OF SPECIAL COUNSELS AND CONGRESSIONAL INVESTIGATIONS: QUESTIONS FOR JUDGE KAVANAUGH

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As you may have heard, President Trump has nominated Brett Kavanaugh, currently a judge on the U.S. Court of Appeals for the D.C. Circuit, to fill the vacancy on the Supreme Court. There has been a good deal of discussion about how a Justice Kavanaugh might approach issues of executive power, and in particular how he might rule on certain (at this point hypothetical) questions arising from the investigation by special counsel Robert Mueller into Russian interference in the 2016 presidential election.

I would like to propose a different line of questioning for Kavanaugh's confirmation hearing, one that is not designed to score points for the pro-confirmation or anti-confirmation teams, but instead to illuminate the legal/constitutional framework within which allegations of presidential misconduct must be addressed. The jumping-off point for this discussion is Kavanaugh's repeatedly expressed preference for congressional, rather than criminal, investigation of presidential misconduct. As we will see, this preference is not (or at least should not be) controversial, but it is in some tension with Kavanaugh's efforts to hinder congressional oversight during his time as associate White House counsel.

Some background on Kavanaugh's career: after graduating from Yale Law School in 1990, he spent several years clerking, culminating in a clerkship for Justice Anthony Kennedy, whose seat he has been nominated to fill. Kavanaugh went on to work for Kenneth Starr, the independent counsel appointed to investigate the Whitewater and Lewinsky matters. After a brief stint at Kirkland & Ellis, he joined the

new George W. Bush administration, spending the first couple of years in the White House counsel's office and then becoming the president's staff secretary. President Bush appointed Kavanaugh to the D.C. Circuit in 2006.

Along the way, Kavanaugh authored three works relevant to our discussion today (there may be more, but I haven't read them). Two are law review articles that have garnered a lot of attention. The third is Kavanaugh's 2013 opinion in *In re Aiken County*, which I have mentioned previously but which has escaped widespread notice until recently.

To sum up briefly, these are the three most important points I would aim to establish during Kavanaugh's confirmation hearing:

1. According to Kavanaugh, Congress is or should be the sole entity to determine whether the conduct of a sitting president warrants a sanction. The special counsel should not (or perhaps constitutionally may not) indict or prosecute a sitting president. (I think Kavanaugh is right about this, but it is important that Congress and the general public understand this view).

2. Congress must have investigatory powers as strong as (or stronger than) those of the special counsel, at least when it is investigating presidential misconduct. Kavanaugh has recognized that a special counsel has a right of broad access to executive branch information, and he should do the same for Congress. Whether or not Kavanaugh accepts this proposition (or will speak to it at all), it seems to me a logical corollary of the first point. Otherwise we would be in a "catch 22" situation where only Congress can judge the conduct of a president but only the special counsel has access to the information needed to make that judgment.

3. During his time at the White House counsel's office, Kavanaugh was a key architect/defender of legal positions allowing the Bush administration to withhold information from Congress, including with respect to several congressional investigations involving serious and credible allegations of executive branch wrongdoing (the campaign finance, Boston FBI and Clinton pardon investigations). Kavanaugh should be pressed to explain the apparent inconsistency between those positions and points 1 and 2 above by, for example, acknowledging that the Bush administration positions were ill-considered and/or distinguishing them on the grounds that they are inapplicable to an investigation of a sitting president.

Kavanaugh's Writings

The 1998 law review article. The first piece of interest is a 1998 Georgetown Law Journal article entitled "The President and the Independent Counsel." Here Kavanaugh proposes reforms to the existing independent counsel statute (which subsequently expired and was not renewed by Congress). Essentially, Kavanaugh argues that independent counsels (or, as he suggested they would be more properly and accurately named, "special counsels") are clearly necessary under some circumstances, but that they should not be seen as the means of ensuring accountability for the president personally. He contends that making this distinction clear "would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that *the Congress alone* is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction." 86 Geo. L. J. at 2178 (emphasis added).

Kavanaugh stresses that the United States has "a deeply rooted tradition of appointing an outside prosecutor to run particular federal investigations of executive branch officials," a tradition that predates

the Watergate special prosecutor by about a century. 86 Geo. L. J. at 2142-43. He is dismissive of the idea that this tradition could be discontinued:

> [I]t is rather untenable as a matter of common sense to contend that an outside prosecutor is *never* necessary—that an ordinary Justice Department prosecutor should *always* preside over a Justice Department investigation. What if the allegation of wrongdoing is directed against the Attorney General herself? What if the allegation of wrongdoing is against the President's spouse or his best friend or the White House Counsel? Would any rational American in such a case believe that the Attorney General and the Justice Department would pursue the matter as vigorously as an outside prosecutor whose personal and professional interests would not be adversely affected by a thorough and vigorous investigation? Two centuries of experience inform us that the citizens (as represented by Congress and the media) will not accept such a procedure.

86 Geo. L. J. at 2145 (emphasis in original).

Kavanaugh argues, however, that the president himself should not be the subject or target of a special counsel investigation. His reasons are a mixture of constitutional and practical. Indicting or prosecuting a president is constitutionally problematic, in Kavanaugh's view, because of the president's unique role in the constitutional structure and because the constitutional text suggests "that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office." 86 Geo. L. J. at 2157-58. Moreover, "[t]he indictment of a President would be a disabling experience for the government as a whole and for the President's political party—and thus also for the

political, economic, social, diplomatic, and military causes that the President champions." *Id.* at 2157. To avoid these constitutional and practical problems, Kavanaugh proposes that Congress enact a law prohibiting the indictment or prosecution of a sitting president. *Id.*

While not everyone agrees that a sitting president is immune from criminal prosecution, few legal experts would disagree with Kavanaugh's assertion that such a prosecution would raise serious constitutional issues. As Kavanaugh points out, during Watergate both Leon Jaworski, the special prosecutor, and Robert Bork, as solicitor general, reached the conclusion that the president cannot constitutionally be indicted while in office. 86 Geo. L. J. at 2158-59. Moreover, shortly after the publication of Kavanaugh's article, the Office of Legal Counsel in the Clinton Justice Department reaffirmed this Watergate-era position. *See* Off. of Legal Counsel, "A Sitting President's Amenability to Indictment and Criminal Prosecution," 24 OLC Op. 222, 260 (Oct. 16, 2000) ("Our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution."). Although perhaps not generally understood by the public (or media), this executive branch precedent makes it virtually impossible (see here and here) for special counsel Mueller to proceed criminally against Trump.

