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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

August 10, 2018

Dear Senators Grassley and Feinstein:

As professors of constitutional law with special interest in separation of powers law and executive-legislative relations, we wanted to bring to your attention a particular area of concern we have about the pending nomination of Judge Brett Kavanaugh to the United States Supreme Court. Judge Kavanaugh, as you know, served in the George W. Bush Administration first in the Office of White House Counsel and then as Staff Secretary. The period of his service coincides with an unprecedented proliferation of presidential signing statements to accompany legislation President Bush signed into law, which often articulated utterly unfounded assertions of presidential power as possible limitations on the enforcement of such statutes.

The two of us led a study of Bush signing statements issued between 2001 and 2006, which documented their extraordinary content and volume.<sup>1</sup> In 2009, one of us published a summary of some our findings:<sup>2</sup>

In his first six years in office, President George W. Bush raised nearly 1400 constitutional objections to roughly 1000 statutory provisions, over three times the total of his 42 predecessors combined. . . . [T]he Bush objections were frequently based on no legal authority whatever and had nothing to do with any plausible version of the public interest. . . .

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<sup>1</sup> Neil J. Kinkopf and Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2006* (2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022202).

<sup>2</sup> PETER M. SHANE, *MADISON'S NIGHTMARE: EXECUTIVE POWER AND THE THREAT TO AMERICAN DEMOCRACY* 135-140 (2009).

Many of President Bush's constitutional objections fall within areas about which Presidents are typically protective. Of the nearly 1400 objections lodged in signing statements between 2001 and 2006, 84 mention potential interference with commander-in-chief powers, 144 mention interference with his constitutional authorities regarding diplomacy and foreign affairs, and another 183 point to alleged violations of the President's constitutional authorities to withhold or control access to information to protect foreign relations or national security, sometimes mentioning also his power to protect executive branch deliberative processes or the performance of the executive's constitutional duties.

Even in these traditional contexts, however, the substance of the President's objections is often extreme and hypertechnical. For example, one provision alleged to raise issues regarding executive privilege was a legal requirement in the Intelligence Authorization Act for Fiscal Year 2002 that certain reports to congressional intelligence committees must be in writing and include an executive summary. Similarly, the President found a violation of his foreign affairs powers in provisions of the so-called "Syria Accountability and Lebanese Sovereignty Restoration Act of 2003" that required him to take certain actions against Syria unless "the President either determines and certifies to the Congress that the Government of Syria has taken specific actions, or determines that it is in the national security interest of the United States to waive such requirements and reports the reasons for that determination to the Congress." In other words, Congress violates the Constitution – according to President Bush – when it requires him either to perform an act or not perform it, at his sole discretion. . . .

Going beyond these somewhat astonishing claims in areas of traditional presidential concern, there are hundreds in wholly novel areas. For example, the President objected to 214 legally imposed reporting requirements as interfering with his constitutional authority to recommend measures to Congress. Apparently, President Bush believes that the President's entitlement to speak his mind to Congress entails a prohibition on Congress demanding any other reports or recommendations from the executive branch. This is an historically baseless argument. As our original Secretary of the Treasury, Alexander Hamilton – the most presidentialist of the framers – clearly found himself as responsible for filing reports with Congress as to the President. Any constitutional infirmity in the requirement of executive reports to Congress is entirely a figment of the contemporary presidentialist imagination.

In his first six years in office, President George W. Bush lodged 346 objections based on Congress's alleged interference with the President's control over the "unitary executive." Many of these assertions seem to be merely "piling on" with regard to other, narrower objections. . . . Beyond these merely cumulative "unitary executive" objections, some invocations of the

unitary executive appear to be distinctively rooted in the Bush Administration's imagined authority to direct personally the discretionary activity of every member of the executive branch on any subject, regardless of what the law prescribes.

For example, one statutory provision to which the President objected on "unitary executive grounds" is Section 115 of a 2002 "Act to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination and for Other Purposes." The act creates an Institute of Education Sciences within the Department of Education, to be run by a Director and a board. Section 115 requires the Director to propose Institute priorities for Board approval. The President of the United States, of course, has no inherent constitutional power over education. Yet, executive branch lawyers seem to imagine that it somehow violates the separation of powers either to allow the Director to recommend priorities or for the Board to decide on those priorities, without presidential intervention. In a similar vein is a "unitary executive" objection to a statutory provision requiring the Secretary of Agriculture to consider, in preparing his annual budget, the recommendations of an advisory committee on specialty crops. Although the law does not require the Secretary actually to implement those recommendations, but merely to take them into account, the President implicitly believes that he has inherent authority to forbid subordinates from giving any weight whatever to public policy input from any source other than the White House.

The assertions of presidential entitlement in many of these statements is nothing short of breathtaking. The prospect that a Supreme Court Justice might advance the theory, for example, that Congress has no constitutional authority to require reports from the executive branch of government over presidential objection is positively frightening. You and your colleagues, along with the American people, deserve to know what role Judge Kavanaugh had in constructing these arguments.

As it happens, our follow-up study covering the remaining years of the Bush Administration showed a decided slowdown in the issuance of these statements after 2006.<sup>3</sup> A number of factors might be responsible for the decrease, including the change in party control of Congress. Recognizing, however, that Judge Kavanaugh left the White House for the D.C. Circuit in 2006 raises the disturbing possibility that he may have had critical responsibility for generating such constitutionally audacious claims.

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<sup>3</sup> Neil J. Kinkopf and Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2009* (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1485715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485715).

We strongly urge the Senate Judiciary Committee, under your leadership, to get to the bottom of this matter. Whether Judge Kavanaugh originated these theories and stands by them today are critically important questions. Adoption of the baseless constitutional views of presidential authority that so many of these statements embody would utterly destabilize our system of checks and balances, at great cost to Congress and to the nation. No issue is more important.

Sincerely,



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Georgia State University College of Law<sup>4</sup>



Peter M. Shane  
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<sup>4</sup> Our institutional affiliations are provided solely for purposes of identification. The views we express are entirely our own and are offered in our personal capacity only.