

**Testimony of Peter M. Shane
To the Committee on the Judiciary of the U.S. Senate
Concerning the Nomination of Brett M. Kavanaugh
to Serve as an Associate Justice on the Supreme Court of the United States
Friday, September 7, 2018**

Chairman Grassley, Ranking Member Feinstein and Distinguished Committee Members:

My name is Peter M. Shane. I hold the Jacob E. Davis and Jacob E. Davis II Chair in Law at Ohio State University's Moritz College of Law. I have been teaching constitutional law, both at Ohio State and elsewhere, with a special focus on law and the presidency, since 1981. I co-author the only law school casebook on separation of powers law¹ and served early in my career as an attorney-adviser in the Department of Justice Office of Legal Counsel and as an assistant general counsel in the Office of Management and Budget.

This committee's consideration of any potential Supreme Court Justice immerses its members in profound constitutional issues. At this moment, no issue before you is more important than Judge Kavanaugh's approach to constitutional questions of executive power and presidential accountability. There is a straightforward constitutional principle that ought to frame any sound analysis of these questions. That principle is that no one, including the president, is above the law. The law's authority over presidents is arguably the most important check and balance for executive power built into our constitutional system.

By way of contrast, in my scholarly writing, I have used the word "presidentialism" to describe a contemporary "theory of government and a pattern of government practice that treat our Constitution as vesting in the President a fixed and expansive category of executive authority largely immune to legislative control or judicial review."² The briefest way of stating my concern about Judge Kavanaugh is that he appears to be an extreme presidentialist. Both on and off the bench, he has crusaded for an indulgent interpretation of the President's constitutional powers that could effectively undermine a President's accountability to law.

Aggressive presidentialism always poses serious constitutional risks. All our Chief Executives, both Republicans and Democrats, have powerful political incentives to press the boundaries of their authority. But at this moment in history, the threat of presidentialism to our constitutional democracy is unusually profound. Our current President and some of his closest associates stand at the center of an ongoing investigation of an election campaign tainted by covert foreign involvement and multiple potential crimes. The President has refused to distance the performance of his public duties from those commercial activities that enrich his private fortunes. The President's plainly expressed contempt for democratic institutions will likely insure that, in the next few years, the Supreme Court will face a host of issues testing the Justices' commitment to the "government of laws" ideal.

The purpose of my testimony is three-fold. First, I want to explain what is wrong in general with so-called Unitary Executive Theory, the specific reading of Article II of the

¹ PETER M. SHANE, HAROLD H. BRUFF, AND NEIL J. KINKOPF, SEPARATION OF POWERS LAW: CASES AND MATERIALS (4TH ED. 2018).

² PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 3 (2009).

Constitution that Judge Kavanaugh enthusiastically champions. Second, I want to highlight why I fear that Judge Kavanaugh will approach questions of presidential authority more as an habitual activist for presidentialism than as an open-minded arbiter. Finally, I want to review the immediate dangers from presidentialism and explain why this is an especially inopportune moment to move the Supreme Court in a yet more presidentialist direction.

I. The Tenets and Errors of Unitary Executive Theory

At least since leaving his role in the independent counsel investigation of President Bill Clinton, Judge Kavanaugh has become an unabashed adherent to the tenets of what has been known since the 1980s as “unitary executive theory” (UET). As UET advocates read Article II of the Constitution, the President is constitutionally vested with the authority to remove from office any executive branch administrator at will and to direct how all such officers discharge their discretionary functions under the statutes Congress enacts. UET purports to root these conclusions in the Executive Power Vesting Clause of Article II of the Constitution and the President’s obligation to take care that the laws be faithfully executed.