While Kavanaugh's view was mainstream in 1998 and even more so today, one aspect of his argument appears to be rather naïve. He contends that adopting his reforms, particularly clarifying that the president cannot be the target or subject of a special counsel investigation, would "depoliticize" such investigations and reduce/eliminate what he views as damaging political controversy surrounding them. In this regard, Kavanaugh is clearly thinking about attacks on special counsels by presidents and their allies, to which his article refers repeatedly. *See* 86 Geo. L. J. at 2148 ("charges of pollical partisanship are almost sure to occur during independent counsel

investigations"); *id.* at 2148-49 ("Sustained presidential . . . criticism of an independent counsel eventually will have an impact on a large percentage of the citizens . . . includ[ing] both potential witnesses and potential jurors."); *id.* at 2150 ("Attacks on the prosecutor's reputation ultimately are designed to scare potential witnesses and to infect the jury pool with negative feelings towards the prosecution."); *id.* at 2151 ("Currently, a President can complain that an independent counsel is politically motivated while implying that he is powerless to do anything about it. This essentially gives the President and his surrogates freedom to publicly destroy the credibility of the independent counsel, and to cleverly avoid questions about why the President does not remove him.").

In retrospect, Kavanaugh's view that these political attacks would cease if the president's immunity from criminal prosecution were clarified looks like wishful thinking. What if the president's conduct is directly implicated in criminal charges brought against others (as when President Nixon was named as an unindicted co-conspirator)? What if, as Kavanaugh himself suggested, the special counsel investigates the president's political allies, close friends, or even family members? What if the president just has an unusually combative personality?

While Kavanaugh does not directly address Congress's authority to compel the production of executive branch information, his article is consistent with a broad right of congressional access to executive branch information relevant to the fitness for office of the president or other impeachable officials. Thus, Kavanaugh argues that "any information gathered [by a special counsel] with respect to executive branch officials that could reflect negatively on their fitness for office should be disclosed to Congress" since Congress "is constitutionally assigned the duty to determine [such] fitness." 86 Geo. L. J. at 2156.

A final takeaway from Kavanaugh's 1998 article relates to the assertion of executive privilege. Much has been made of the fact that Kavanaugh once mused at a panel discussion that *Nixon v. United States*, 418 U.S. 683 (1974), may have been wrongly decided. It seems clear, however, that Kavanaugh was referring only to the justiciability of the controversy in *Nixon*. To wit, because Nixon could have ordered the special prosecutor not to subpoena the tapes and could have fired him if he refused, the court proceeding could have been viewed as a request for an advisory opinion rather than a truly adversarial proceeding. Kavanaugh's article, however, proceeds on the assumption that such a dispute is justiciable because the *Nixon* Court "so held" and "there is no reason to revisit that decision, particularly because the President retains authority to prevent such disputes from reaching the courts." 86 Geo. L. J. at 2162 n. 89.

On the merits, moreover, Kavanaugh clearly agrees with the *Nixon* holding, on which he elaborates at some length (even reviewing the internal case correspondence of the *Nixon* Court). *See* 86 Geo. L. J. at 2166-73. If anything, Kavanaugh could be criticized for interpreting *Nixon* too strongly against the president's ability to assert executive privilege in a criminal case. According to Kavanaugh's reading, the only time the president can prevail is if national security is at issue. Anticipating the criticism that this interpretation makes the privilege recognized in *Nixon* largely meaningless, Kavanaugh responds that the privilege "may well be absolute in civil, congressional, and FOIA proceedings." 86 Geo. L. J. at 2171. Only in criminal cases is it easily overcome. *Id.*

In short (and at the risk of over-simplification), Kavanaugh's 1998 article is generally "pro-special counsel," with the important caveat that questions about sanctioning a sitting president should be reserved for Congress alone. *See* 86 Geo. L. J. at 2138 (proposed reforms "would ensure that the ultimate judgment on the President's conduct . . . is

made where all great national political judgments ultimately must be made—in the Congress of the United States").

The 2009 law review article. Like the 1998 article, Kavanaugh's 2009 article in the Minnesota Law Review focuses on policy prescriptions, rather than analysis of existing law. Its subject matter is much wider, however, covering recommendations for the confirmation process, structuring of executive and independent agencies, war powers, and a possible constitutional amendment to limit presidents to a single, six-year term. Whatever one thinks of these proposals, it is hard to disagree (then or now) with his observation that "the federal government is not working effectively in meeting the nation's challenges" and that many of the problems can be traced to "the interaction of the legislative and executive branches in performing their respective and sometimes overlapping functions under the Constitution." 93 Minn. L. Rev. at 1454-55.

Only Kavanaugh's first proposal in the 2009 article, which returns to the subject of investigating presidential misconduct, is directly relevant to our discussion here. As Benjamin Wittes correctly observes, nothing in the 2009 article suggests Kavanaugh had changed the "pro-special counsel" views he articulated in 1998. However, perhaps understandably given Kavanaugh's recent experience in the Bush administration, the focus of the 2009 proposal is on ensuring that the president is not distracted by criminal or civil litigation and thereby inhibited from performing the duties of his office. *See* 93 Minn. L. Rev. at 1459-62.

Specifically, Kavanaugh reiterates his 1998 proposal that a sitting president be temporarily exempted from indictment and prosecution, and he expands this proposal in two ways. First, he proposes that Congress also "enact a statute providing that any personal civil suits against presidents . . . be deferred while the President is in office." 93

Minn. L. Rev. at 1460-61. Kavanaugh explicitly connects this to his experience with the 1990s investigation of President Clinton, noting that in retrospect "the nation certainly would have been better off if President Clinton could have focused on Osama bin Laden without being distracted by the Paula Jones sexual harassment case and its criminal-investigation offshoots." *Id.* at 1460. He makes clear that his policy proposal is not dependent on any determination the president is constitutionally exempt from civil suits; he allows that the Supreme Court's decision to the contrary in *Clinton v. Jones* "may well have been entirely correct." *Id.* at 1461.

Second, Kavanaugh expands his prior proposal to exempt the president even from being questioned in criminal cases. *See* 93 Minn. L. Rev. at 1461 ("Congress might consider a law exempting a President—while in office— from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel."). To be sure, his 1998 proposal would have exempted the president from criminal investigation, but Kavanaugh at that time did not propose (at least explicitly) that the president be exempt from questioning even as a witness. Now, however, he explains "this temporary deferral also should excuse the President from depositions or questioning in civil litigation or criminal investigations." *Id.* at 1462 n. 35.

