

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
135 Hart 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 Grassley and Feinstein:

We write as former attorneys in the U.S. Department of Justice's Office of Legal Counsel (OLC). It is the function of OLC to uphold the rule of law within the executive branch. It was a privilege to have had the opportunity to perform this role. From this perspective, we are troubled by Judge Brett Kavanaugh's apparent commitment to a version of the unitary executive theory of presidential power that holds that the President has total control of actions and decisions of any executive branch official, and that in many cases this control cannot be reviewed by a court of law nor regulated by Acts of the Congress. Judge Kavanaugh's opinions and law review articles produce this concern, and they are reinforced by remarks by Judge Kavanaugh that *United States v. Nixon*, 418 U.S. 684 (1974), was wrongly decided and should be overruled.

The *Nixon* case, of course, addressed whether the President was obligated to disclose audio tapes of specific Oval Office conversations in response to a criminal subpoena for them. The unanimous decision by the Supreme Court that Nixon was obligated to do so was a major defeat for the unitary executive theory, and it is Judge Kavanaugh's statement that the case was "wrongly decided" that prompts this letter. We urge the Senate Judiciary Committee to question Judge Kavanaugh about that remark and the *Nixon* decision, as well as more generally about the unitary executive theory. The remainder of this letter elaborates why the country should be vitally interested in what he says.

Nixon arose in the course of a Special Counsel investigation of alleged improprieties during the 1972 presidential contest between Richard Nixon and George McGovern. Criminal prosecutions of individuals who broke into the offices of the Democratic National Committee in the Watergate Complex generated evidence of the involvement of senior White House and other government officials in criminal activities and subsequent efforts to cover up that involvement. When the existence of an Oval Office taping system was revealed in congressional testimony, Special Counsel Archibald Cox obtained a grand jury subpoena for the recordings of specific conversations. Although the term "unitary executive" was not then in use, in negotiations with Cox, President Nixon's lawyers made a clear unitary executive argument against honoring the subpoena: The President has the final word on whether the subpoena is warranted, and he has decided it is not. (Letter from Charles Alan Wright, attorney for Richard M. Nixon, to Archibald Cox, quoted in Watergate Special Prosecution Task Force 91 (1975)).

When Cox disagreed and refused to abandon his efforts to obtain a court order enforcing the subpoena, Nixon ordered the Attorney General to fire Cox. Attorney General Richardson and his immediate successor, Deputy Attorney General Ruckelshaus, both resigned when ordered to do so. Finally, Solicitor General Bork fired Cox. These resignations and firing, which became known as the Saturday Night Massacre, produced a firestorm of public outcry. Nixon was compelled to quickly agree to the appointment of a replacement special prosecutor, Leon

Jaworski. The new Attorney General, William Saxbe, appointed Jaworski pursuant to new regulations that provided even greater independence from control than Archibald Cox had enjoyed. Jaworski successfully requested a court to issue a subpoena for additional recordings, renewing the controversy. Nixon's attorneys then continued Nixon's unitary executive claim by arguing that no federal court could issue the subpoena because the President had authority to control the actions of the Special Prosecutor, including his request for the subpoena. Nixon's lawyers claimed the disagreement between them was an "intra-branch" dispute, which the President wins because he holds the executive power, not a case or controversy between two adverse parties, as required by Article III of the Constitution. Therefore, Nixon's lawyers argued, the dispute was "nonjusticiable" in a court of law.

The Supreme Court unanimously rejected these unitary executive arguments and held that federal courts could indeed adjudicate whether the President was legally obligated to comply with a subpoena requested by the Special Counsel. The Court explained that Congress had vested the Attorney General, not the President, with the power to conduct the criminal litigation of the United States Government (*see* 28 U.S.C. § 516), and with the authority to appoint subordinate officers to assist him in the discharge of those duties. Acting pursuant to those congressional delegations, the Attorney General had delegated the authority to represent the United States in the Watergate matter to a Special Prosecutor "with unique authority and tenure," pursuant to a regulation that gave Jaworski "explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties." As long as that regulation was in place, the Court held, it had "the force of law," and therefore Jaworski was *not* subject to the direction of the Attorney General, let alone the President.

The Court then considered the President's substantive claim—that "executive privilege" gave him the power to refuse compliance with the subpoena. The Court held that the President's assertion of executive privilege could not overcome a valid subpoena for evidence issued in the context of a criminal proceeding.

Judge Kavanaugh's comments on *Nixon* are not entirely clear. At one point, he states:

But maybe *Nixon* was wrongly decided—heresy though it is to say so. *Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implications to this day that most people do not appreciate sufficiently.

Attorney Client Privilege: Does It Pertain to the Government? The Washington Lawyer Jan./Feb. 1999, at 34, 39. At another point, he asks, "Should *United States v. Nixon* be overruled on the ground that the case was a nonjusticiable intrabranch dispute? Maybe so." *Id.* At a minimum, Judge Kavanaugh was expressing doubt about whether the Supreme Court was correct in its holding on justiciability. He may have been going further, however, and suggesting that the Court's ruling on the merits also was incorrect.

Even if Kavanaugh meant only to suggest that "maybe" the case was an "intrabranch dispute" that was nonjusticiable because it could be resolved by a directive from the President to Jaworski—a suggestion, consistent with the theory of the "unitary executive," that Congress may

not limit the President's power to direct all actions of Executive branch officials (or prosecutors, at a minimum), even in a case investigating his own possible wrongdoing—it would mean that the federal courts would lack jurisdiction to entertain the arguments of a Special Counsel who disagrees with the President as to how to conduct an investigation or prosecution of the President himself and his associates.