It bears noting at the outset that the Supreme Court thus far has largely rejected UET. Two well-settled decisions are pivotal. The first is *Humphrey’s Executor v. United States*,³ the Court’s unanimous decision over 80 years ago that Congress was constitutionally entitled to protect members of the Federal Trade Commission from removal at will by the President. The second is *Morrison v. Olson*,⁴ the Court’s 1988, 7-1 decision upholding the independent counsel provisions of the Ethics in Government Act. Notably, each opinion was written for the Court by a prominent conservative Justice—George Sutherland in the earlier case and William H. Rehnquist, Jr. for the latter.

The Court’s opinions upholding Congress’s design of independent agencies are sound for multiple reasons. First, even if UET were an accurate reading of what Article II meant in 1787—and it is not—tethering Congress’s modern institutional design choices to the realities of 1787 government administration would make no sense. The smallest 21st century cabinet department is larger than the entire federal executive branch in 1800. In 1787, facing the prospect of a federal civil establishment likely to employ at most a few thousand persons,⁵ Americans might have found it plausible to institutionalize a hierarchical civil command structure with meaningful accountability effectively vested in a single human manager. Such an aspiration is wholly fanciful today.

Moreover, today’s federal government wields extensive powers that the founding generation could not have envisioned. As the libertarian legal scholar Ilya Somin has argued, it makes no sense from an originalist point of view to give the President comprehensive authority over today’s vastly more sprawling federal administration: “In many cases, it might be more in the spirit of the Founding Fathers to divide this overgrown authority than to give it all to the President. After all, the Founders repeatedly warned against excessive concentration of power in the hands of any one person.”⁶

³ 295 U.S. 602 (1935).

⁴ 487 U.S. 654 (1988).

⁵ SOLOMON FABRICANT, TRENDS OF GOVERNMENT ACTIVITY IN THE UNITED STATES SINCE 1900 161–203 (1952).

⁶ Ilya Somin, “Rethinking the Unitary Executive,” THE VOLOKH CONSPIRACY (May 3, 2018), <https://reason.com/volokh/2018/05/03/rethinking-the-unitary-executive>.

Imputing plenary supervision and removal powers to the President because he is vested with “the executive power” imagines a 1787 consensus as to the meaning of executive power that simply did not exist. The most obvious evidence of the ambiguity in the Constitution itself is the Appointments Clause in Article II which allows Congress to vest the appointment of inferior officers not only in the executive branch, but also in the courts of law.⁷ An 1879 Supreme Court decision upholding the authority of courts to appoint election inspectors highlights how the clause signals the debatable contours of executive power:

It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, *it would be difficult in many cases to determine to which department an office properly belonged.*⁸

It is an especially egregious error to imagine that the late 18th century understood “executive power” as necessarily embracing criminal prosecution. This is why Justice Scalia’s famous “unitary executive” dissent in *Morrison v. Olson* lacks any historical basis. The influential writings of John Locke a century earlier had made no distinction between executive and judicial power.⁹ In England, criminal prosecution was still largely a private function.¹⁰ A number of the early states authorized the legislative appointment of their Attorneys General or the judicial appointment of prosecutors. Connecticut is especially instructive. Its 1818 Constitution not only vested the executive power in the governor, but—like the federal Constitution—required the governor to take care that the laws be faithfully executed and gave the governor the equivalent of Opinions Clause authority. Yet Connecticut courts appointed prosecutors at least until 1854.¹¹ Other early state constitutions explicitly gave their legislatures significant power over the selection of officers to perform what would usually be considered executive duties, again suggesting that the vesting of executive power did not entail that the executive branch be, in every respect, unitary.¹² In its *Siebold* decision, the Court pointed to U.S. Marshals as officials who could be sensibly viewed as officers of either the executive or the judiciary; the same ambiguity surrounds prosecutors.

The First Congress's creation of our initial federal administrative bodies likewise reflected a diversity in organizational design and supervisory arrangements that belies any consensus around a hard version of a unitary executive.¹³ An especially important debate concerned a proposed duty of the Treasury Secretary “to digest and prepare plans for the

⁷ U.S. CONST., Art. II, § 2.