As in 1998, Kavanaugh anticipates the objection that his proposals would render the president above the law or leave the country without "a check against a bad-behaving or law-breaking President." 93 Minn. L. Rev. at 1462. Again his response centers on impeachment. As he explains, "[i]f the President does something dastardly, the impeachment process is available." *Id.* Because "the Constitution [already] establishes a clear mechanism to deter executive malfeasance . . . we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions." *Id. See also id.* ("No single

prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress.").

2013 D.C. Circuit Opinion. In a somewhat different vein is Judge Kavanaugh's 2013 opinion in *In Re Aiken County* or, more precisely, section 3 of that opinion. Although neither the case nor the opinion have anything to do with executive misconduct, section 3 deals at some length with the president's control over the mechanisms of criminal investigation and prosecution.

In this part of the opinion Judge Kavanaugh observes that "the President possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of federal law." Slip op. at 13. This discretion is rooted in Article II, including, importantly, in the Pardon Clause. Thus, Kavanaugh maintains that "[t]he President may decline to prosecute certain violators of federal law just as the President may pardon certain violators of federal law." *Id.* Nor, in his view, is the president limited to nonenforcement of laws he believes to be unconstitutional; he can refuse to enforce criminal laws he simply objects to on policy grounds. Thus, "the President's prosecutorial discretion and pardon powers act as independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed." *Id.* at 15.

Kavanaugh acknowledges that a president's exercise of prosecutorial discretion or the pardon power "can be very controversial." Slip op. at 17. He gives the example of a president who "disagreed on constitutional or policy grounds with certain federal marijuana or gun possession laws." *Id.* The president's exercise of prosecutorial discretion or the pardon power to halt enforcement of those laws might provoke widespread criticism, but the only "remedy for Presidential abuses of the power to pardon or to decline to prosecute comes in the form of public disapproval, congressional

'retaliation' on other matters, or ultimately impeachment in cases of extreme abuse." *Id.* at 18-19.

These views seem largely consistent with Kavanaugh's academic writings on special counsel investigations. They suggest that the president has the power to direct the special counsel not to prosecute any person(s) or offense(s). And they confirm that the ultimate remedy for abuse of this power is impeachment.

On the other hand, one might ask why the president needs a temporary criminal immunity, either constitutional or statutory, if he can always simply pardon himself or order the special counsel not to investigate/prosecute him. Put another way, Kavanaugh's argument for temporary immunity looks stronger if the president does *not* have the power to self-pardon (or the corresponding power to direct the special counsel not to investigate and/or prosecute him).

Finally, it is worth recalling that in a June 23, 2017 letter to the special counsel, Marc Kasowitz, then the president's personal lawyer, cited Kavanaugh's *Aiken County* opinion for the proposition "the President has exclusive authority to direct that a matter be investigated, or that an investigation be closed without prosecution, or that the subject of an investigation or conviction be pardoned." From this predicate Kasowitz argued it could not amount to obstruction of justice for the president to exercise his constitutional authority to terminate an investigation, nor therefore to take the lesser step of allegedly suggesting to then-FBI director James Comey that he "let go" the investigation of former national security advisor Michael Flynn. Whether this particular chain of reasoning makes sense (or would be accepted by Kavanaugh), it is consistent with the general proposition that whether Trump wrongfully interfered with the Russia investigation is a matter for Congress, rather than the special counsel, to address. This, in turn, suggests that Congress must have access to evidence

gathered by the special counsel relevant to this issue (including, for example, the special counsel's interviews with White House counsel Don McGahn regarding Comey's firing).

Kavanaugh as Associate White House Counsel

During his time in the White House counsel's office (2001-03), Kavanaugh had the opportunity to deal with Congress on a number of matters involving congressional requests for information and executive privilege. Below I will discuss several of these controversies that arose during this period. I have some personal knowledge of these matters from my service in the House General Counsel's office, but I was of course not privy to the internal executive branch deliberations on them. Based on my recollection and understanding, however, I think it is fair to describe Kavanaugh as "one of the leading architects" of the Bush administration's positions on executive privilege and withholding information from Congress (which the author of the linked article calls, not inaccurately, a "don't tell" policy).

The Campaign Finance and Boston FBI Investigations. The first controversy was one left over from the prior administration. Bob Woodward reported in the Washington Post that "[a] Justice Department investigation into improper political fundraising activities has uncovered evidence that representatives of the People's Republic of China sought to direct contributions from foreign sources to the Democratic National Committee before the 1996 presidential campaign." This allegation of foreign meddling in a U.S. election, which in many ways parallels current controversies, touched off both criminal and congressional investigations, including a 9-month Senate investigation chaired by Senator Fred Thompson. The Thompson investigation reported on a wide-ranging series of abuses and irregularities by the DNC and Clinton campaign, including donations and fundraising by "individuals with business or political ties to the PRC,

who have escorted PRC officials and businessmen to meetings with President Clinton and Vice President Gore, and who otherwise have facilitated efforts to shape United States policy towards China."

In the meantime, the Justice Department's investigation resulted in separate memos written by Louis Freeh, the FBI director, and Charles LaBella, the head of the campaign finance task force, to Attorney General Janet Reno recommending the appointment of an independent counsel. Reno, however, refused to appoint an independent counsel and also refused to provide Congress with the Freeh and LaBella memos. To put this in today's terms, it would be as if James Comey, while FBI director, and another senior DOJ official separately recommended that Attorney General Sessions appoint a special counsel to investigate the 2016 election and Sessions not only rejected these recommendations but invoked executive privilege to prevent Congress from seeing the basis for the advice.

Interestingly, Kavanaugh invoked the campaign finance scandal in his 1998 article as an example of the flaws in the triggering mechanism of the independent counsel statute. He argued that the debate over the legal technicalities of whether the statute's requirements were met had "obscured the broader question of whether United States officials, or members of American political parties, knowingly solicited or accepted contributions which were provided by citizens of foreign countries." 86 Geo. L. J. at 2152. Moreover, "Justice Department prosecutors reportedly used the independent counsel statute as a shield to protect the President and Vice President from the kind of investigation that any ordinary citizen might receive . . . [thereby using] the statute not as a *sword against* executive officials, but as a *shield to protect* them." *Id.* at 2153 (emphasis in original).

Kavanaugh used this example in support of his argument that there should not be an automatic triggering mechanism for the

appointment of a special counsel, but rather the decision should be made on a case-by-case basis considering the totality of the circumstances and particularly whether Congress and the public could be expected to have confidence in the outcome of an investigation in the absence of a special counsel. 86 Geo. L. J. at 2153. In light of these views, one might expect Kavanaugh to support congressional access to documents like the Freeh and LaBella memos so as to fully understand the basis for the failure to appoint a campaign finance independent counsel and to adopt any reforms needed to ensure that such problems would not reoccur in the future.

