**Statement of Neil J. Kinkopf**
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**Before the Committee on the Judiciary**
**United States Senate**
**Hearing on the Nomination of**
**William P. Barr to be Attorney General of the United States**
**January 16, 2019**

I

I want to thank the Committee for the privilege of presenting testimony on the nomination of William P. Barr to be the Attorney General of the United States. Mr. Barr enjoys a reputation as a skilled and intelligent lawyer and as a committed public servant – a reputation earned in part through his previous service within the Department of Justice, including as Attorney General under President George H.W. Bush. I do not mean to challenge this reputation. Nonetheless, I oppose this nomination.

It is the job of the Attorney General to lead the Department of Justice in providing legal counsel to the President and the entire executive branch. The object of that counsel is to ensure that President pursues the great objectives entrusted to him – national security, economic prosperity, liberty, and justice – within the constraints of the rule of law. I oppose the nomination of William Barr to be Attorney General because I have no doubt that he will unflinchingly apply his understanding of the Constitution – and that understanding is dangerously mistaken. As I elaborate below, William Barr's view of the Constitution exalts presidential power, ignores Congress's legitimate legislative powers, and minimizes the role of the judiciary. What remains is an executive power of breathtaking scope, subject to negligible limits. This is not the presidency our founders contemplated; this is not the presidency our Constitution meant to embody.

William Barr's vision of executive power should be deeply alarming to every member of this Committee, regardless of party. In every Administration, the practice and the formal opinions of the Justice Department establish precedents that are used and relied upon by future Administrations. The edifice of presidential power is built on the precedents of Administrations of both political parties. It appears that, if confirmed, William Barr will establish precedents that adopt an enduring vision of presidential power; one that in future Administrations can be deployed to justify the exercise of power for very different ends. This vision of presidential power is contrary to the constitutional system of checks and balances that lies at the heart of our Constitution. It is contrary to the Supreme Court's consistent understanding of that system. It is too dangerous for any President of any political party to wield.

II

* Affiliation is listed for identification purposes only. The views expressed are the author's own and do not reflect the position of Georgia State University.

As head of the Office of Legal Counsel, William Barr issued opinions propounding an extreme view of the so-called Unitary Executive theory of presidential power.[1] At its core, that theory regards as unconstitutional any law that limits the President's authority to supervise the work of officers and other subordinates in the executive branch. It is principally concerned with maintaining a clear, unfettered chain of command within the Administration.[2] In a recent memorandum, Barr has gone beyond these chain-of-command concerns and propounded a novel theory of presidential power that holds unconstitutional any law that limits the way the President, or his subordinates, exercise their executive powers.[3] Where the Unitary Executive theory is concerned with preserving the President's ability to supervise subordinates, Barr's recently elaborated theory holds that statutes may not limit or regulate the ways in which the President exercises his executive powers. In Barr's own words,

> 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. As such, he is the sole repository of all Executive powers conferred by the Constitution.[4]

With this formulation, the Barr Memo transforms the Unitary Executive into an Imperial Executive.

Under this 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,[5] impeachment, and political considerations.[6] 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'

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[1] *See, e.g., Common Legislative Encroachments on Executive Branch Constitutional Authority*, 13 Op. O.L.C. 248 (1989).

[2] The unitary executive theory is a deeply flawed interpretation of the Constitution. It is contrary to virtually every relevant Supreme Court decision of the last 80 years and is irreconcilable with such leading rulings as *Morrison v. Olson*, 487 U.S. 654,(1988)(upholding limits on the President's authority to remove the Independent Counsel); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)(upholding the independence of the Federal Trade Commission); and *Wiener v. United States*, 357 U.S. 349 (1958)(inferring and upholding limits on the President's authority to remove members of the War Claims Commission).

[3] *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).

[4] The Barr Memo at 9 (emphasis in the original)(*n.b.* The Barr Memo is not paginated. Pin cites are therefore estimates).

