judgments. In the interim, the people's representatives stand watch and have the tools to oversee, discipline, and, if they deem appropriate, remove the President from office. Thus, under the Framers' plan, the decision whether the President is making decisions based on "improper" motives or whether he is "faithfully" discharging his responsibilities is left to the People, through the election process, and the Congress, through the Impeachment process.[3]

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[1] It bears noting that Barr's longstanding view is that Congress's oversight authority is extremely limited. *See, e.g.*, Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 160 (1989).

[2] *See* Memorandum from Bill Barr to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel, *re: Mueller's "Obstruction" Theory* (June 8, 2018)(hereinafter, The Barr Memo). At least, these are the only checks recognized in the Barr Memo. In discussing checks on presidential power, the Barr Memo never mentions the judiciary. It is therefore unclear to what extent, if any, judicially enforceable limits – such as individual constitutional rights – might operate as a constraint on presidential power. In this connection, it is relevant to note that the Barr Memo frequently refers to the President's constitutional executive powers as "illimitable," a description that would appear to run against the judiciary as well. It is also relevant that the Barr Memo regards it as inappropriate (presumably for courts as well as investigators) to look behind facially-legitimate exercises of power. *E.g., id.* at 9-12.

[3] The Barr Memo at 11.

This passage purports to describe the Framers' design for the constitutional allocation of powers between the President and Congress. It is not surprising that it does not cite any actual Framer, because it is difficult to imagine a more fundamentally mistaken interpretation of our Constitution. In *The Federalist* nos. 47, 48, and 51, James Madison offers a comprehensive account of the Constitution's structure and distribution of power within the federal government. In *The Federalist* no. 47, Madison explains that each branch is accorded "a partial agency" in, meaning a "control over, the acts of each other."[4] In numbers 48 and 51, Madison explains that the reason for granting overlapping and coordinated, rather than exclusive and distinct, powers was to establish the system of checks and balances that is so familiar to us. Within this system, Madison regarded Congress as the most powerful branch. "The legislative department derives [its] superiority in our government[] from … [the fact of i]ts constitutional powers being at once more extensive, and less susceptible of precise limits …."[5] By contrast, "the executive power [is] restrained within a narrower compass …."[6] Madison's account of the Constitution's design would be obviously wrong if the Barr Memo's description, quoted above, were accurate.

The fundamental flaw in the Barr Memo's description of the constitutional system of checks and balances is that it completely ignores Congress's most important power – the power to legislate. To take federal criminal law as an example, the Constitution vests Congress with an array of substantive powers that authorize it to enact the vast expanse of federal criminal law contained in the U.S. Code. In addition, Congress is empowered to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."[7] Congress, therefore, clearly holds the authority to establish a Department of Justice to investigate and prosecute violations of those criminal laws. It also has the authority to confer investigative and prosecutorial authorities upon particular officers, such as the Attorney General, and to establish the rules that anyone who prosecutes and investigates must follow.

The Barr Memo's Imperial Executive theory, however, ignores the existence of these legislative powers. Instead, it extols "[t]he illimitable nature of the President's law enforcement discretion"[8] and claims "the full measure of law enforcement authority is placed in the President's hands, and no limit is placed on the cases subject to his control and supervision."[9] The Memo takes the view that the President and his subordinates in the Department of Justice are at liberty to investigate and prosecute as they see fit, subject only to the (vanishingly small) possibility of impeachment or the inconvenience of legislative oversight hearings. This is not the system our Constitution adopts or our Founders envisioned.

a. Mr. Barr claimed that he would support the release of the Special Counsel's report as far as he was able to under the law. In your view, what implications does Mr. Barr's expansive view of executive power have for

[4] *The Federalist Papers* No. 47, at 302 (Madison)(Clinton Rossiter ed. 1961).
[5] *Id.* no. 48, at 310.
[6] *Id.* at 309.
[7] U.S. Const. art I, §8, cl. 18.
[8] The Barr Memo at 11.
[9] *Id.* at 10.

his ability to ensure the Special Counsel's report is released to the public and not subject to, for example, unwarranted claims of executive privilege?

