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The Implications for the Mueller Investigation of Confirming Judge Brett Kavanaugh

Neil Kinkopf*

August 23, 2018

* Professor, Georgia State University College of Law.

This memorandum was prepared for the Presidential Investigation Education Project, a joint initiative by ACS and CREW to promote informed public evaluation of the investigations by Special Counsel Robert Mueller and others into Russian interference in the 2016 election and related matters. This effort includes developing and disseminating legal analysis of key issues that emerge as the inquiries unfold and connecting members of the media and public with ACS and CREW experts and other legal scholars who are writing on these matters.

Introduction

This paper examines the consequences that confirming Judge Brett Kavanaugh, President Donald Trump's nominee to be Associate Justice of the United States, would have for the ongoing investigation of Russian interference in the last presidential election. Because Judge Kavanaugh is an ardent proponent of the Unitary Executive Theory, the implications of Judge Kavanaugh's confirmation are reasonably clear: the confirmation of Judge Kavanaugh would significantly undermine the ability of Special Counsel Robert Mueller, or any other authority, to conduct a credible, independent investigation of the President or the President's campaign. This paper begins by setting forth the meaning of the Unitary Executive Theory of presidential power as well as Judge Kavanaugh's advocacy of the theory. The paper then examines a number of the specific ramifications of this theory for the Mueller probe.

I. The Unitary Executive Theory

The Unitary Executive Theory of presidential power is a dangerous and persistent misunderstanding of the United States Constitution. It proceeds from an uncontroversial, even trite, observation: the executive branch is headed by a single officer, the President. Alexander Hamilton argued that this characteristic would allow the President to act decisively, energetically, and with secrecy and dispatch.¹ The Unitary Executive Theory takes these unremarkable observations to unjustified extremes. According to the theory, the President must have total control of actions and decisions of any executive branch official; in the main, this control cannot be reviewed by a court of law or regulated by Acts of the Congress. Any law that interferes with the President's ability to control or supervise these subordinates is, according to the Unitary Executive Theory, unconstitutional. Yet many thousands of laws do precisely that. This is why the last Administration to subscribe to the Unitary Executive Theory -- the George W. Bush Administration -- objected to nearly 1,500 newly enacted statutory provisions.² To take just one dramatic example, laws that establish independent agencies, such as the Federal Reserve, are unconstitutional under the Unitary Executive Theory.

¹ See The Federalist No. 70.

² See Neil J. Kinkopf and Peter M. Shane, Signed Under Protest: A Database of Presidential Signing Statements, 2001-2009 (Oct. 8, 2009). Ohio State Public Law Working Paper No. 118. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485715.

Textually, the Unitary Executive Theory proceeds from the Executive Vesting Clause, which provides that “the executive Power shall be vested in a President of the United States.”³ The theory places crucial reliance on the contrast between this unqualified allocation of executive power and the qualified grant of authority to Congress in the Legislative Vesting Clause, which provides that “All legislative Powers herein granted shall be vested in a Congress of the United States”⁴ Thus, the Unitary Executive Theory holds that Congress may only exercise those powers specifically granted to it (regulating interstate commerce, declaring war, spending, taxing, etc.). By contrast, adherents of the Theory believe the Executive Vesting Clause provides the President with “all the executive powers of which the Government is capable.”⁵

The Unitary Executive Theory regards the scope of power vested in the President as vast. It also regards that power as exclusive. Thus, Congress may not enact laws that regulate the way the President exercises the vast expanse of executive power. Moreover, Congress may not interfere with the President’s authority to direct and control other officials within the Executive Branch. The Supreme Court briefly adopted this view of presidential power in *Myers v. United States*.⁶ In that case, the Court invalidated the Tenure in Office Act, which required the President to receive the advice and consent of the Senate before he could remove a range of covered federal officers.⁷ Chief Justice and -- not coincidentally -- former President William Howard Taft held that the President had to be able to exercise complete control over all officials of the executive branch.⁸ To do so, on Taft’s reasoning, the President had to hold unfettered authority to remove any officer at will -- that is, for any reason.⁹ The rationale for this decision was that the President must, as a practical matter, act through subordinates because no one person can fulfill all the functions entrusted to the executive branch.¹⁰ A law that interferes with the President’s authority to direct the conduct of other executive branch officials would interfere with the President’s ability to bring the attributes of energy, decisiveness, and dispatch to his office and therefore

³ U.S. Const. art. II, § 1, cl. 1.