[5] 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).

[6] 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.

> 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.[7]

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."[8] 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 …."[9] By contrast, "the executive power [is] restrained within a narrower compass …."[10] 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."[11] 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

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

discretion"[12] 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."[13] 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.

III

In his prepared statement, Mr. Barr has characterized his memo as "narrow in scope," addressing only "a specific obstruction-of-justice theory under a single statute." But in order to answer the specific issue, the Barr Memo offers a comprehensive theory of the President's constitutional power. That theory has momentous ramifications throughout the executive branch, as well as implications for aspects of the Special Counsel's investigation that reach beyond the specific obstruction-of-justice theory discussed in the Barr Memo. In this section, I will first address some of the portent of Mr. Barr's views for the Administration. Next, I will consider the ways in which those views could be used to undermine the Special Counsel's investigation.

A. Implications of the Imperial Executive Theory for the Administration

**The independent agencies are unconstitutional.** William Barr's view of presidential power would hold independent agencies unconstitutional, overturning nearly a century of Supreme Court precedent and upending dozens of regulatory agencies. It would be shocking enough for the Barr Memo to assert that the Supreme Court's most foundational decisions relating to the constitutionality of the regulatory state have been consistently wrong for nearly a century. The Barr Memo does not even note that it is irreconcilable with these decisions, let alone attempt to explain why they should be disregarded.

The Supreme Court has held that Congress may establish independent agencies – that is, agencies that exercise their power subject to the policies set forth in law and not subject to the President's political oversight.[14] The mechanism that renders an agency independent in this sense is a limit on the President's removal authority; the President may only remove the head(s) of an independent agency "for cause" rather than "at will." As then-Assistant Attorney General for the Office of Legal Counsel William Barr put it, "Because the power to remove is the power to control, restrictions on removal power strike at the heart of the President's power to direct the Executive Branch and to perform his constitutional duties."[15] The Barr Memo does not mince words, the President "has illimitable discretion to remove principal officers carrying out his Executive functions."[16] On this theory, the President may, for example, order the Chairman of the Federal Reserve to raise interest rates (or not) and then may fire the Fed chairman if he refuses to heed the President's order. The President may order the Securities Exchange

[12] The Barr Memo at 11.
[13] *Id.* at 10.
[14] *See Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).
[15] *Common Legislative Encroachments, supra* note 1, at 252-253 (1989).
[16] The Barr Memo at 9.

Commission to undertake certain enforcement actions, or to drop certain actions, and remove any commissioner who objects. The result would be a dramatic re-working of the administrative state, and a massive aggrandizement of the President's power.

**The *Qui Tam* provisions of the False Claims Act are unconstitutional.** Then-Assistant Attorney General Barr composed a lengthy legal opinion expressing precisely this view in 1989.[17] He asserted, "the authority to enforce the laws is a core power vested in the Executive. The False Claims Act effectively strips this power away from the Executive and vests it in private individuals, depriving the Executive of sufficient supervision and control over the exercise of these sovereign powers. The Act thus impermissibly infringes on the President's authority to ensure faithful execution of the laws."[18] He also argued that the *qui tam* provisions violate the Appointments Clause.[19] The Barr Memo's commitment to the President holding "illimitable" power over all law enforcement actions on behalf of the United States makes it clear that he continues to view these provisions of the False Claims Act as violations of both the Appointments Clause and the clause vesting the executive power in the President.

**The President may prohibit executive branch agencies from sharing information and reports with Congress.** 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."[20] Under this view, the President may order executive branch officials to withhold information or reports that do not support or otherwise accord with the President's position on a range of issues, from military and foreign affairs policy to climate change.