⁸ Ex parte Siebold, 100 U.S. 371, 397 (1879) (emphasis added).

⁹ Victoria Nourse, The Special Counsel, *Morrison v. Olson*, and the Dangerous Implications of the Unitary Executive Theory 11 (June 2018), <https://www.acslaw.org/wp-content/uploads/2018/07/UnitaryExecutiveTheory.pdf>.

¹⁰ Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 605 (1989).

¹¹ Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PENN. J. CONST. L. 323, 348 (2016).

¹² *Id.*, at 334-344.

¹³ JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

improvement and management of the revenue, and for the support of public credit.” This wording was nearly identical to the charge to financial officers authorized under the Articles of Confederation. Some in Congress were alarmed that this parliamentary duty would so involve the Secretary in legislation as to undermine the authority of the House; others saw the charge as undermining the President’s power to propose legislation. Nonetheless, Congress conferred this duty upon the Secretary, essentially borrowing a description of the Secretary from this country’s former, short-lived parliamentary system.¹⁴

Judge Kavanaugh’s writings in defense of UET take no account of these arguments or evidence. Instead, he insists: “Presidential control of . . . agencies . . . helps maintain democratic accountability and thereby ensure the people’s liberty.”¹⁵ This assertion profoundly oversimplifies the meaning of accountability and ignores the multiple ways in which presidential elections are too blunt an instrument to insure presidential responsiveness to the nation as a whole.¹⁶ Moreover, Judge Kavanaugh’s modern notion of democratic accountability can hardly be linked to the Framers. As Professor Somin has written, the Framers “would be especially appalled to see [unitary control] in the hands of an office whose occupant is now selected by a far more populist selection process than the Founders intended, and therefore more likely to be a dangerous demagogue.”¹⁷

The so-called originalist defenses of UET demonstrate what the celebrated judicial conservative Judge J. Harvie Wilkinson III has urged as most dangerous about originalism:

[O]riginalism, perhaps more than other cosmic theories, provides cover for discretionary interventions into the democratic process that might otherwise not take place. Our theories are convincing us that we are being objective when broad daylight reveals that we are not.¹⁸

Judge Kavanaugh’s record on issues of presidential authority demonstrates that he has become an activist in just the sense Judge Wilkinson fears.

II. Judge Kavanaugh’s Presidentialist Crusade

Judge Kavanaugh is not just an enthusiast for presidential power; he is a campaigner. He has elaborated presidentialist theories in cases that did not require constitutional analysis at all. He has written law review articles urging Congress to expand and protect presidential power.¹⁹ He was a key White House official when the George W. Bush Administration made some of its most outlandish claims for presidential authority

¹⁴ Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 615 (1989).

¹⁵ *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011), subsequent mandamus proceeding, 725 F.3d 255 (D.C. Cir. 2013).

¹⁶ Peter M. Shane, *Political Accountability in A System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1994).

¹⁷ Somin, *supra* note 7.

¹⁸ J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 57 (2012).

¹⁹ See, e.g., Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2133 (1998).

under Article II of the Constitution.

Judge Kavanaugh's most noteworthy judicial opinions on the unitary executive were rendered in disputes where no constitutional issue should have been addressed. One was his concurrence at a preliminary stage in *In re Aiken County*,²⁰ a suit that required no constitutional analysis. Judge Kavanaugh's concurrence offered a detailed explanation why, in his view, the creation of independent administrative agencies like the Nuclear Regulatory Commission departed from a proper reading of Article II—a reading in which the President would be deemed singly and personally responsible for all “execution of the laws.” Although insisting that his point was “not to suggest that [*Humphrey's Executor*] should be overturned,”²¹ a concession not binding on a Supreme Court Justice, he suggested that the earlier case might best be regarded dismissively as a decision “by a Supreme Court seemingly bent on resisting President Roosevelt and his New Deal policies.”²² At a later stage in the litigation,²³ he detailed at length his expansive view of the President's prerogatives regarding criminal prosecution—before concluding that the NRC could not use that prerogative to defend the challenged NRC decision at issue. This presumably came as no surprise to the NRC, which had never raised the issue in its briefs.