Alas, this was not to be. At the outset of the Bush administration, the House Committee on Government Reform, chaired by Representative Dan Burton, renewed its previously unsuccessful efforts to obtain deliberative memoranda in the campaign finance investigation. (By this time, the Freeh and LaBella memos themselves had been released, I believe, but the committee was still trying to obtain similar and related documents, including a subsequent memorandum by LaBella's successor, Robert Conrad, again recommending the appointment of a special). The new administration's legal team, led by Kavanaugh, balked, arguing that these types of "prosecutorial deliberative documents" were protected by executive privilege and should not be disclosed to Congress under any but the most compelling circumstances (if at all).

It should be noted here that these documents did not involve any claim of national security and thus would not have fallen within the narrow ambit of constitutional privilege cognizable in criminal cases under Kavanaugh's interpretation of *Nixon*. Moreover, because the memoranda did not involve *presidential* decision-making at all (as the president was not involved and legally could not be involved with the decision to appoint an independent counsel), the memoranda were not even within the broader scope of the *Nixon* privilege that Kavanaugh

had stated might "well be absolute" in congressional and other non-criminal proceedings. Nonetheless, the Bush administration adhered to its predecessor's decision not to provide the campaign finance documents to Congress.

The campaign finance issue was joined with a second controversy that involved similar legal issues, but in a very different factual and political context. In early 2001, the House Government Reform committee opened an investigation of corruption in the FBI's Boston office with regard to the use of confidential informants. This investigation would eventually find that beginning in the mid-1960s the FBI used a number of organized crime figures, including most notoriously James "Whitey" Bulger, as informants, that it looked the other way while these informants committed numerous serious crimes (including at least 19 murders according to the committee report), and that it tolerated or even encouraged perjured testimony from these informants in order to protect the guilty from justice and with the result that innocent men were convicted and sentenced to death. *See* H. Comm. Gov't Reform, *Everything Secret Degenerates: The FBI's Use of Murderers as Informants*, H.R. Rep. No. 108-414 (2003).

In the course of its investigation, the committee sought access to prosecution and declination memoranda related to the confidential informants and cases in which they were potential witnesses and/or defendants. These documents, which generally involved cases that had been closed for decades, were central to the committee's effort to determine why and how federal law enforcement decided to proceed or not proceed in cases in which these informants were involved, and whether it deliberately caused or permitted gross miscarriages of justice in order to protect these informants.

Nonetheless, Kavanaugh and other Bush administration lawyers objected to providing these documents to the committee. They argued

that these types of prosecutorial deliberative memoranda, like the Freeh/LaBella/Conrad memoranda, were considered "the crown jewels of executive privilege" and providing them to Congress would risk legislative interference with criminal investigations. (We hear echoes of this argument when the current deputy attorney general responds to the demands of Republican members of Congress for various documents related to actions taken by the Justice Department in response to allegations of wrongdoing by individuals associated with the Trump campaign during the 2016 election).

On September 6, 2001, the Government Reform committee, having lost patience after months of fruitless negotiations with the Bush administration, subpoenaed both the campaign finance documents and the deliberative materials related to the Boston FBI matter. That same day I accompanied committee counsel to the White House for a meeting with Kavanaugh and a number of other White House and Justice Department lawyers to discuss the subpoena.

This meeting did not make any progress on the dispute between the committee and the administration. Kavanaugh, who led the meeting for the administration, reiterated that providing these types of prosecutorial deliberative documents would cause harm to core executive branch functions and that the administration's position was based on a firm historically rooted principle. The congressional lawyers pointed out that Congress had in fact obtained such information on numerous occasions in the past; the response was that those had been mistakes which the new administration did not intend to repeat. There was some discussion whether the administration was adopting an inflexible or blanket policy of refusing to provide these types of materials to Congress; the executive branch lawyers in essence explained (in a kidding, not kidding fashion) that the policy was to make a case-by-case determination in which every case would be resolved against Congress.

At the conclusion of the meeting, there was a lot of frustration on the part of the committee. A hearing was scheduled for September 13, 2001, at which the committee invited the attorney general to appear and explain the administration's position. The terrorist attacks of September 11 intervened and delayed proceedings for several months, however.

When matter resumed, President Bush formally invoked executive privilege with regard to the documents subpoenaed by the committee. This was the first invocation of executive privilege in his presidency (and one of only a handful of occasions on which he would do so). Acting on the advice of his lawyers, Bush directed the attorney general:

> It is my decision that you should not release these documents or otherwise make them available to the Committee. Disclosure to Congress of confidential advice to the Attorney General regarding the appointment of a Special Counsel and confidential recommendations to Department of Justice officials regarding whether to bring criminal charges would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions. Moreover, I am concerned that congressional access to prosecutorial decisionmaking documents of this kind threatens to politicize the criminal justice process.

Memorandum on the Congressional Subpoena for Executive Branch Documents (Dec. 12, 2001).

It should be noted that Bush's statement covers both the campaign finance and Boston FBI documents, but highlights only the former. This was probably a wise political move as there was little congressional enthusiasm, apart from the tenacious Chairman Burton,

for pursuing the campaign finance memoranda. Most congressional Republicans saw little advantage in vigorously pursuing an investigation into the former administration, while congressional Democrats had long opposed the investigation in general and Burton's handling of it in particular. (You will be shocked to hear they even described it as a "witch hunt.")

The Boston FBI investigation, on the other hand, was strongly supported by both Republicans and Democrats on the committee, a point that was well-illustrated by a hearing convened the day after President Bush invoked executive privilege. *See Investigation into Allegations of Justice Department Misconduct in New England: Hearings before the H. Comm. on Gov't Reform* (Dec. 13, 2001). The administration sent Michael Horowitz, at the time the chief of staff of the DOJ criminal division, as its primary witness/punching bag, and the hearing began with every member present explaining to Horowitz why the administration was wrong. As Burton summed it up, "[w]e have liberals, moderates and conservatives on both sides of the aisle here, and everyone is in agreement [that] '[y]ou guys are making a big mistake' . . . ."

The committee's position was simple. There was not historically and should not be going forward a DOJ policy that absolutely shielded prosecutorial, deliberative documents from congressional oversight, particularly with regard to closed criminal cases. Such documents might be entitled to a presumption of confidentiality, but this presumption must yield to a demonstrable congressional need for the documents, which clearly existed in the case of the Boston FBI documents.