Mr. Barr's long held view of presidential authority regards the President as constitutionally empowered to withhold from Congress any reports or other documents produced by the Administration that do not comport with the Administration's position on a given matter. Mr. Barr, in 1989, castigated legislation that the required executive officials to submit reports concurrently to Congress. Such requirements, he claimed, "prevent[] the President from exercising his constitutionally guaranteed right of supervision and control over executive branch officials. Moreover, such provisions infringe on the President's authority as head of a unitary executive to control the presentation of the executive branch's views to Congress."[10]

This view has significant ramifications for Mr. Barr's assurance that he would support the release of the Special Counsel's report. Under Barr's view, it is the President – not the Attorney General – who has the ultimate authority to decide what information the executive branch should share with Congress. Moreover, Mr. Barr also made it clear that he views it as proper procedure for the Department of Justice to refuse public comment on any matter it has investigated and declined to prosecute. This testimony should be understood in conjunction with his testimony that he is inclined to adhere to the position – which he takes to be established Department of Justice policy – that a sitting President may not be indicted. Together these statements mean the President may not be indicted and it would be improper for the Department to comment (including by issuing a report) on any investigation of the President. In short, Mr. Barr's "consistent with law" caveat swallows the seeming assurance that he will support the release of Special Counsel Mueller's report.

2. In your written statement, you stated that the Barr Memo is clear that anyone who exercises prosecutorial discretion is subject to the President's supervision and control. But in his testimony before the committee, Mr. Barr also gave several assertions that he would allow the Special Counsel to do his job and would not allow interference with the investigation.

a. Do these assertions assure you that Mr. Barr would allow the Special Counsel to finish his investigation and potentially any subsequent prosecutions?

No. They assure me that he would not interfere with or terminate the special Counsel's investigation of his own accord. Mr. Barr's view of presidential power is, as I set forth in my written statement, quite clear that the President himself may exercise complete supervision and control over any federal criminal investigation, including an investigation of the President himself or of the President's family members. Nothing in Mr. Barr's testimony offers any kind

[10] *Common Legislative Encroachments on Executive Branch Constitutional Authority*, 13 Op. O.L.C. 248, 255 (1989).

of assurance that he would instruct the President that it would be a violation of law (in particular, of the regulation establishing the Special Counsel) for the President to interfere or to terminate the investigation or to terminate the Special Counsel without cause. Indeed, the Barr Memo makes perfectly clear that Mr. Barr would advise the President that he has the constitutional authority to interfere with or terminate the Special Counsel's investigation.

b. Does the Barr memo potentially undermine Mr. Barr's ability to prevent presidential interference in the Special Counsel's investigation – under his own analysis that anyone who exercise prosecutorial discretion falls under the control of the President?

Yes. Under Mr. Barr's theory, the Attorney General may not prevent the President from interfering with the Special Counsel's investigation. In fact, if the President were to seek the opinion of the Attorney General as to whether the President has the authority to supervise, control, or direct the Special Counsel's investigation, Mr. Barr would answer in the affirmative – *i.e.*, that the President has such authority. In the Barr memo, he goes so far as to assert that the President may manipulate the investigation in his own favor by "plac[ing] his thumb on the scale in favor of lenity."[11] Mr. Barr, then, would actually facilitate the President's manipulation of the investigation.

3. The President has expressed interest in declaring a national emergency in order to use funds allocated to other departments to build a "border wall" along the Southern Border.

a. In your academic and professional view, do you believe that President Trump declaring a national emergency to build the border wall would constitute an exercise of power by the "Imperial Executive"?

My understanding is that the President would rely on statutory authorities. If so, I would not regard that as "imperial" inasmuch as such a move would be predicated upon congressional authorization rather than upon unilateral and illimitable power to declare and respond to emergencies. Having said that, the legality of such a move would depend on the specific statutes upon which the President purports to rely. There are many statutes that authorize the President to declare specific types of national emergencies and to take specific types of actions in response. A proper view of executive power holds that the President is constrained by the terms of those statutes. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

b. Do you believe that Mr. Barr, as Attorney General and given his views on executive power, would push back on President Trump declaring a national emergency to seize funds to build his border wall as a violation of the powers granted to the Executive Branch?

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[11] The Barr Memo at 9.