Moreover, in a more recent decision, Judge Kavanaugh demonstrated that unitary executive theory could well be promoted—and Congress's design for agency independence undermined—not by overturning *Humphrey's Executor*, but by inventing wholly new theories that would enable courts to work around it. *PHH Corp. v. Consumer Finance Protection Bureau*²⁴ involved a challenge by a mortgage lender against the CFPB's imposition of a massive penalty for an alleged impropriety. The three-judge D.C. Court of Appeals panel to which Judge Kavanaugh belonged concluded unanimously on statutory grounds that the CFPB's order was improper. Judge Kavanaugh nonetheless used the case as occasion to cut a new theory from whole cloth as why the CFPB's structure as a single-headed independent agency was unconstitutional under the separation of powers.

Recognizing that *Humphrey's Executor* precluded his holding the CFPB unconstitutional simply on the ground that the President could not fire its director at will, Judge Kavanaugh manufactured an entirely new rationale for *Humphrey's Executor*, namely, that “[i]n the absence of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decisionmaking and abuse of power, and thereby to protect individual liberty.”²⁵ He then determined that a single-headed independent agency lacks the liberty-protecting features of multimember agencies and proceeded to hold the CFPB structure unconstitutional on that ground—a conclusion the D.C. Circuit has since reversed en banc.²⁶ Arrogating to a court the power to determine whether a congressionally designed administrative structure is sufficiently protective of liberty under a wholly subjective metric is extraordinary enough. Equally remarkable,

²⁰ 645 F.3d 428 (D.C. Cir. 2011), subsequent mandamus proceeding, 725 F.3d 255 (D.C. Cir. 2013).

²¹ *In re Aiken County*, 645 F.3d 428, 446 (D.C. Cir. 2011).

²² *Id.*

²³ *In re Aiken County*, 725 F.3d 255, 259-266 (D.C. Cir. 2013).

²⁴ 839 F.3d 1 (D.C. Cir. 2016), reh'g en banc granted, order vacated (Feb. 16, 2017), on reh'g en banc, 881 F.3d 75 (D.C. Cir. 2018).

²⁵ *Id.* at 26.

²⁶ 881 F.3d 75 (D.C. Cir. 2018).

however, is that the author of a judicial opinion five years earlier that decried the constitutionality of multimember agencies like the Nuclear Regulatory Commission then offered in his *PHH* decision the most robust policy defense in the history of U.S. jurisprudence of the wisdom of multimember independent administrative agencies.

Judge Kavanaugh's on-the-bench activism for executive power may also be reflected in his possible role crafting aggressive claims for executive authority during the George W. Bush Administration. In signing statements alone during his first six years in office—when Judge Kavanaugh was in White House Counsel's office or serving as staff secretary—President Bush raised nearly 1,400 constitutional objections to roughly 1,000 statutory provisions of over 100 statutes, more than three times the total such objections raised by his 42 predecessors combined.²⁷ After Judge Kavanaugh left his role as staff secretary, the pace of Bush signing statements slacked off. This fact raises the question to what degree Judge Kavanaugh was responsible for urging such aggressive claims of presidential power.

Nearly all of Bush objections either implied or claimed outright a constitutional barrier to Congress's authority to exercise its legislative powers in the face of the President's Article II authorities. Many of these assertions were also unprecedented, if not bizarre—suggesting, for example, that the President's power to recommend measures for Congress's consideration might limit Congress's authority to demand reports from the executive branch or that Congress's requirements that administrators “consider” specified factors in the course of their decision making would conflict with the President's supervisory powers over the “unitary executive.”