⁴ U.S. Const. art. I, § 1, cl. 1.

⁵ Brief of Respondent, United States, quoted in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952); accord Memorandum for Alberto Gonzales, Counsel to the President, from Jay Bybee, Assistant Attorney General, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* at 37 (August 1, 2002), <https://www.justice.gov/olc/file/886061/download> (Executive Vesting Clause grants the President “any power that is traditionally understood as pertaining to the executive”).

⁶ 272 U.S. 52 (1926).

⁷ *Id.* at 176.

⁸ *Id.* at 134-35.

⁹ *Id.*

¹⁰ *Id.*

would be inconsistent with the Constitution's design.¹¹ Taft embraced the extreme ramifications of his reasoning. He thought it permissible for the President to remove Administrative Law Judges who issued decisions of which the President disapproved.¹²

The Supreme Court's acceptance of the Unitary Executive Theory was fleeting. Its rejection of the theory has been emphatic and longstanding. The very next case in which the Unitary Executive Theory was considered, *Humphrey's Executor v. United States*,¹³ saw the Court unanimously uphold a restriction on the President's authority to remove a Commissioner of the Federal Trade Commission. The Court specifically rejected Taft's theorizing as *dicta* and refused to follow it because it was not persuasive.¹⁴ The Court also decisively rejected the Unitary Executive Theory's reading of the Vesting Clause in the *Steel Seizure* case.¹⁵ As Justice Jackson put it:

The example of such 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. Continental European examples were no more appealing. And if 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 this 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.¹⁶

More recently, the Court rejected the Unitary Executive Theory in *Morrison v. Olson*.¹⁷ That case upheld the validity of the Independent Counsel provisions of the

¹¹ *Id.*

¹² *Id.* at 135 ("there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals ... which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise, he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.")

¹³ 295 U.S. 602 (1935).

¹⁴ *Id.* at 626-627.

¹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In this case, the Court upheld a challenge to President Truman's executive order seizing control of the nation's steel mills in order to keep them operating and head off a threatened labor strike. The action was taken during the Korean War and President Truman found that a lapse in steel production would seriously harm the war effort. The President asserted constitutional authority to take this emergency measure based on the Executive Vesting, Commander in Chief, and Take Care Clauses. The Court held the seizure to be beyond the President's authority.

¹⁶ *Id.* at 641 (Jackson, J., concurring).

¹⁷ 487 U.S. 654 (1987).

Ethics in Government Act.¹⁸ The challengers asserted that investigating and prosecuting criminal offenses against the United States was a purely executive function that could not be insulated from the President's supervision and control, and relied for this proposition on *Myers*.¹⁹ The Supreme Court was nearly unanimous (only Justice Scalia dissented) in rejecting this argument, and the Court rejected the reasoning of *Myers*.²⁰ Instead, the Court held that Congress may limit the President's removal power and render any office independent as long as that independence does not go so far as to "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions."²¹

The Unitary Executive Theory is dangerous. Most immediately, its adoption would eliminate the independence of all executive and administrative officers. These officials would be subject to the President's political supervision and control. This would mean the Board of Governors of the Federal Reserve would lose their tenure protection and independence with the consequence that the President could manipulate the nation's monetary policy for political advantage. Administrative Law Judges could be fired if they did not render decisions that advance the President's political and policy agenda. This would subvert the rule of law in such key areas as immigration, tax collection and enforcement, and social security. Law enforcement officers, such as those at the Federal Bureau of Investigation, could be appointed and fired according to the President's political whims.