**The President, acting as Commander in Chief, may order the use of torture as an interrogation technique notwithstanding federal law prohibiting it.** The Barr Memo repeatedly asserts that the President's constitutional powers are illimitable. One of the President's most significant constitutional powers is his authority to act as Commander in Chief. Under the Imperial Executive theory, then, no statute may limit the President's discretion as Commander in Chief to determine by what means to interrogate enemy combatants. This is, in fact, precisely the legal theory of the infamous Torture Memo.[21]

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[17] The *qui* tam provisions authorize private individuals, whistleblowers, with knowledge of fraud being perpetrated against the United States to bring claims against these perpetrators on behalf of the United States. This program has been remarkably successful in helping the federal government combat fraud.

[18] *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 210 (1989).

[19] *Id.* at 209-210.

[20] *Common Legislative Encroachments, supra* note 1, at 255.

[21] Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogations under 18 U.S.C. §§2340-2340A (August 1, 2002). The Torture Memo was wrong for many reasons. The one most relevant here is that it ignored the existence of numerous powers authorizing Congress to enact the Anti-Torture Act, including Congress's power to make rules for the government and regulation of the land and naval forces, to make rules regarding captures, and to define and punish offenses against the law of nations, as well as the Necessary and Proper Clause.

**The President, acting as Commander in Chief, may order warrantless domestic surveillance despite statutory warrant requirements such as the Foreign Intelligence Surveillance Act.** As with torture, the President's Commander-in-Chief power includes the authority to engage in surveillance of the enemy. If this power is illimitable, as the theory of the Barr Memo holds, then Congress may not dictate how the President exercises it, even if that dictate is the protection that before engaging in electronic surveillance the executive first secure a warrant.

**The President may initiate and prosecute a full-scale war without first receiving a declaration or authorization from Congress.** The view of illimitable executive power expressed throughout the Barr Memo has been taken to support the claim that Congress's power to declare war is irrelevant to the President's power as Commander in Chief to order U.S. troops into combat, including foreign invasions that clearly constitute war in the constitutional sense.[22] On this view, the function of a formal declaration of war is limited to technical international law consequences and has nothing to do with the President's power to go to war.

**The President alone may determine the nation's foreign policy.** Since the founding, it has been understood that the President holds extensive power relating to the nation's foreign affairs. Future Chief Justice John Marshall's description of the President's role, offered during a House of Representatives debate, endures, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[23] This expresses the broad consensus that the President speaks for the nation and serves as our chief diplomat. It does not, however, follow that the President is exclusively authorized to determine the content of the nation's foreign policy. Indeed, numerous powers assigned specifically to Congress[24] appear plainly to contemplate a significant legislative role in this area. In a 1989 memorandum, Mr. Barr opined that "[i]t 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."[25] This claim was based on broad dicta[26] that the Supreme Court has since repudiated.[27] As the views expressed in the 1989 Memo are consistent with the approach of the 2018 Barr memo – insofar as each minimizes or ignores the existence of relevant legislative powers – Mr. Barr should be asked whether he continues to adhere to the position he expressed in 1989.

**Statutes should be read to relieve the President of statutory obligations.** The Barr Memo applies the so-called clear statement rule in a manner that grants the President a broad exemption from the obstruction-of-justice statute. According to the Barr Memo, "statutes that do not *expressly* apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives."[28]

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[22] *See, e.g.*, Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sep. 25, 2001).
[23] 10 Annals of Cong. 813 (1800).
[24] *See, e.g.*, U.S. Const. art. I, §8, cl. 3 (regulate foreign commerce); *id.* cl. 10 (define and punish offenses against the law of nations).
[25] Common Legislative encroachments at 256 (emphasis added).
[26] *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
[27] *See Zivotofsky* ex rel. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015).
[28] The Barr Memo at 6.