Up until the December 13 hearing, "it was clear that the Administration sought to establish a restrictive policy regarding prosecutorial documents and that no demonstration of need by the Committee would be sufficient for the Justice Department to produce

the documents." H.R. Rep. No. 108-414, vol. 1, at 130. Beginning with the hearing, though, this position was walked back, as Horowitz "claimed that the Department was using a case-by-case analysis which weighed the Congressional need for the documents against the Administration's need to keep the documents secret." *Id.* at 131. This claim was belied, however, "by the fact that the Justice Department had never had a discussion with the Committee about the Committee's need for the documents." *Id.*

After two more months of wrangling, and Burton's threat to hold administration officials in contempt, the Justice Department finally relented and provided the committee access to the documents. The committee found that the withheld documents contained "vital information" for its investigation. H.R. Rep. No. 108-414, vol. 1, at 134-35. Its judgment on the Bush administration's reluctance to provide information to Congress was harsh: "the President's claim of executive privilege was a drastic departure from the longstanding history of Congressional access to precisely the types of documents sought by the Committee." *Id.* at 132. The claim of executive privilege and the Justice Department's delaying tactics "impeded" the investigation and "distracted the Committee from pursuing a number of issues related to the use of confidential informants." *Id.* at 134-35.

Presidential Records Act. On November 1, 2001, President Bush issued Executive Order 13233, which purported to implement the Presidential Records Act of 1978, 44 U.S.C. §§ 2201 et seq., a law passed in the aftermath of Watergate to establish public ownership of and access to presidential records. The Bush E.O. limited access to presidential records to a greater degree than the E.O. it replaced, which had been issued by President Reagan in 1989.

Defending (and very likely designing/drafting) the Bush E.O. was Kavanaugh's responsibility. *See, e.g.,* Bruce P. Montgomery, *Presidential*

Materials: Politics and the Presidential Records Act, 66 Am. Archivist 102, 130 (2003) (noting that White House counsel Alberto Gonzales designated Kavanaugh to meet with scholars and researchers who opposed the Bush E.O.). Like the Bush administration's response to the Boston FBI investigation, the presidential records E.O. provoked strong bipartisan opposition in Congress. *See Hearings Regarding Executive Order 13233 and the Presidential Records Act before the Subcomm. On Gov't Efficiency, Financial Mgt. & Intergovernmental Relations, H. Comm. on Gov't Reform* (Nov. 6, 2001; Apr. 11 & 24, 2002).

Congressional critics argued that the new E.O. conflicted with the Presidential Records Act in numerous respects, including by restricting the access of congressional committees to presidential records. Section 6 of the E.O., for example, set up successive review periods for the former and current president (each of which could be extended indefinitely at their request) to determine whether any privilege claims should be asserted in response to a congressional request and prohibited the archivist of the United States from allowing congressional access "unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and unappealable court order." This burdensome procedure, critics maintained, was far too weighted against congressional access and contravened the letter and intent of the governing statute.

Another objectionable provision of the E.O. related to its broad definition, in section 2(a), of the president's "constitutionally based privileges." In the view of the E.O.'s congressional opponents, section 2(a) improperly to subsume non-constitutional, common law privileges within the president's constitutional privilege. Such an expansion of executive privilege would not only adversely affect the ability of Congress and the public to get access to presidential records of former

administrations, but congressional oversight of the current administration as well.

A particular area of disagreement related to the E.O.'s assertion that the president's constitutional privilege included "legal advice or legal work (the attorney-client or work product privileges)." Not only was this assertion unsupported in Supreme Court precedent on executive privilege, but it was undermined by the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. den.*, 117 S.Ct. 2482 (1997), in which the court rejected the argument that the White House could assert a governmental attorney-client or work product privilege in response to a grand jury subpoena, noting that the confidentiality of government legal advice is outweighed by "the general duty of public service [which] calls upon government employees and agencies to favor disclosure over concealment."

Kavanaugh was involved in briefing the Eighth Circuit case on behalf of independent counsel Starr, and he cited the decision in his 1998 article in support of the proposition that the governmental attorney-client and work product privileges are non-constitutional, common law privileges which are unavailable in federal criminal proceedings. 86 Geo. L. J. at 2163-65. It is unclear how this proposition can be squared with the language of the Bush E.O. (Of course, it is possible that Kavanaugh disagreed with the E.O. and was simply obligated to defend it in his role as associate White House counsel). More importantly, it is problematic to rely on Congress, as Kavanaugh does, to be the primary or sole check on presidential misconduct if Congress lacks the ability to obtain the same information as a special counsel.

During the Bush administration, there were several bipartisan but unsuccessful legislative efforts to overturn the presidential records

E.O., as well as a lawsuit which was partially successful in having one of the E.O.'s provisions declared invalid. On the first day of his administration, President Obama rescinded E.O. 13233 and replaced it with a new executive order that closely resembled the original Reagan order.

The Pardon Investigation. We have previously discussed the House Committee on Government Reform's investigation of the Marc Rich pardon and a number of other controversial pardons granted in the final hours of the Clinton administration. Although this investigation was directed solely at conduct in the prior administration, the committee's investigation faced a number of obstacles from the Bush administration. Indeed, the committee's report unfavorably contrasts the recalcitrance of the incumbent administration with the relative cooperation it received from former President Clinton, who agreed to waive all claims of executive privilege with regard to the pardon investigation. *See* H.R. Rep. No. 107-454, vol. 1, at 38, 41 (2002). It is worth noting that these are the views of the committee majority regarding an administration of their own party at a time when President Bush enjoyed overwhelming public support. As in the case of the controversies discussed above, there is thus no reason to take this criticism by congressional Republicans of the Bush administration's withholding information from Congress at anything other than face value.

The pardon report explains that the committee issued document requests to the National Archives and Records Administration (NARA). NARA gathered the responsive documents, which were reviewed and cleared for release by representatives of former President Clinton. H.R. Rep. No. 107-454, vol. 1, at 38.

NARA, however, was unable to produce the records to the committee "because of objections from the Bush White House

Counsel's Office." The committee staff then "spent the next month engaged in fruitless negotiations with the Bush White House . . . [during which the White House staff] explained that they had concerns about producing the requested records, because the records went to the heart of the clemency review process, which was a core Presidential power." H.R. Rep. No. 107-454, vol. 1, at 38-39. Although the report does not identify the White House staff in question, there is no doubt that Kavanaugh was first and foremost among them.