Mr. Barr's legal opinions strongly indicate that he would not constrain the President's exercise of statutory authorities. Indeed, those opinions indicate that Mr. Barr would most likely act to facilitate expansive and unwarranted assertions of statutory powers. The Memo that Mr. Barr wrote last summer on the issue of whether the President is subject to the obstruction of justice statute is alarming in this regard. It demonstrates that Mr. Barr will read statutes in a way that facilitates his underlying view of the President's constitutional authority – which, again, is itself an extreme view. Were Mr. Barr to follow the same approach to statutory interpretation that he applied in his June 2018 memo, he would read statutory limits on the Presidnt's emergency powers narrowly or as inapplicable altogether.

I want to emphasize that I have no doubt that Mr. Barr would uphold legal limits on the President's authority where he sees them as applicable. My concern is that Mr. Barr too often sees statutory limits on the President's power as inapplicable or unconstitutional. In other words, I do not mean to challenge Mr. Barr's character. It is the substance of his theory of presidential power that I find dangerous.

4. Mr. Barr stated before the Senate Judiciary Committee that politics degenerating into investigating political officials would lead us to a banana republic.

a. Do you believe there is a legal basis to indict a sitting president if there is clear evidence of wrongdoing? Would this lead us to a banana republic, or would this be upholding the rule of law?

Yes. I believe there is a legal basis for indicting a sitting President. It is often asserted that the Department of Justice has reached a settled view to the contrary. Former Assistant Attorney General for the Office of Legal Counsel Walter Dellinger has explained that the Department's position is actually much more equivocal on this point and has emphasized that it would be consistent with the Department's views to indict a President and postpone actual prosecution until the President has left office.[12] I agree. Given the Supreme Court's ruling in *Clinton v. Jones* that requiring a sitting President to subject himself to civil litigation while in office is constitutionally permissible, it is difficult to see how an indictment on its own would unconstitutionally prevent the President from performing his constitutional duties.

Regardless of the Department's position, I believe the question of whether a sitting President may be prosecuted while in office is a close one. I think it especially close, and one to which the Department has paid scant attention, if the basis of the indictment and prosecution is conduct that took place before the President took office. In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court thought this crucial and distinguishing of the precedents (*e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)) that held the President could not be sued for conduct undertaken while in office. It is difficult to imagine that a criminal prosecution would be any more disruptive to a sitting President than Paula Jones's lawsuit was to President Clinton.

[12] Walter Dellinger, *Indicting a Sitting President Is Not Foreclosed: The Complex History* Lawfareblog (June 18, 2018), available at https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history.

Politicization of the criminal justice system would, to use your term, render us "a banana republic." The threat of politicization is greatest where an incumbent administration uses its prosecutorial powers against its political opponents, as Mr. Barr has seemingly suggested with respect to investigating Hillary Clinton. The threat of politicization also arises when the President and his allies are given more favorable treatment than ordinary citizens. The rule of law demands that the law be applied without fear or favor. That means the President must be amenable to the law and that the investigation of a sitting President vindicates, rather than vitiates, the rule of law.

Questions for the Record for Prof. Neil J. Kinkopf from Senator Mazie K. Hirono

Section 1 of the 14th Amendment states that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." During Mr. Barr's confirmation hearing, I asked him whether he believed birthright citizenship is guaranteed by the 14th Amendment. He responded that he "ha[d] not looked at that issue" and that he would have to ask the Office of Legal Counsel whether eliminating birthright citizenship is "something that is appropriate for legislation."

a. **Is birthright citizenship guaranteed by the 14th Amendment?**

   Yes. Birthright citizenship is unequivocally guaranteed by the Fourteenth Amendment.

b. **Can birthright citizenship be eliminated by legislation?**

   Certainly not. There can be no more bedrock principle of civil liberty than birthright citizenship. If Congress could, by simple legislation, eliminate birthright citizenship, Congress could define who is a citizen entitled to fundamental rights under the Constitution, and who is not.

   This is not merely my interpretation of the Constitution; it is the long-standing view of the Supreme Court. *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649 (1898); *Afroyim v. Rusk,* 387 U.S. 253 (1967); *see also Rogers v. Bellei*, 401 U.S. 815, 835 (1971). Mr. Barr's asserted need to consult with the Office of Legal Counsel is puzzling, as the view that Congress may not by statute eliminate birthright citizenship is the settled position of the Office of Legal Counsel and the Department of Justice. *Legislation Denying Citizenship at Birth to Certain Children Born in the United States*, 19 Op. O.L.C. 340 (1995).