Nomination of Judge Brett Kavanaugh, of Maryland, to be an Associate Justice of the United States Supreme Court Questions for the Record

Questions for Professor Peter Shane, Professor Law Moritz College of Law, Ohio State University

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QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. If a sitting president is immune from criminal investigation, what potential issues would this raise with respect to the preservation of evidence, either documentary or testimonial?

The delay in any investigation of a potential criminal offense inevitably jeopardizes the recovery of evidence. It prolongs the opportunity for potential defendants to destroy inculpatory documents or electronic records. Delay makes it more likely that, even without corrupt intent, relevant material will be lost, memories will fade, and witnesses will become unavailable. In his opinion letter for Independent Counsel Kenneth Starr advising that incumbent presidents may be indicted, the late Professor Ronald Rotunda wrote: "As veteran prosecutors know, if a trial is delayed, then the memories of witnesses will fade, documents may be destroyed. It is an axiom that delaying a criminal trial - especially delaying for years - may result in, or be tantamount to creating, a de facto immunity." Letter from Professor Ronald D. Rotunda to the Honorable Kenneth W. Starr re: Indictability of the President (May 13, 1998), at 35, http://digitalcommons.unl.edu/usjusticematls/32/. These problems exist alongside the possibility, also noted by Professor Rotunda, that statutes of limitations, if not tolled, could prevent prosecution.

It is worth noting, however, that even the arguments raised for immunity from indictment do not support immunity from investigation. Indeed, in its opinion disputing the indictability of an incumbent President, the Justice Department's Office of Legal Counsel conceded the permissibility of a criminal investigation while the President is in office: "A grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary." A Sitting President's Amenability to Indictment & Criminal Prosecution, 2000 WL 33711291, at *29 n. 36 (O.L.C. Oct. 16, 2000).

Thus, any immunity an incumbent President might have from investigation would be a *practical* immunity, but not a *legal* immunity. As a practical matter, a President could immunize himself from investigation if he were treated as having the constitutional power to control the discretion of federal prosecutors. This is one of the reasons why the "unitary executive" interpretation of Article II to which Judge Kavanaugh adheres is so dangerous. If upheld, it would allow an incumbent President to control the actions of any federal prosecutor, including a special counsel. (The president's lawyers have also implicitly relied on this theory of presidential discretion to argue that a president's official act in firing the FBI Director can never be the basis of an obstruction of justice charge—an unsound proposition, but one that no court has yet confronted.)

For this reason, I would like to reiterate the point made in my full testimony that Justice Scalia's solo dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), while rhetorically powerful, is historically wrong. The founding generation did not understand Article II as giving the chief executive the power to control every exercise of discretionary legal authority vested in subordinate executive branch functionaries. This is especially true for criminal prosecutors. As

then-Judge Ginsburg noted in her dissent from the Court of Appeals decision that *Morrison* reversed:

> Prosecution was decentralized during the federalist period, see L. White, The Federalists: A Study in Administrative History 408 (1948), and it was conducted by district attorneys who were private practitioners employed by the United States on a fee-for-services basis. Id. at 406–08. I cannot conclude that the framers, or the Congress that enacted the Judiciary Act of 1789, would have considered prosecution a function that must remain, sans exception, with the President and his men.

In re Sealed Case, 838 F.2d 476, 526–27 (D.C. Cir.), (Ginsburg, J., dissenting), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

I sought to amplify this point in my prepared testimony as follows:

> The influential writings of John Locke a century earlier had made no distinction between executive and judicial power. In England, criminal prosecution was still largely a private function. A number of the early states authorized the legislative appointment of their Attorneys General or the judicial appointment of prosecutors. Connecticut is especially instructive. Its 1818 Constitution not only vested the executive power in the governor, but—like the federal Constitution—required the governor to take care that the laws be faithfully executed and gave the governor the equivalent of Opinions Clause authority. Yet Connecticut courts appointed prosecutors at least until 1854. Other early state constitutions explicitly gave their legislatures significant power over the selection of officers to perform what would usually be considered executive duties, again suggesting that the vesting of executive power did not entail that the executive branch be, in every respect, unitary. In its *Siebold* decision, the Court pointed to U.S. Marshals as officials who could be sensibly viewed as officers of either the executive or the judiciary; the same ambiguity surrounds prosecutors.

I hope this helps you and the Committee in your review of Judge Kavanaugh's nomination. Thank you for the opportunity to share my views on these questions.