The chilling ramifications of the Unitary Executive Theory are not limited to the President's authority to fire executive and administrative officials. The Unitary Executive Theory also frees the President from other legal constraints. The most notorious illustration of this is the Torture Memo. That memo repeated the standard elaboration from the Executive Vesting Clause, without acknowledging the Supreme Court's rejection of it in the *Steel Seizure* case, and concluded that Congress could not interfere with the President's exercise of his vast and exclusive executive powers.²² Thus the law expressly forbidding U.S. personnel from engaging in torture did not, indeed could not, apply to prohibit the President from ordering the torture of enemy combatants.²³ Because the Unitary Executive Theory reads the President's constitutional power as expansive and sees that power as exclusive, rather than concurrent with congressional power, it regards as impermissible encroachment a vast

¹⁸ *Id.* at 695-96.

¹⁹ *Id.* at 688-91.

²⁰ *Id.*

²¹ *Id.* at 695 (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

²² See Memorandum for Alberto Gonzales, Counsel to the President, from Jay Bybee, Assistant Attorney General, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002).

²³ *Id.*

array of laws that would otherwise constrain the President. The consequence is a President who is, in effect, above the law or, as Richard Nixon famously put it, "When the President does it, that means that it is not illegal."²⁴

II. Judge Kavanaugh Adheres to the Unitary Executive Theory.

It has become clear that Judge Kavanaugh is a proponent of the Unitary Executive Theory. His commitment to this view is most evident in his decisions in *PHH v. Consumer Financial Protection Bureau (CFPB)*.²⁵ The CFPB is an independent agency and the President may only remove the head of the CFPB for cause. The CFPB brought an enforcement action against PHH for running what the CFPB alleged was an illegal kickback scheme. PHH responded that the statute granting the CFPB independence was an unconstitutional violation of separation of powers. Judge Kavanaugh wrote an opinion for the D.C. Circuit that was grounded on the Unitary Executive Theory.

Judge Kavanaugh embraced *Myers* as establishing the general rule for questions regarding the President's removal power, even though *Myers* had been thoroughly and consistently repudiated for over 80 years. He then (mis)characterized *Humphrey's Executor* as carving out a narrow exception to *Myers*.²⁶ More egregiously, nowhere in his introductory narrative of the development of the law of the President's removal power does he even acknowledge the leading case, *Morrison v. Olson*, except to quote from the dissenting opinion. Judge Kavanaugh's opinion may seem narrow in that it rests on a novel distinction (that the CFPB is unlike other independent agencies because it is headed by a single individual rather than by a board or commission) and so may be limited to the peculiar facts of the case. The reasoning, however, is not so limited. Judge Kavanaugh embraces the full, extreme scope of *Myers*:

Of course, the President executes the laws with the assistance of subordinate executive officers who are appointed by the President, often with the advice and consent of the Senate. To carry out the executive power and be accountable for the exercise of that power, the President must be able to control subordinate officers in executive agencies. In its landmark decision in *Myers v. United States*, 272 U.S. 52 (1926), authored by Chief Justice and former President Taft, the Supreme Court therefore recognized the President's Article II authority to

²⁴ <https://www.youtube.com/watch?v=MkAzD0RUtao>.

²⁵ 839 F.3d 1 (D.C. Cir. 2016), *rev'd*, 881 F.3d. 75 (D.C. Cir. 2018) (en banc); 881 F.3d 75, 164 (Kavanaugh, J., dissenting).