Ultimately, the committee was able to obtain many of the records it was seeking, in large part because NARA inadvertently produced many of the responsive documents the Bush administration was trying to withhold. *See* H.R. Rep. No. 107-454, vol. 1, at 39. The committee declined to return these documents because (1) they were responsive to the committee's document requests and many "were critical to the Committee's investigation;" (2) many did not, in the committee's view, "raise legitimate executive privilege concerns;" and (3) neither the former nor incumbent president had in fact asserted executive privilege with regard to the documents in question. *Id.* at 39-40. The committee nonetheless noted "[i]t is disappointing that the Bush Administration would attempt to withhold key documents from the Committee in an investigation like this, where the Committee is looking into allegations of malfeasance at the highest levels of government." *Id.* at 41. It also observed that the administration's "recalcitrance" had prevented it from obtaining certain Justice Department documents relevant to the investigation. *Id.* at 41-42.

There is on its face an apparent contradiction between Kavanaugh's theory that Congress alone is responsible for checking presidential malfeasance, and Kavanaugh's practice of withholding information from Congress regarding precisely such malfeasance. One could possibly reconcile this contradiction on the grounds that former President Clinton was no longer in office at the time of the pardon

investigation and therefore no longer subject to impeachment (at least as a practical matter) nor entitled to benefit from any temporary immunity from criminal process. If this is the explanation, though, now would be a good time to get it on the record.

Questions for Kavanaugh

This lengthy background would provide fodder for several different lines of questioning at Kavanaugh's confirmation hearing. Some senators will undoubtedly probe Kavanaugh's views to determine how he might rule on various issues that could arise out of the Mueller investigation. For example, Kavanaugh is obviously skeptical about the constitutionality (as well as the wisdom) of indicting a sitting president so I imagine this topic will be explored. Because Kavanaugh will decline to make commitments on specific issues that may come before the Court, this is unlikely to produce much in the way of new information, though it may be useful to senators looking to justify their confirmation votes. Other senators may use the opportunity to embarrass President Trump by, for example, asking Kavanaugh about his disapproving comments with regard to presidential attacks on special counsels.

I suggest some senators may want to try a more constructive approach. After all, we are facing a unique challenge in terms of presidential (mis)behavior, and we have a Supreme Court nominee who has undoubtedly thought and written far more about that subject than most. So below are some suggested questions to take advantage of this confluence.

1. Judge Kavanaugh, on June 4, 2018, President Trump tweeted:

> As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the

never ending Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the midterms!

Do you agree with the president that he has the absolute right to pardon himself?

2. **Would you agree that the question of whether the president can pardon himself is unsettled?**

3. In both your 1998 and 2009 law review articles, you called on Congress to enact a law giving a president temporary immunity from indictment or criminal prosecution.

If a president can pardon himself, why would he need this immunity?

4. In an opinion you wrote in 2013 (In re Aiken County), you said:

> The remedy for Presidential abuses of the power to pardon or to decline to prosecute comes in the form of public disapproval, congressional "retaliation" on other matters, or ultimately impeachment in cases of extreme abuse.

What in your judgment would be an example of "extreme abuse" of the pardon power?

5. **Whether or not the president has the constitutional power to pardon himself, do you think a president who attempts to pardon himself would be committing "extreme abuse"?**

6. **When you served in the White House counsel's office, were you familiar with congressional investigations into whether**

President Clinton properly used the pardon power when he pardoned certain people at the end of his presidency?

Note: Kavanaugh refers to this issue and the congressional investigations at 93 Minn. L. Rev. at 1457.

7. **Based on what you know about those pardons, do you believe any of them constituted "extreme abuse" of the pardon power?**

8. **Did you believe that Congress had a right to investigate these pardons to ascertain why they were granted?**

9. **What was your role in responding to congressional requests for information about those pardons?**

10. In its report on the pardon investigation, the House Committee on Government Reform described "fruitless negotiations" with Bush White House staff over document production and said that White House staff "had concerns about producing the requested records, because the records went to the heart of the clemency review process, which was part of a core Presidential power.

See H.R. Rep. 107-454, vol. 1, at 38-39.

Were you part of these negotiations or discussions?

11. **Did you participate in any decision to deny or limit the committee's access to executive branch information related to President Clinton's pardons?**

12. **Is it fair to say that the committee's Republican majority was frustrated with the Bush administration's failure to cooperate with its investigation?**

13. Let me quote again from the committee's report:

> It is disappointing that the Bush Administration would attempt to withhold key documents from the Committee in an investigation like this, where the Committee is looking into allegations of malfeasance at the highest levels of government. That the Bush Administration attempted to withhold these records even though former President Clinton approved their release is especially discouraging.
>
> H.R. Rep. 107-454, vol. 1, at 41.

Is it true that the Bush administration withheld or attempted to withhold from Congress documents relevant to the pardon investigation even though President Clinton had approved their release?

14. **In retrospect, do you think the Bush administration failed to cooperate adequately with the House committee's pardon investigation?**

15. Now let me turn your attention to an article by Andy Wright which recently appeared in Slate (8-9-18). Wright is a law professor who served in the Obama White House counsel's office, worked as a Democratic staffer on the Hill, and was a lawyer for Vice President Gore during the Clinton administration.

Here is how Professor Wright begins his article:

> A foreign adversary trying to curry favor with a major American political party. Surreptitious and illegal efforts to influence the election in that party's favor. A national officeholder and White House staff targeted. A resulting political furor, followed by criminal and congressional investigations.

Professor Wright is referring here to "apparent Chinese efforts to influence the 1996 re-election campaign of President Clinton against his challenger, Republican Senate Majority Leader Bob Dole."

Professor Wright goes on:

> Most disturbing were allegations that Chinese intelligence was orchestrating these efforts to cultivate political contacts within the Democratic Party. The Justice Department uncovered evidence that the Chinese Embassy had been used for planning illegal political contributions to the DNC. The Thompson [then-Senator Fred Thompson] investigation alleged that [one donor] was a Chinese intelligence agent. Johnny Chung, a Democratic fundraiser, told federal investigators that China's military intelligence chief, Maj. Gen. Ji Shengde, had funneled $300,000 through Chung to support Bill Clinton's re-election campaign.

Judge Kavanaugh, would you agree that Congress has the constitutional authority and responsibility to investigate such allegations of foreign meddling in U.S. elections?

16. In your 1998 law review article, you wrote about the question of whether a special counsel should be appointed to investigate the 1996 campaign fundraising scandal. You wrote "there seems

an obvious need for an outside prosecutor in order to assure the public of a thorough and credible investigation."