Two signing statements stand out as both exemplary and outlandish. It is conventional wisdom that the president's commander-in-chief power extends to presidential decisions concerning the deployment of military force. Yet a 2002 Bush signing statement²⁸ claimed that the commander in chief power also extends to deciding troop strength in the Defense Department's Office of Legislative Affairs. It would be revealing to know if Judge Kavanaugh agreed that Congress burdened the president's commander in chief powers by limiting the number of Defense Department civilian and military personnel who could be engaged in liaison with the legislative branch.

A 2004 signing statement accompanying the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 made a yet more worrisome suggestion.²⁹ Among other things, that Act prohibited Department of Defense personnel from interfering with certain military lawyers who might give independent legal advice to their superiors. The Bush signing statement insisted that this provision raised constitutional concerns and would be implemented only as consistent with “the President's constitutional authorit[y] to take care that the laws be faithfully executed.” It would plainly be worrisome if Judge Kavanaugh believes a prohibition on interference with independent legal advice within the military could compromise the president's obligation of legal fidelity. One would assume that protecting the independent legal advice of military lawyers would help to bolster that presidential obligation, not threaten it.

²⁷ Neil Kinkopf and Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2006* (October 2007). Ohio State Public Law Working Paper No. 106. Available at SSRN: <https://ssrn.com/abstract=1022202>.

²⁸ <http://coherentbabble.com/Statements/SShr3801.pdf>.

²⁹ <http://coherentbabble.com/Statements/SShr4200.pdf>.

Without a more complete documentary record than we now have concerning Judge Kavanaugh's service in both the office of White House Counsel and as Staff Secretary, we cannot know his precise role in crafting, advocating, or approving such audacious constitutional claims. Yet they seem to be of a piece with the views he has expressed as both judge and author that are exceptionally protective of presidential authority and antagonistic to the roles of Congress and the courts in checking that power. His White House experience, like his unnecessary judicial opinions on independent agencies, suggests he is more a campaigner for presidentialism than a neutral arbiter. This is troubling.

III. Unitary Executive Theory and the Dangers of an Authoritarian Presidency

Aggressive presidentialism on the Supreme Court would pose a risk to constitutional checks and balances at any time, but the danger at this current moment is exceptionally grave. We have a President not only disdainful of the institutions most important to checking abuses of executive power, but his utterances betray a fantasy that the other branches of government should actually take direction from him. As I explained earlier, it is likely that legal issues nearly unprecedented in their volume and seriousness will emerge from this President's public and private conduct. It would be disastrous if the federal judiciary addressed those issues in ways that undermined effective constitutional checks on overreaching presidents.

Judge Kavanaugh has already expressed potentially troubling views on three of these issues: whether the President has constitutionally based authority to supervise or dismiss the special counsel investigating his campaign, whether the President can be required to respond to judicial or congressional subpoenas, and whether a sitting President may be indicted. His views are presumably a source of comfort to the President.

Judge Kavanaugh's views on independent prosecutors are clear. He wrote a law review article in 1998 advocating that Congress require criminal investigations of high-level executive branch officials to be conducted only by prosecutors directly answerable to the President. "The President," he wrote, "should have *absolute discretion* (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel."³⁰ He urged that Congress give the President complete control over such a prosecutor's jurisdiction.

Judge Kavanaugh would thus vote in all likelihood to overturn any attempt by Congress to give statutory protection to the special counsel investigating President Trump. As I mentioned earlier, a key Supreme Court precedent inconsistent with unitary executive theory is *Morrison v. Olson*, which properly upheld the constitutionality of the Ethics in Government Act. That post-Watergate statute authorized the judicial appointment of an independent counsel to investigate serious allegations of wrongdoing against the President and high-level Administration officials.³¹ In a 2016 speech to the American Enterprise Institute, Judge Kavanaugh—ignoring the historical baselessness of Justice Scalia's lone dissent—expressed the dubious view that *Morrison v. Olson* had "been effectively

³⁰ Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2136 (1998) (emphasis added).