²⁶ *Id.* at 5-6.

supervise, direct, and remove at will subordinate officers in the Executive Branch.²⁷

This reformulation of the law of the President's removal power shows a strong indication that he wishes to restore the full scope of *Myers* and to overrule the many precedents contrary to the Unitary Executive view of the President's removal power, most notably *Morrison v. Olson*. This inclination was largely implicit in *PHH*, but Judge Kavanaugh, in comments that have just come to light publicly, has made his desire to overrule *Morrison v. Olson* explicit. At a 2016 gathering at the American Enterprise Institute, he declared that he would like to "put the final nail in" the coffin of that ruling.²⁸

Just before the 2008 presidential election, Judge Kavanaugh gave a speech at the University of Minnesota Law School (which he then published as an article) in which he argued, consistently with the Unitary Executive Theory, that the President should be given special treatment under the law and be exempted from the application of various laws.²⁹ In particular, Judge Kavanaugh argued that a sitting President should be immune from civil lawsuits and criminal prosecution while in office.³⁰ The article advocates that this immunity be conferred by statute.³¹ A number of commentators have argued that this article actually indicates that Judge Kavanaugh must think that, absent such a statute, the Constitution allows a sitting President to be sued or prosecuted. Otherwise, why suggest such a statute?³² These commentators are mistaken.

First, Judge Kavanaugh expressly reserves the question: "The result the Supreme Court reached in *Clinton v. Jones* -- that Presidents are not *constitutionally* entitled to a deferral of civil suits -- may well have been entirely correct; that is beyond the scope of

²⁷ *Id.* at 5.

²⁸ See Jane C. Timm, *Trump Supreme Court pick Kavanaugh: I'd 'put the final nail in' independent counsel precedent*, NBC NEWS (July 18, 2018), <https://www.nbcnews.com/politics/donald-trump/trump-supreme-court-pick-kavanaugh-i-d-put-final-nail-n892421>.

²⁹ Hon. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1459-62 (2009).

³⁰ *Id.* at 1460-61.

³¹ *Id.*

³² See Noah Feldman, *Kavanaugh's Papers Don't Help Trump Avoid Indictment*, BLOOMBERG (July 10, 2018), available at <https://www.bloomberg.com/view/articles/2018-07-10/supreme-court-brett-kavanaugh-doesn-t-give-president-trump-cover>; see also Benjamin Wittes, *Brett Kavanaugh and the Mueller Investigation: What Do His Writings Really Say?*, LAWFARE (July 10, 2018), <https://www.lawfareblog.com/brett-kavanaugh-and-mueller-investigation-what-do-his-writings-really-say>.

this inquiry."³³ His reason for making the proposal is that it serves sound public policy, as he sees it.³⁴

Second, Judge Kavanaugh's *Minnesota Law Review* article is concerned with the problem of the judicial process interfering with the President's ability to focus on his job. He quite clearly identifies the source of "the problem" he is addressing: the Independent Counsel statute and "the extent to which [then-existing law] allowed civil suits against presidents to proceed while the President is in office."³⁵ We now have Judge Kavanaugh's comments on the record that he would overrule *Morrison v. Olson*, which would redress the first problem. Does it really seem likely that he would hesitate to redress the second problem with existing law and nail the coffin shut on *Clinton v. Jones*?³⁶

Third, Judge Kavanaugh's article uses the principles of the Unitary Executive Theory to denounce independent agencies.

Why shouldn't someone have the authority to fire [independent agency heads] at will? And if anyone is to possess that power, it must be the President. Why is it that the President should not have the power, in the first place, to direct and supervise that independent agency head in the exercise of his or her authority? ... [T]he people expect that the leader they elect will actually have the authority to execute the laws, as prescribed by the Constitution. Yet that is not the way the system works now for large swaths of American economic and domestic policy, including energy regulation, labor law, telecommunications, securities regulation and other major sectors where the President has little direct role in rulemaking and enforcement actions despite those functions being part of the executive power vested in the President by the Constitution.³⁷

It is true that this discussion comes in the context of advocating statutory reforms to independent agencies, so it might be read as not bearing on the question of the constitutional validity of those agencies. This, however, would misunderstand what Judge Kavanaugh said and wrote. His claim is that the Constitution itself vests in the President the authority to supervise and direct all rulemaking and enforcement functions.³⁸ Furthermore, he claims that the statutes that grant independence to administrative agencies prevent the President from exercising the functions that the

³³ Kavanaugh, *supra* note 28, at 1461.