86 Geo. L. J. at 2152.

Does that continue to be your view today, that there should have been an outside prosecutor to investigate allegations of improper fundraising and foreign influence in the 1996 presidential election?

17. **And similarly, do you believe it was appropriate to appoint a special counsel to investigate alleged improper foreign influence in the 2016 presidential election?**

18. Now, returning to your 1998 law review article, you expressed concern that the independent counsel statue either did not work properly or was not used properly with regard to the campaign fundraising matter. Specifically, you wrote:

> [A]t least at the outset of the investigation, Justice Department prosecutors reportedly used the independent counsel statute as a shield to protect the President and Vice President from the kind of investigation that any ordinary citizen might receive. Over the reported objection of FBI investigators, Justice Department officials prohibited certain investigative techniques because the threshold for triggering the independent counsel statute was not met. Thus, the Attorney General (or, at least, her delegates) has used the statute not as a *sword against* executive branch officials, but as a *shield to protect* them.
>
> 86 Geo. L. J. at 2153 (emphasis in original)

Judge Kavanaugh, do you agree it was appropriate for Congress to conduct oversight to determine whether there were flaws in the independent counsel statute as drafted or whether the Attorney General and Justice Department failed to properly comply with the statute?

19. **Are you aware that during the Clinton administration congressional committees attempted unsuccessfully to get access to documents that would shed light on these issues, including a memorandum written by then-FBI director Louis Freeh recommending the appointment of an independent counsel?**

20. **At the beginning of the Bush administration, the House Government Reform committee chaired by Republican Dan Burton was still trying to obtain these types of memos, do you recall that?**

21. **In fact, on September 6, 2001, the committee issued a subpoena to the Bush Justice Department seeking those documents, correct?**

22. **You were intimately involved in developing the administration's legal response to that subpoena, were you not?**

23. On December 12, 2001, President Bush formally invoked executive privilege with regard to that subpoena. He stated in part:

> Disclosure to Congress of confidential advice to the Attorney General regarding the appointment of a Special Counsel and confidential recommendations to Department of Justice officials regarding whether to bring criminal charges would

inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions. Moreover, I am concerned that congressional access to prosecutorial decisionmaking documents of this kind threatens to politicize the criminal justice process.

Did you advise President Bush to make this assertion of executive privilege?

24. **Sitting here today, do you believe it was appropriate for President Bush to invoke executive privilege with regard to the campaign fundraising documents?**

25. Let's put this in terms of today's issues. Suppose that former FBI director Comey wrote some memos during his tenure regarding the investigation of Russian interference in the 2016 election, perhaps involving appointment of a special counsel or some other prosecutorial decision.

Would the precedent you set during the Bush administration prevent Congress from getting access to these documents?

Why or why not?

26. Let me direct your attention to another congressional investigation conducted by the House Government Reform committee in 2001-02. **Do you recall the Boston FBI investigation? Can you tell us what that investigation involved?**

27. To sum up very briefly, the Boston FBI investigation involved credible allegations that the FBI starting in the 1960s used organized crime figures, such as James "Whitey" Bulger, as

informants, that it looked the other way while these informants committed multiple murders, and that it tolerated or even encouraged perjured testimony from these informants in order to protect the guilty from justice and with the result that innocent men were sentenced to death.

Is that a fair characterization?

28. This again was a case where the committee issued a subpoena to the Justice Department seeking documents it considered vital to its investigation, specifically prosecution memoranda related to these informants and cases in which they were potential witnesses and/or defendants. **And again you advised the Bush administration not to cooperate with the committee's investigation but to assert executive privilege over such "prosecutorial deliberative documents," correct?**

29. In its report on the Boston FBI matter, the committee said that the documents the Bush administration tried to withhold contained "vital information" for its investigation and that "the President's claim of executive privilege was a drastic departure from the longstanding history of Congressional access to precisely the types of documents sought by the Committee."

It also stated that "it was clear that the Administration sought to establish a restrictive new policy regarding prosecutorial documents and that no showing of need by the Committee would be sufficient for the Justice Department to produce the documents."

Do you think there is any merit to these criticisms by the committee, which were endorsed by every member on both sides of the aisle?

30. **Would you agree that the Boston FBI investigation involved serious and credible allegations of wrongdoing by the federal government?**

31. **Would you also agree that the campaign finance and pardon investigations involved serious and credible allegations of wrongdoing at the highest levels of government?**

32. **Returning to your 1998 law review article, you argued that as a policy matter a sitting president should not be subject to criminal indictment or prosecution, correct?**

> *See* 86 Geo. L. J. at 2157 ("Congress should clarify that a sitting President is not subject to criminal indictment while in office.")

33. **And you have also suggested that there is a serious constitutional question whether the president could be indicted or prosecuted while in office?**

> 86 Geo. L. J. at 2158-61
>
> 93 Minn. L. Rev. at 1461 n.31

34. **And in fact in 2000 the Office of Legal Counsel in the Clinton Justice Department ruled that the Constitution does not permit a sitting president to be indicted or prosecuted, correct?**

> 24 OLC 222, 260 ("Our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution.")

35. **Wouldn't you agree that this OLC opinion as a practical matter makes it impossible for a special counsel today to indict or prosecute a sitting president?**

36. At the conclusion of your 1998 article, you wrote:

> Clarifying the role of the President in the manner proposed in this article would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that the Congress alone is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction.

Do you stand by that statement today?

37. **When you referred to "depoliticizing" special counsel investigations, you meant at least in part trying to minimize political attacks on the integrity and legitimacy of special counsels, did you not?**

38. For example, you wrote the following:

> Although many prosecutors receive complaints that they are politically motivated, those complaints take on a different order of magnitude when they emanate from the Oval Office. Sustained presidential (and presidentially directed) of an independent counsel eventually will have an impact on a large percentage of the citizens and on their opinion of the independent counsel. Those citizens include both potential *witnesses* and potential *jurors*. The decision by witnesses whether to volunteer the full truth (or not) often may depend on their impressions of the credibility and integrity

of the special counsel. As to juries, a truly energetic political campaign to destroy the credibility of an independent counsel is an effort to obtain a hung jury, and there is a real danger that it will work in all but the most clear-cut cases of guilt.

Is it fair to say that political attacks by the president or his allies on a special counsel investigation are dangerous to our system of justice?

39. **So, just hypothetically, if a president publicly referred to a special counsel investigation as a "witch hunt" more than 84 times, that would be a bad thing?**

Note: according to this article in the Atlantic on 8-3-18, Trump had referred to Mueller investigation as a "witch hunt" 84 times thus far in 2018 alone.

