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UNRESOLVED RECUSAL ISSUES REQUIRE A PAUSE IN THE KAVANAUGH HEARINGS

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Eisen and Tribe act as co-counsel in pending litigation concerning the president's acceptance of allegedly unconstitutional emoluments, and CREW is a party in active litigation involving President Trump and the administration. The authors have no other relevant interests to disclose.

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I. Introduction

This paper explains why the Constitution as originally designed by the framers requires the Supreme Court nomination of Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit to be put on hold. It takes no view on his ultimate confirmation. But as one of us has elsewhere explained,[1] and all of us agree, it offends the structure the framers created for a president who is facing mounting personal liability under our Constitution and laws to choose one of the judges in his own case.

Or more likely, multiple cases. Never before in the history of presidential nominations of Supreme Court justices have there been so many matters of the deepest personal impact to the president that may come before the Supreme Court.

In addition to legal and procedural questions surrounding possible impeachment proceedings, there are a staggering array of issues with which the nominee may well be presented owing to the historically unprecedented fact that his patron the president was a named subject and, but for hesitation to indict a sitting president, could well have been a target,[2] in a criminal investigation at the very time that he handpicked the judge—reportedly after White House consideration of the judge's views on some of these very issues. As detailed below, those issues include:

- Whether a president can use the pardon power to shield himself from criminal liability;
- Whether a president can be charged with obstructing justice;
- Whether a president can defy a subpoena for testimony;
- Whether a president can be criminally indicted;
- Whether a president can unilaterally fire a special counsel without cause; and
- Related civil matters involving a president's personal interests.

The need for a pause is particularly strong here, where the judge, as we also explain below, holds views that, while formally denying that presidents are above the law, amount to affirming that proposition as a practical matter—and where the deliberate confirmation process needed at a minimum to examine those views has been rushed and, in our view, broken. All of the authors of this paper have either been before the Senate for confirmation, worked on Supreme Court or other confirmations, or both. We have never seen anything like this hurried and defective process for such an important nomination.

In this paper, we advance an additional constitutional ground that strongly counsels that there be a hiatus. Although the Constitution provides no process for making a binding and enforceable determination that a particular Supreme Court Justice take no part in the consideration and decision of a specific case or set of cases, it does not follow that the Constitution, read with fidelity to its structure and its purposes and in light of the precedents construing its implications, has nothing to say on the matter to a justice who was worthy of

[1] Laurence H. Tribe, The Founding Fathers Wouldn't Want Kavanaugh's Confirmation to Continue, *Washington Post,* Aug. 24, 2018, *available at* https://www.washingtonpost.com/opinions/the-founding-fathers-wouldnt-want-kavanaughs-confirmation-to-continue/2018/08/24/5184ece6-a70b-11e8-8fac-12e98c13528d_story.html.

[2] Barry H. Berke, Noah Bookbinder, and Norman Eisen, Presidential Obstruction of Justice: The Case of Donald J. Trump, 2nd Ed., *Brookings*, Aug. 22, 2018, *available at* https://www.brookings.edu/research/presidential-obstruction-of-justice-the-case-of-donald-j-trump-2nd-edition/.

confirmation in the first instance. On the contrary, we believe the Constitution instructs that a judge nominated to the Court in the situation that currently confronts Judge Kavanaugh recuse himself from the full swath of cases presenting the issues of personal presidential liability this paper identifies -- and that precedent demands he do so now, as other nominees have done under far less compelling circumstances. The confirmation hearings should therefore be halted so these issues can be explored and proper recusals agreed to after due deliberation, including full production of the judge's documents so his views can be thoroughly probed.

Our position is based upon first principles of our system of justice under the law, reinforced by a trio of Supreme Court precedents in the past decade establishing the parameters of constitutionally mandatory recusal—parameters that are triggered by the unique circumstances of Judge Kavanaugh's situation. Those cases are *Caperton v. A.T. Massey Coal Co.*, *Williams v. Pennsylvania*, and *Williams-Yulee v. Florida Bar*, which we describe in detail below. They have reflected two key constitutional principles that should dictate the outcome of recusal questions: judges must step aside when there is either a "serious risk of actual bias" or where there is an independent and compelling government-wide interest in protecting against the appearance of bias regardless of whether that appearance compromises the particular rights of any litigant. That includes the paramount interest at stake in this case of protecting the public faith in the judicial system as a cornerstone of the legal process as a whole and as a guardian of the rule of law.