³⁴ *Id.*

³⁵ *Id.* at 1460.

³⁶ 520 U.S. 681 (1997).

³⁷ Kavanaugh, *supra* note 28, at 1473-74.

³⁸ *Id.*

Executive Vesting Clause commits to the President.³⁹ These claims lead inescapably to the conclusion that independent agencies cannot be squared with the Constitution.

Judge Kavanaugh also concedes that "[i]ndependent agencies are constitutional under *Humphrey's Executor*...."⁴⁰ As a Supreme Court Justice, however, Kavanaugh would not be bound to uphold *Humphrey's Executor*. Even as an appellate judge, formally bound to follow *Humphrey's Executor*, Judge Kavanaugh could barely contain his disdain for the ruling and managed to avoid actually applying it.⁴¹ Coupling this record with his clearly articulated view that independent agencies are inconsistent with constitutional principle, it follows that Judge Kavanaugh would vote to overrule *Humphrey's Executor*.

III. What the Unitary Executive Theory Would Mean for the Mueller Investigation.

The application of the Unitary Executive Theory to the Mueller investigation raises a number of distinct issues, but many of them rest on a common error. It is a basic precept of the Unitary Executive Theory that the Constitution vests in the President the authority to conduct or direct all criminal investigations and prosecutions. As Judge Kavanaugh puts it, "The President is the chief law enforcement officer."⁴² This is wrong as matter of history and original understanding.⁴³

More importantly, it is wrong as a matter of existing statutory law. The United States Code designates the Attorney General as the chief law enforcement officer. Congress has vested the authority to conduct litigation on behalf of the United States (with exceptions not relevant here) in the Department of Justice.⁴⁴ The authority to supervise and direct the conduct of this litigation is specifically vested not in the President but in the Attorney General.⁴⁵ The Attorney General, in turn, has afforded special counsels, such as Robert Mueller and Watergate Special Counsel Leon Jaworski, certain of those statutory authorities, subject to various constraints and removal protections. Moreover, the *Accardi* doctrine requires the Attorney General to follow Department of Justice regulations, such as those pertaining to the independence of a

³⁹ *Id.* at 1473-1475.

⁴⁰ *Id.* at 1472.

⁴¹ See generally *PHH v. Consumer Financial Protection Bureau*, 839 F. 3d 1 (D.C. Cir. 2016) *rev'd*, 881 F.3d. 75 (D.C. Cir. 2018) (en banc).

⁴² See *Attorney Client Privilege: Does It Pertain to the Government?* THE WASHINGTON LAWYER Jan./Feb. 1999, at 34, 39.

⁴³ See Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 14-22 (1994).

⁴⁴ See 28 U.S.C. § 516.

⁴⁵ *Id.* §§ 516, 519.

special counsel, or to take certain procedural steps to undo the relevant regulations.⁴⁶ The President does not have the authority to direct DOJ officials how to enforce and prosecute criminal laws, because Congress has given that authority to the Attorney General. With this point in hand, we can now turn to the specific issues the Unitary Executive Theory -- and the nomination of Judge Kavanaugh -- raises for the Mueller investigation.

1. May a Sitting President Be Indicted?

The Constitution's text does not specifically answer the question whether a President may be indicted or, if so, prosecuted while in office. No judicial precedent addresses the question either. As Walter Dellinger has recently pointed out, the position of the Department of Justice itself is equivocal on this question.⁴⁷ In short, this is an open question of constitutional law. Under the Unitary Executive Theory, it may be more apt to say the question is open and shut.