40. **Would you say that would constitute a "truly energetic political campaign to destroy the credibility of an independent [or special] counsel"?**

41. **And is that something that could cause witnesses not to cooperate with a special counsel or could poison a potential jury pool?**

42. Let's say (again, hypothetically) that Congress had reason to believe that a president was engaged in such a campaign for the purpose of persuading witnesses not to cooperate or to affect potential jurors. **Is that something Congress could investigate as part of its role in "overseeing the conduct of the president"?**

43. Now in both your 1998 and 2009 articles, you make clear that the proper check against " a bad-behaving or law-breaking President" is Congress, not the criminal justice system.

93 Minn. L. Rev. at 1462

86 Geo. L. J. at 2157-61

I assume that is still your view?

44. **So let me read you some of the things you have written about impeachment—stop me if there is anything you would like to change or add to these statements.**

In 1998, referring specifically to the proposal that the president not be subject to indictment or prosecution, you say this change "would ensure that the ultimate judgement on the President's conduct (inevitably wrapped up in its political effects) is made where all great national judgments ultimately must be made—in the Congress of the United States." (2137)

Then referring to all your proposals, you say they "would ensure that a specific entity (Congress) is directly and solely responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether that conduct warrants a public sanction." (2138)

In the same article you say: "The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office." (2158)

Then again: "Thus, the Framers explained the wisdom, and perhaps also the constitutional necessity, of the idea that *public* judgment with respect to the President be rendered not by a prosecutor or jury, but by the Congress." (2160-61)

Finally, in 2009 you wrote: "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 Congress." (1462)

45. **To fulfill the role you have laid out, Congress needs to have broad investigatory powers with respect to presidential misconduct, wouldn't you agree?**

46. As you note in your 1998 article, in Federalist 65 Hamilton refers to impeachment as a "national inquest."

86 Geo. L. J. at 2160.

To be an inquest requires inquisitorial powers, wouldn't you agree?

47. **If Congress is to oversee the conduct of the president, does it not need to have power to compel the production of information at least as great as that of the special counsel?**

48. For example, there has been much discussion whether the special counsel has the authority to compel the president to provide testimony before the grand jury, and you wrote in 2009 that the president should be given immunity from having to provide testimony in criminal proceedings. **But doesn't that make it all the more essential that Congress be able to compel the**

president to provide answers when there are serious and credible allegations of presidential misconduct?

49. Let's talk about claims of privilege. In your 1998 article, you say that the only executive privilege the president can assert in grand jury proceedings is based on national security.

86 Geo. L. J. at 2173

Shouldn't this also be the case with regard to congressional investigations of presidential misconduct?

[Followup if Kavanaugh doesn't accept this logic] **Doesn't that create a Catch 22 where only Congress can investigate presidential misconduct but only the special counsel can get the information needed for a proper investigation?**

50. **When you were in the White House counsel's office, did you take a position on whether the president or the executive branch can assert governmental attorney-client or work product privilege in congressional investigations?**

51. **These privileges are not constitutionally based, correct?**

86 Geo. L. J. at 2163-66

[Possible follow-up] **What is the basis for asserting a non-constitutional privilege in a congressional investigation?**

52. Let's take a specific example. I understand you have no personal knowledge of these facts so I just ask you to accept them as a given. On August 18, the New York Times reported that White House counsel Don McGahn "has cooperated extensively in the

special counsel investigation, sharing detailed accounts about the episodes at the heart of the inquiry into whether President Trump obstructed justice . . . ."

The article goes on to say that "[i]n at least three voluntary interviews with investigators that totaled 30 hours over the past nine months, Mr. McGahn described the president's fury toward the Russia investigation and the ways in which he urged Mr. McGahn to respond to it." Among things McGahn discussed were "Mr. Trump's comments and actions during the firing of the F.B.I. director, James B. Comey, and Mr. Trump's obsession with putting a loyalist in charge of the inquiry, including his repeated urging of Attorney General Jeff Sessions to claim oversight of it." McGahn also discussed "Mr. Trump's attempts to fire the special counsel."

Now, here is my question, Judge Kavanaugh. **As I read your 1998 article, McGahn would have had no viable privilege to withhold this information from the special counsel even if the president had directed him to do so, isn't that right?**

He could not have asserted attorney-client or work product privilege, correct?

86 Geo. L. J. at 2173 ("In criminal proceedings, a governmental attorney-client or work product privilege has no roots whatsoever.")

Nor could he have asserted executive privilege under the Supreme Court's holding in *U.S. v. Nixon*, unless a specific claim of national security was made, correct?

86 Geo. L. J. at 2168 ("Nixon, in short, held that the showing required under Rule 1.7 (relevance and

admissibility for a trial subpoena; relevance for a grand jury subpoena) itself demonstrates the specific need for evidence that overrides the President's general need for confidentiality.")

86 Geo. L. J. at 2173 ("*Nixon*, moreover, held that even the deeply rooted and constitutionally mandated executive privilege for presidential communications did not override the need for relevant evidence in criminal proceedings except when a specific claim of national security was at issue.")

53. Now according to this same article, although the president's personal lawyers never asserted executive privilege, "they told people that they believed that they still had the ability to stop Mr. Mueller from handing over to Congress the accounts of witnesses like Mr. McGahn and others."

Do you agree that the president could properly assert executive privilege to prevent Congress from getting these witness interviews?

Note: Kavanaugh will probably refuse to answer this, but his 1998 article strongly suggests the answer should be negative, at least if the special counsel believes the materials would bear upon Trump's fitness for office.

See 86 Geo. L. J. at 2156 ("there is a strong sense that evidence of the conduct of executive branch officers should not be concealed, at least not from Congress, which is constitutionally assigned the duty to determine their fitness for office.")

What is a plausible argument that could be made to withhold these materials from Congress?

Let's say that in the course of interviews of Mr. McGahn or others, the special counsel gathers information that reflects negatively on the president's fitness for office. **Does it make sense that this information can be withheld from the entity that is constitutionally assigned the duty to determine that fitness for office?**

54. **Do you believe that the three matters we discussed from your time in the White House counsel's office (the pardon investigation, the campaign finance investigation and the Boston FBI investigation) established precedents that would apply in the case of a congressional investigation of presidential misconduct today?**

Why or why not?

55. **Does it matter that none of those investigations involve alleged misconduct by the sitting president? Does that effect the privilege analysis?**

56. **Do you believe that to employ the full range of its inquisitorial powers with regard to presidential misconduct, the House of Representatives needs to take some formal step, such as authorizing an impeachment inquiry?**