While these precedents and the principles they embody have not yet been applied to require a Supreme Court justice to recuse, they plot a trajectory that points unmistakably in that direction. As we explain below, both principles clearly compel recusal here. Bias and the appearance of bias are powerfully implicated by the unique confluence of factors in this case.

If, moreover, we are to believe press reports[3] that Judge Kavanaugh will refuse to commit now to recuse, he will be repudiating the guidance of the Constitution before he ever sits on the Court, inasmuch as recusal is mandatory if our understanding of the Constitution is correct. The seriousness of the matter is highlighted by the fact that other nominees have, as we explain below, committed to the Senate to recuse on substantially lesser grounds. This is after all no routine nomination but a lifetime appointment as one of nine individuals who determine the course of our justice system and the shape of the laws under which all of us will live, and as one who may, among other things, determine the fate of the president who nominated him and potentially of the presidency itself.

If the foregoing press reports are accurate, they further warrant our view that the Kavanaugh nomination should be delayed until the relevant legal issues overhanging the sitting president are resolved—and that the hearings set to begin on September 4, 2018, should not be taking place at this time. That pause must include further production of documents relating to the nominee's White House service, a process that to date contrasts starkly with the timely and transparent production of documents regarding Justice Elena Kagan's prior White House service when the Senate was considering her nomination to the Court.[4] To date, only a small

[3] *See* Alexander Mallin and Katherine Faulders, Kavanaugh Won't Commit to Recusal from Trump, Mueller Related Matters, *ABC News*, Aug. 31, 2018, *available at* https://abcnews.go.com/Politics/kavanaugh-commit-recusal-trump-mueller-related-matters/story?id=57534501.

[4] *See* Senator Patrick Leahy, Letter to Senator Jeff Sessions, Jun. 23, 2010, *available at* https://www.leahy.senate.gov/press/leahy-responds-to-republican-requests-for-more-kagan-documents-from-archives (noting that vast majority of requested paper records had been produced to the Committee

fraction of the requested Kavanaugh materials have so far been made available on the hasty schedule gratuitously set by the Senate majority. Unlike with Kagan's nomination, where no White House documents were withheld on privilege grounds,[5] 101,921 of the Kavanaugh documents were abruptly withheld, without adequate explanation of the privilege assertions made in conclusory form, late on the last business eve before the hearings were to begin.[6] The Senate must have adequate time to review those documents as well as the documents that have already been produced, including 42,000 pages produced on the eve of the first day of the hearing.[7]

II. The Law of Recusal and Its Application to Judge Kavanaugh

Judicial recusal is the removal of a judge from a case due to a potential conflict of interest or a perceived or actual inability to act impartially. There are a number of reasons a judge may be recused—either under the judge's own initiative or involuntarily through disqualification—including a financial interest in the outcome of a case, a personal involvement in the case (or the involvement of a close family member of the judge), or other reasons that would create a reasonable perception that the judge could not or in any event would not act fairly and impartially in a particular case.

Recusal rules are generally codified in the code of judicial conduct, statutes, and case law.[8] These rules recognize that judges are only human and that under some circumstances a judge cannot be perceived as impartial. Even if the judge were able to put aside his or her own interests and rule fairly, the public would reasonably doubt his or her ability to do so.

Unlike other judges (at both the federal and state level), the U.S. Supreme Court is not bound by the Code of Conduct for United States Judges. While Supreme Court justices are arguably bound by the federal statute addressing the procedures for determining recusal, in practice justices have been allowed to determine, at their own discretion, whether to step aside from a case.[9] Their decision is not typically subject to review of any sort.