The Barr Memo ignores two predicates for the application of the clear statement rule: first, the statute must be reasonably susceptible of an interpretation that does not include the President; and second, the application of the statute must involve more than a hypothetical or "possible" constitutional conflict, it must create a serious and unavoidable constitutional conflict. Application of the obstruction of justice statute to the President satisfies neither of these predicates. Even more troubling is what this loose application of the clear statement rule would mean across the spectrum of federal statutes. The President would be exempt from broad swaths of federal criminal laws, not to mention civil and administrative statutory requirements.[29] As I have explained elsewhere, applied without rigorous application of its predicates, the clear statement rule "is a sort of magic wand that allows the lawyer wielding it to make laws (and legal constraints on the President) disappear."[30]

This is not an academic concern. President Trump has made it clear that he plans to explore pursuing to their utmost his statutory emergency powers to deal with issues such as the government shutdown and the construction of a wall along the southern border. It is crucial that the Attorney General be committed to facilitating the President's policy agenda in a manner that fully complies with federal law – both constitutional and statutory.

B. The Investigation of Russian Interference in the 2016 Election

The Department of Justice is investigating serious allegations of attempted interference with the 2016 election. The investigation involves allegations regarding involvement relating to the campaign of President Donald Trump. As a result of the investigation, several members of the President's campaign have been convicted of or plead guilty to violating federal law. In keeping with Department of Justice tradition of how to proceed when allegations are made against the President, the Department has appointed a Special Counsel, Robert Mueller, to conduct the investigation and related prosecutions. The Imperial Executive theory set forth in the Barr Memo would have grave consequences for this investigation were it accepted by the Department of Justice.[31] Below, I set forth several of those consequences.

**The President may effect the firing of the Special Counsel.** The Barr Memo makes this declaration quite straightforwardly: [The President] "has 'illimitable' discretion to remove principal officers carrying out his Executive functions."[32] Special Counsel Mueller is an inferior, not a principal, officer.[33] Nonetheless, the Barr Memo is clear throughout that anyone who exercises prosecutorial discretion does so on the President's behalf and acts "merely [as] his hand," subject to his continuing supervision and control.[34] As a result, the President may

[29] *See, e.g.*, Daniel Hemel and Eric Posner, *The President Is Still Subject to Generally Applicable Criminal Laws: A Response to Barr and Goldsmith*, Lawfareblog (Jan. 8, 2019).
[30] *See Clear Statement: The Barr Memo is Disqualifying*, Take Care Blog (Jan. 14, 2019). *See also* H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 Ind. L.J. 1313 (2006).
[31] There is no small irony in this, given the extraordinary weight the Barr Memo places on "the solemn national decision" the people make in electing the President. The Barr Memo at 11. Given that this is one of the few checks on executive power that the Barr Memo recognizes, it should be all the more important that this solemn decision be protected from corruption, especially at the hands of a foreign power.
[32] *Id.* at 9.
[33] *See Morrison v. Olson* (concluding the Independent Counsel was an inferior officer).
[34] The Barr Memo at 11 (internal quotes and citation omitted).

remove, or order the removal of, any prosecutor or investigator from any matter, and for any reason he wishes.[35] Since the Special Counsel has jurisdiction over only one matter, removing him from that matter is the functional equivalent of an unqualified removal.

**The President may terminate the investigation into Russian interference with the 2016 election.** President Trump has declared that he has authority to take over the investigation from Special Counsel Mueller. The Barr Memo would vindicate that position. Again, the Barr memo's Imperial Executive theory holds that all federal prosecutors and investigators serve on behalf of and in the place of the President. The President retains complete authority to supervise and control their prosecutions and investigations, without any limit. The Barr Memo expressly includes the investigation currently being conducted by Special Counsel Mueller in that category and asserts the President's "illimitable" power "to start or stop a law enforcement proceeding …."[36]

**The President may manipulate the investigation into Russian interference with the 2016 election.** One of the more alarming passages of the Barr Memo is the following:

> [I]n commenting to Comey about Flynn's situation – to the extent it is taken as the President having placed his thumb on the scale in favor of lenity – the President was plainly within his plenary discretion over the prosecution function. The Constitution vests *all Federal law enforcement power*, and hence prosecutorial discretion, in the President. The President's discretion in these areas has long been considered "absolute," and his decisions exercising this discretion are presumed to be regular and are generally deemed non-reviewable.[37]

The President's complete control over prosecutorial discretion, according to the Barr Memo, includes the power to "place[] his thumb on the scale" in favor a particular outcome – even in a case where the President has obvious conflicts of interest. And, making the power truly imperial, it may not be reviewed.