To adherents of the Unitary Executive Theory, such as Judge Kavanaugh, the President has constitutional authority to direct the conduct of law enforcement officers. President Trump therefore would be constitutionally authorized to order Special Counsel Mueller not to seek any indictment, whether of the President himself or of any of his associates. President Trump could also, on this theory, order any pending indictment to be dismissed. This is the basis of Judge Kavanaugh's recently unearthed objection to *United States v. Nixon*:⁴⁸

The president is the chief law enforcement officer. That is one of the bedrock principles that has gotten lost since *Nixon*. The power of the president in these situations has diminished dramatically. There should be more focus on the merits of *Nixon* than there has been. ... Should *United States v. Nixon* be overruled on the ground that the case was a nonjusticiable intrabranched dispute? Maybe so.⁴⁹

It is axiomatic that, in an intrabranched dispute between law enforcement officers, the "chief law enforcement officer" prevails. For Judge Kavanaugh, the Unitary Executive Theory makes the President the chief law enforcement officer with ultimate authority over all indictments.

⁴⁶ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

⁴⁷ See Walter Dellinger, *Indicting a President Is not Foreclosed: The Complex History*, LAWFARE (June 18, 2018), <https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history>.

⁴⁸ 418 U.S. 683 (1974).

⁴⁹ *Attorney Client Privilege: Does It Pertain to the Government?* THE WASHINGTON LAWYER Jan./Feb. 1999, at 34, 39.

2. Can a President Commit Obstruction of Justice with Impunity?

Under the Unitary Executive Theory, the President may obstruct justice with impunity. The starting point is the President's supposed constitutional role as chief law enforcement officer. The President's authority, under the Unitary Executive Theory, includes the power to direct any federal prosecutor, including Special Counsel Mueller, to drop an investigation or indictment. On this theory, then, the President can order Special Counsel Mueller not to seek an indictment against him for obstruction of justice.⁵⁰

The President's lawyers have made a more strident argument: the President need not order the Special Counsel to refrain from indicting him, because the President cannot commit obstruction of justice. As they put it, "the President's actions here, by virtue of his position as the chief law enforcement officer, could neither constitutionally nor legally constitute obstruction because that would amount to him obstructing himself, and that he could, if he wished, terminate the inquiry, or even exercise his power to pardon if he so desired."⁵¹ Under the Unitary Executive Theory, this claim presents a difficult constitutional question. President Trump's lawyers aside, most adherents of the Unitary Executive Theory concede that the President may commit obstruction of justice by directing the termination of a criminal investigation as a result of a bribe.

But the allegations against Trump are different, and trickier. They are allegations that his use of his acknowledged Article II powers might constitute an obstruction. The allegations all involve acts—firing people, for example, and supervising investigations and staff—that the Constitution specifically gives the president the power to do. So these allegations raise a different question: Is it possible for a president to obstruct justice in the context of performing his constitutionally assigned role, that is, using only otherwise valid exercises of his constitutional powers?⁵²

⁵⁰ See, e.g., Saikrishna Prakash & John Yoo, *Can the President Obstruct Justice?*, THE NATIONAL REVIEW (Dec. 15, 2017), available at <https://www.nationalreview.com/2017/12/mueller-trump-can-president-obstruct-justice>.

⁵¹ Memorandum for Robert S. Mueller, from John M. Dowd, re: Request for Testimony on Alleged Obstruction of Justice (Jan. 29, 2018), available at <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html>.

⁵² Benjamin Wittes, *The Flaw in Trump's Obstruction of Justice Defense*, THE ATLANTIC MONTHLY (June 4, 2018), available at <https://www.theatlantic.com/politics/archive/2018/06/even-the-president-can-obstruct-justice/561935/>.