³¹ *Morrison v. Olson*, 487 U.S. 654 (1988).

overruled,” but added, “I would put the final nail in.”³²

It is worth comparing Judge Kavanaugh’s enthusiasm for the unitary executive with the measured approach of the *Morrison v. Olson* Court. The 1988 Court recognized that, more than 50 years earlier, *Humphrey’s Executor* had rested the constitutionality of the Federal Trade Commission on that agency’s “quasi-legislative” and “quasi-judicial” functions. Yet the Court wrote: “[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a ‘good cause’-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as ‘purely executive.’”³³ Instead, after reviewing the powers and duties of the Independent Counsel, the Court concluded:

Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.³⁴

The Court found it constitutionally sufficient that the Attorney General—himself subject to removal at will by the President—could remove the independent counsel for good cause, should it arise. The Court logically regarded this distribution of authority as sufficient to ensure the President’s capacity to take care that the laws be faithfully executed.

Yet it is doubtful that a potential Justice eager to put “the final nail in” *Morrison v. Olson* would be protective of a special counsel appointed by an Acting Attorney General to investigate the 2016 presidential campaign. At the very least, UET would grant the President authority to re-enact the Saturday Night Massacre until he found an acting Attorney General willing to fire the special counsel, with or without the bureaucratic nicety of rescinding the regulation that protects the special counsel from at-will dismissal. At the extreme—and this may be Judge Kavanaugh’s view—the President would be entitled to delimit the Special Counsel’s jurisdiction and require him to operate within it.

That such control would plainly be at odds with an effective investigation of the President might not pose a problem of principle for Judge Kavanaugh because of his view that a sitting President should not be subject to criminal indictment. He proposed in his 1998 article that Congress prohibit the lodging of criminal charges against a sitting president,³⁵ and suggested that the Constitution itself might provide impeachment as the only permissible recourse against an incumbent for even the most serious misconduct.³⁶ This is an especially intriguing view because Independent Counsel Kenneth Starr, for whom Judge Kavanaugh worked, solicited an opinion on the indictment question from the late law professor Ronald D. Rotunda, one of the most prominent conservative constitutional scholars of his generation. Professor Rotunda concluded that the indictment of a sitting President would be constitutional, citing a long string of Supreme Court opinions

³² <https://www.c-span.org/video/?407491-1/discussion-politics-supreme-court>.

³³ *Id.* at 689.

³⁴ *Id.* at 691-692.

³⁵ *Id.* at 2157.

³⁶ *Id.* at 2160-2161.

supporting the proposition that “no one is above the law.”³⁷

Of course, there can be little accountability to either Congress or the courts if information about a President’s conduct is not available to them. Although Judge Kavanaugh has not expressed his constitutional views categorically on the subpoena issue, two pieces of evidence provoke anxiety. First, he has voiced the possibility³⁸ that the Supreme Court reached the wrong decision in *United States v. Nixon*,³⁹ which upheld a judicial subpoena for the Watergate tapes. This conclusion might seem to follow from Judge Kavanaugh’s apparent belief that an executive branch prosecutor should not be entitled to pursue a subpoena over the President’s objections. Second, he was a member of the White House Counsel’s office in 2001, when President Bush asserted executive privilege to prevent the Justice Department from releasing certain open law enforcement records subpoenaed by the House Committee on Government Reform.⁴⁰ If that letter expresses Judge Kavanaugh’s view on executive privilege, it could conceivably extend to open law enforcement files regarding the President. This is even more likely with regard to subpoenas for presidential testimony, an issue the Supreme Court has not addressed. Judge Kavanaugh has expressed deep sympathy for the proposition that presidents should be able to perform their role “with as few distractions as possible,” including, for example, the need to respond to civil suits.⁴¹ There is no guarantee that Judge Kavanaugh would not regard compulsory presidential testimony before court or Congress as an unconstitutional “distraction.”