**The President cannot be required to testify.** Again, the Barr Memo is straightforward: "Mueller should not be permitted to demand that the President submit to interrogation about alleged obstruction."[38] The statement refers only to testimony regarding obstruction. Nonetheless, the Barr Memo's theory that the President may control the investigation means that the President can step in and withdraw any subpoena emanating from the investigation. Any decision by the President to testify, then, would be completely voluntary and subject to terms that the President is constitutionally empowered to dictate.[39]

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[35] *See, e.g.*, *id.*
[36] *Id*. at 2.
[37] *Id*. at 9 (emphasis in the original).
[38] *Id*. at 1.
[39] I do not mean to suggest that the unique position of the President is irrelevant to the question of whether and under what conditions the President may be compelled to testify. Taken together, *United States v. Nixon*, 418 U.S. 683 (1974) and Clinton v. Jones, 520 U.S. 681 (1997), strongly suggest both that the President is subject to compulsory process to testify and that such process will apply differently to the President than it does to other individuals.

**The President cannot commit obstruction of justice.** The Barr Memo concludes that the obstruction of justice statute may not constitutionally be applied to reach "facially-lawful actions taken by the President in exercising the discretion vested in him by the Constitution."[40] In other words, a statute may not make the President's exercise of a constitutional executive power the *actus reus* of a crime. Thus, it is not a crime for the President to issue a pardon as the result of receiving a bribe, nor could it be obstruction of justice for the President to issue a pardon to someone who agrees to commit perjury in return. The Barr Memo asserts that this is not a blanket immunity for the President because a President may still commit obstruction of justice if the *actus reus* involves an "inherently subversive 'bad act'" such as tampering with a witness or destroying evidence.[41] Facially-lawful and inherently bad acts are not, however, distinct categories. Particularly under the Imperial Executive theory, the President may make orders for the management and disposal of federal records. Is an order to destroy a document, then, the facially lawful exercise of the constitutional executive power to manage federal records or an inherently bad act of evidence destruction? The answer could well be "yes," which is to say, the proffered distinction reduces to characterization and meaningless word play.[42]

**The President can likely pardon himself.** The Barr Memo does not directly address the validity of a self-pardon. It includes the claim that

> The authority to decide whether or not to bring prosecutions, as well as the authority to appoint and remove principal Executive officers, and to grant pardons, are quintessentially Executive in character and among the discretionary powers vested exclusively in the President by the Constitution. When the President exercises these discretionary powers, it is presumed he does so lawfully, and his decisions are generally non-reviewable.[43]

On this theory, a self-pardon would be presumptively valid and, in general, not subject to review. It is unclear whether Mr. Barr would find an exception to the general bar on reviewability.

IV

We live in troubled times, marked by deep political divisions. In such times, it is especially crucial that our legal institutions remain anchored to sound legal principles. Our President has declared "I have [the] absolute right to do what I want to do with the Justice Department."[44] Public confidence in the rule of law depends on there being an Attorney General who will not allow the President to do whatever he wants with the Justice Department. William Barr's views of presidential power are so radically mistaken that he is simply the wrong man, at the wrong time to be Attorney General of the United States.

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[40] *Id*. at 2.
[41] *Id*. at 1.
[42] A full consideration of this aspect of the Barr Memo is would take this statement beyond the allotted page limit. I have posted a fuller examination here: https://takecareblog.com/blog/clear-statement-the-barr-memo-is-disqualifying.
[43] *Id*. at 13.
[44] Michael S. Schmidt and Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. "Look Very Bad,"* N.Y. Times (Dec. 28, 2017).