This is only a difficult and tricky issue if we accept the erroneous premise that the President as chief law enforcement officer holds constitutional authority to direct all law enforcement activities and that this power is not subject to statutory limit. Under this Unitary Executive precept, it is in fact difficult to determine which corrupt motives are like bribery and so outside the President's constitutional role and which corrupt motives are unlike bribery and so immune from criminal investigation and sanction. (Of course, the correct view is that Congress is constitutionally authorized to define by statute what motives are corrupt and therefore impermissible.⁵³)

As a practical matter, it is enough for the Unitary Executive Theory to regard the issue as significant and difficult. Once this much is conceded (and on the Unitary Executive Theory, it must be), the constitutional avoidance canon kicks in.⁵⁴ This canon of statutory interpretation holds that a statute should be interpreted to avoid significant constitutional questions, where an alternative interpretation is available. For adherents of the Unitary Executive Theory, this canon applies with peculiar force in the context of statutes that bear on the President's exercise of official powers.⁵⁵ Thus, Judge Kavanaugh would not have to conclude that the obstruction of justice statute does not apply to the President. It would be enough for him to conclude that the application would raise significant constitutional questions. Given his commitment to the Unitary Executive precept that the President has inherent constitutional authority, as chief law enforcement officer, to direct federal criminal investigations and prosecutions, it would be unreasonable to speculate that Judge Kavanaugh would come to any other conclusion.

3. Can the President Defy a Grand Jury Subpoena for Testimony?

There is no case that directly rules on this precise question. However, the body of existing law in the area overwhelmingly supports requiring a President to comply with a grand jury subpoena to testify in a criminal proceeding. First, the Supreme Court held in the Watergate Tapes case that the President must comply with a subpoena for record evidence (the subpoena did not seek the President's personal testimony) where that evidence is demonstrably relevant to an ongoing criminal

⁵³ See U.S. Const. art. I, § 8, cl. 18 (authorizing Congress "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.")

⁵⁴ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁵⁵ See Memorandum for Alberto Gonzales, Counsel to the President, from Jay Bybee, Assistant Attorney General, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002).

prosecution.⁵⁶ Second, the Supreme Court held that a sitting President may be subject, while in office, to a civil suit against the President personally for conduct undertaken before he became President.⁵⁷ The Court held that requiring the President to submit to the requirements of defending such a suit, including providing deposition testimony, would not unduly interfere with the President's ability to perform his constitutional role. Finally, President Clinton voluntarily gave testimony before a grand jury.⁵⁸ Taken together, these precedents leave little doubt that a President is not immune from complying with a grand jury subpoena to give testimony.

Under the Unitary Executive Theory, however, there is great doubt whether a President must comply with a grand jury subpoena. Again, the President as chief law enforcement officer, holds constitutional authority to direct the conduct of the special counsel. Thus, the President may direct the special counsel to withdraw any such subpoena. It is the interference with this law enforcement hierarchy that causes adherents of the Unitary Executive theory to question *United States v. Nixon*. Judge Kavanaugh has placed himself squarely in this camp.⁵⁹ Were the Supreme Court to overrule *Nixon* and accept the President's unchecked authority over law enforcement, as Judge Kavanaugh has urged, then President Trump could not be required to submit to questioning before a grand jury or even to provide documentary evidence.

4. May President Trump Terminate a Department of Justice Investigation of the President Himself?

Under the Unitary Executive Theory, the President may order the termination of any criminal investigation, including an investigation of the President himself. The Theory holds that the Constitution renders the President the nation's chief law enforcement officer. This role is understood to authorize the President to control all criminal investigations and prosecutions, which includes the power to direct the termination of such proceedings. Judge Kavanaugh has plainly aligned himself with this view of presidential power.⁶⁰

⁵⁶ *United States v. Nixon*, 418 U.S. 683 (1974).

⁵⁷ *Clinton v. Jones*, 520 U.S. 681 (1997).