Beyond these issues are two that could quite easily reach the Supreme Court and another almost certain to do so. One is whether a President is potentially liable for obstruction of justice if he “corruptly . . . endeavors to influence, obstruct, or impede the due and proper administration of the law”⁴² through an official act. The President’s lawyers say no, which is almost certainly both wrong and dangerous. Yet it is not difficult to imagine an unduly presidentialist opinion seeking to prevent prosecutors from inquiring into the presidential motivation behind an official act.

Another is whether a President may relieve himself of criminal liability through self-pardon, a power President Trump has said he “absolutely” has. The notion of self-pardon is plainly at odds with a President’s obligation to take care that the laws be faithfully executed and the principle of due process that no one should be judge in his own cause. Yet the only explicit constitutional exclusion from the President’s pardon power is impeachment. A misguided reading of the Constitution to allow presidential self-pardons is not unthinkable.

With regard to the President’s business dealings, a case is already underway concerning the President’s attempt to exempt himself from the reach of the Constitution’s

³⁷ Letter from Ronald D. Rotunda to Kenneth W. Starr re: Indictability of the President (May 13, 1998), at 3 and n. 6, <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html>.

³⁸ Lawyers Roundtable, *Attorney Client Privilege: Does It Pertain to the Government?* THE WASHINGTON LAWYER, Jan./Feb. 1999, at 34, 39.

³⁹ 418 U.S. 683 (1974).

⁴⁰ George W. Bush, Memorandum on the Congressional Subpoena for Executive Branch Documents (Dec. 12, 2001), <http://www.presidency.ucsb.edu/ws/index.php?pid=73498>.

⁴¹ “I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible.” Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1460 (2009)

⁴² 18 U.S.C. §1505.

emoluments clauses. The President takes the position that, unless a payment is made to him personally for services rendered, the profits he pockets from foreign or state governments patronizing his properties are not Congress's business. Although a federal district court has already rejected that view based on a painstaking analysis of the constitutional text, the Framers' purposes, and our institutional history,⁴³ a jurist determined to insulate the President from "distractions" might determine that the resolution of emoluments controversies should be left entirely to the political process.

* * *

With regard to these profound issues of presidential accountability, I fear Judge Kavanaugh would approach them from a set of premises about the Constitution that are unfounded and dangerous, but, for him, unquestioned. They are rooted in both his role as a campaigner for presidential authority and in the unitary executive theory he has embraced.

I would close by reminding this committee of the words of two of the most important legal minds of the twentieth century. One, Justice Robert H. Jackson, had served as Attorney General for one of the most energetic presidents in U.S. history, Franklin D. Roosevelt. He nonetheless remained vigilant as a Justice against executive overreach, dissenting, for example, from the ignominious 1944 *Korematsu* decision.⁴⁴ It was, however, after his service as chief U.S. prosecutor at Nuremberg that he wrote the following as part of his iconic concurring opinion in the *Youngstown* case:

The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. . . [I]f we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that [the Executive Power Vesting] clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.⁴⁵

Just as timely are the words of Harvard's Paul Freund, perhaps one of the most revered law teachers of all time, who wrote in approval of the Supreme Court's decision in *United States v. Nixon*:

[T]he notion of a unitary executive branch in which tensions between contending executive interests are authoritatively resolved by the President loses its claim when striking allegations of misconduct have been leveled against high executive officials, including the President himself.⁴⁶

We were told at the founding that our Constitution gives us "a Republic, if we can keep it." Unitary executive theory threatens, rather than advances that sacred charge. I hope I have helped to persuade this committee that bolstering the cause of presidentialism on the Supreme Court would be a grave historic mistake, and I thank you for the opportunity to share these views with you.

⁴³ *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018).

⁴⁴ *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting), abrogated by *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁴⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

⁴⁶ Paul A. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 15-17 (1974).