Nixon has come to occupy an important place in the pantheon of Supreme Court decisions. Judge Kavanaugh, in fact, has acknowledged that *Nixon* is a fine example of the Supreme Court performing its role of standing up to the political branches, though nothing in this acknowledgement addressed the reasoning or holding of *Nixon*. In holding that President Nixon was required to comply with a valid subpoena by turning over the Watergate Tapes, the Supreme Court rejected the unitary executive theory and ruled that the doctrine of executive privilege does not shield the President from a well-founded criminal investigation. The Court's opinion is based on the idea that, under the Constitution, the President is bound by the rule of law. As the Constitution itself puts the idea, it is the President's duty to "take care that the laws be faithfully executed" even when the law applies to the President personally.

Overruling or limiting *Nixon*'s holding on the ground that it is inconsistent with the unitary executive theory of presidential power would have dramatic practical consequences for the investigation currently being led by Special Counsel Robert Mueller. It would allow the President to ignore the Justice Department regulation that insulates the Special Counsel from removal except by the Attorney General for cause, and which grants that officer a certain degree of independence in decision-making (subject to some supervision by the Acting Attorney General, not the President). At its apex, the theory would allow the President to control every action taken by a Special Counsel. Thus, the President could prohibit the Special Counsel from pursuing an investigation or even compel him to cease prosecuting a case in which a grand jury has already issued an indictment. And of course it would make it impossible to obtain testimony or documents from the President relevant to the investigation—including for purposes of the *counterintelligence* aspects of the investigation that are designed to assess Russia's ongoing threat to the American electoral system and any possible "links" between Russia and individuals who were involved in the 2016 campaign (including the President himself). As a practical matter, it effectively could render the President immune from criminal prosecution and allow the President to shield co-conspirators from criminal liability.

Overruling *Nixon* would have serious practical ramifications for the constitutional system of checks and balances. The ultimate check against serious presidential misconduct is Congress's power of impeachment. To override the judgment of the American people and unseat the head of the executive branch is a monumental step. The Constitution is designed to make it one that is exceedingly difficult to take. It is inconceivable that Congress would deploy such an extraordinary power without a solid evidentiary basis for doing so, and an important source of such evidence would be lost if the Court were to overrule *Nixon*. Congress itself could issue subpoenas to the President for information or even testimony, but if *Nixon* were overruled, there would be no avenue for judicial enforcement of the subpoena were the President to refuse to comply.

Beyond the context of criminal investigations, rejecting *Nixon* and embracing a strong unitary executive theory has consequences for the federal government that are breathtaking. The President would possess the authority to supervise and control the functioning of all federal

officials outside Congress and the judiciary, which no statute could diminish nor any court review. If embraced, it means that all independent agencies are unconstitutional. Were the Supreme Court to adopt this theory, the Federal Reserve, the Federal Election Commission, the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, the Consumer Finance Protection Board, to name a few, would be unconstitutional.

We do not mean to suggest that it is improper to question or to criticize the Court's reasoning in *Nixon*. But rejecting the fundamental holding of *Nixon* is a different matter entirely, and that is what Judge Kavanaugh's comments seem to do, suggesting that the case was "wrongly decided" rather than flawed in its reasoning. If *Nixon* were to be overruled, whether on jurisdictional grounds or on the merits, it could render unattainable the ideal that no one, not even the President, is above the law. Also alarming is the strong unitary executive theory that is the apparent source of Judge Kavanaugh's concern about *Nixon*'s holding. It is beyond the scope of this letter to examine all of this theory's consequences, although we have described a few. In general, the theory tends to relieve the President from important statutory constraints and his actions from vital scrutiny. This, in turn, tends to make illusory the Constitution's promise that the President is bound to follow the law.

As former OLC lawyers, we are keenly aware that executive privilege is a critical component of the constitutional separation of powers. We would be deeply troubled by any Supreme Court nominee who did not show an appreciation for the role that executive privilege plays in ensuring that the President can successfully perform the vital functions that the Constitution commits to that office. We are also aware, however, that an overbroad formulation of executive privilege threatens our fundamental constitutional commitment to the rule of law. Judge Kavanaugh's comments on *Nixon* raise the latter concern.

We know that you take your constitutional advise-and-consent role very seriously. It is our belief that in performing this duty, you should ask Judge Kavanaugh to clarify his views on *Nixon* and the unitary executive theory. In this connection, we believe that a review of the relevant records during his tenure as Associate White House Counsel and as Staff Secretary may be critical to a full understanding of his views. A full review of those documents that are relevant and not subject to a legitimate claim of privilege will allow the Senate to perform its constitutional duty and press Judge Kavanaugh to clarify his views on a range of vital issues, including *Nixon* and the unitary executive theory.

Sincerely,

Walter Dellinger
Douglas B. Maggs Professor Emeritus
Duke University School of Law*
Assistant Attorney General, OLC 1993-1996

Dawn E. Johnsen
Walter W. Foskett Professor
Indiana University Maurer School of Law

* Academic affiliations are listed for identification purposes only.

Acting Assistant Attorney General, OLC 1997-1998
Deputy Assistant Attorney General 1993-1996

Neil Kinkopf
Professor
Georgia State University College of Law
Attorney Advisor, OLC 1993-1997

H. Jefferson Powell
Professor
Duke University School of Law
Deputy Assistant Attorney General, OLC 1993-1994, 1996, 2011-2012

Christopher H. Schroeder
Charles S. Murphy Professor
Duke University School of Law
Acting Assistant Attorney General, OLC 1996
Deputy Assistant Attorney General 1994-1996

Peter M. Shane
Jacob E. Davis and Jacob E. Davis II Professor
Ohio State University Moritz College of Law
Attorney Advisor, OLC 1978-1981