⁵⁸ President Clinton did not agree to testify, however, until after Independent Counsel Ken Starr issued him a subpoena. Following the issuance of the subpoena President Clinton's legal team and the Independent Counsel negotiated the terms of his voluntary testimony, including that the Independent Counsel would withdraw the subpoena. See John M. Broder and Don Van Natta Jr., *Testing of a President*, NEW YORK TIMES (July 30, 1998), <https://www.nytimes.com/1998/07/30/us/testing-president-overview-clinton-agrees-testify-for-lewinsky-grand-jury-starr.html>.

⁵⁹ See *Attorney Client Privilege: Does It Pertain to the Government?* THE WASHINGTON LAWYER Jan./Feb. 1999, at 34, 39.

⁶⁰ See *id.*

5. May President Trump Fire Special Counsel Robert Mueller?

It is an article of faith within the Unitary Executive Theory that the President must have ultimate authority to fire a Special Counsel or any other federal law enforcement officer. Beginning with first Unitary Executive principles, the Constitution vests all federal executive power in the President. Although Congress creates federal agencies and officers, these agencies and officers exist merely to assist the President in enforcing the law; they do not, under the Unitary Executive Theory, hold any authority to execute the law independent and apart from the President. The President must have complete, unfettered authority to direct and control these subordinates. As such, the President must have complete and unfettered authority to remove subordinate officers.

The Supreme Court, as noted above, has repeatedly rejected this view of presidential power. Most notably, the Court held in *Morrison v. Olson* that Congress could limit the President's authority to remove an Independent Counsel, who was charged with investigating and prosecuting credible criminal allegations against the President, cabinet officers, and Department of Justice officials. Judge Kavanaugh has dispelled any suspense as to where he stands on these questions, declaring that he would overrule *Morrison*.⁶¹

6. May President Trump Pardon Himself?

The Constitution vests the pardon power in the President.⁶² The Constitution's text, however, does not otherwise define the scope of this power. The Department of Justice has expressed the view that the scope of this authority does not include self-pardons.⁶³ The Unitary Executive Theory does not itself compel a position on this question. The Theory as a general matter leads to broad constructions of presidential power. This would incline an interpreter toward accepting that the power allows self-pardons.⁶⁴ It is true that such a reading tends to undermine the force of the constitutional commitment to the rule of law, and particularly to the ideal that the

⁶¹ See Jane C. Timm, *Trump Supreme Court pick Kavanaugh: I'd 'put the final nail in' independent counsel precedent*, NBC NEWS (July 18, 2018), <https://www.nbcnews.com/politics/donald-trump/trump-supreme-court-pick-kavanaugh-i-d-put-final-nail-n892421>.

⁶² See U.S. Const. Art. II, § 2, cl. 1 ("The President ... shall have power to grant reprieves and pardons for offenses against the United States.")

⁶³ See *Presidential or Legislative Pardon of the President*, 1 Op. O.L.C. (Supp.) 370 (1974), <https://www.justice.gov/file/20856/download>.

⁶⁴ See, e.g., Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* 107-108 (2015).

President is not above the law. Those who adhere to the Unitary Executive Theory discount these concerns on the ground that the Constitution provides impeachment as a remedy for presidential abuse of power. Judge Kavanaugh has adopted this view.⁶⁵ There is, in short, reason to anticipate that Judge Kavanaugh would affirm a self-pardon were President Trump to issue himself one.

CONCLUSION

The nomination of Judge Brett Kavanaugh to the Supreme Court raises serious concerns. His adherence to the Unitary Executive Theory of presidential power has the potential to profoundly alter the constitutional landscape. Specifically, it threatens the viability of the ongoing investigation being conducted by Special Counsel Robert Mueller. More generally, it threatens to undermine our bedrock commitment to the rule of law and the ideal that no one, including the President, is above the law.

⁶⁵ See *Separation of Powers During the Forty-fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1462 (2009) (“But the Constitution already provides that check. If the President does something dastardly, the impeachment process is available. No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress.”)