However, Supreme Court justices (like presidents and all other Americans) are most emphatically not above the law. That of course includes the Constitution, and a series of recent precedents by the Court establish principles which in our view may be applied to require the

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two weeks before the start of confirmation hearings and the email records were produced one week prior); SCOTUSblog Briefing Paper, Elena Kagan – Privilege and Release of Kagan Documents, *SCOTUSBlog*, June 30, 2010, *available at*: http://www.scotusblog.com/wp-content/uploads/2010/06/Kagan-issues_privilege-June-301.pdf.

[5] *See* Senator Leahy, Jun. 23, 2010 (noting that the Obama Administration had not invoked executive privilege and the Clinton Library had withheld fewer than 2,000 documents on "personal privacy" grounds).

[6] Ariane de Vogue, Trump Admin Withholds 100,000-Plus of Kavanaugh Documents, *CNN*, Sept. 1, 2018, *available at* https://www.cnn.com/2018/09/01/politics/trump-kavanaugh-bush-supreme-court-documents/index.html.

[7] Fred Barbash and Seung Min Kim, Hours before Kavanaugh nomination hearings, Bush lawyer releases 42,000 pages of documents to Judiciary Committee, *Washington Post*, Sept. 3, 2018, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2018/09/03/hours-before-kavanaugh-nomination-hearings-bush-lawyer-releases-42000-pages-of-documents-to-judiciary-committee/;

[8] *See* Charles Gardner Geyh, Judicial Disqualification: An Analysis of Federal Law (Federal Judicial Center 2010), *available at* https://www.fjc.gov/sites/default/files/2012/JudicialDQ.pdf.

[9] *See* Chief Justice John Roberts, Jr., 2011 Year-end Report on the Federal Judiciary, at 4-8, *available at* https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

recusal of one of its members. To say that recusal is legally required is not to say that anyone will compel a justice to follow that requirement. But it is of the essence of the unique role the Supreme Court occupies that its justices not exploit their technical freedom to defy the law by taking the position that, because nobody can "make them" act lawfully, they need not do so.

In the first of these precedents, the landmark case of *Caperton v. A.T. Massey Coal Co.*, the Supreme Court articulated a constitutional principle that a judge must step aside from a case when there exists "a serious risk of actual bias."[10] In *Caperton*, a candidate for the West Virginia Supreme Court received the vast majority of his campaign support from Don Blankenship, a coal baron who had recently lost tens of millions of dollars in a trial that was expected to reach the state supreme court on appeal.[11] Like most states, West Virginia selects members of its highest court via election. The candidate, Brent Benjamin, was elected in a relatively close race. He refused to recuse himself from Blankenship's case and voted to overturn the verdict against Blankenship's coal company.[12] The U.S. Supreme Court reversed, finding that the circumstances of Blankenship's involvement in electing Justice Benjamin created a serious risk of actual bias.[13] To be sure, the Court invoked the Fourteenth Amendment's Due Process Clause to hold that the company's right not to be deprived of liberty or property without "due process of law" had been violated by Judge Blankenship's non-recusal. But the core of the Court's opinion focused on systemic rule-of-law values that transcended the coal company's corporate interests in avoiding the verdict that ensued from the refusal to recuse. The procedural posture of the case, involving as it did a money judgment against the complaining party, created Article III standing to invoke the Supreme Court's jurisdiction but did not provide the exclusive basis for the precedent that the Court's decision established.

In *Williams v. Pennsylvania*, the Court reaffirmed the principle that a serious risk of actual bias requires recusal under the Constitution.[14] In that case, the chief justice of the Pennsylvania Supreme Court refused to recuse himself from the appeal of a death sentence of Terrance Williams, despite the fact that the chief justice had served as the district attorney leading the office that had prosecuted Williams.[15] The Court concluded that the justice's prior personal involvement in the case created an objective, serious risk that he would be unable impartially to assess the fairness of the conviction.[16] Notably, the tainted justice in *Williams* did not cast the deciding vote—indeed, the verdict had been unanimous. But the U.S. Supreme Court found that the participation of even one biased judge on a multi-member body violated due process.[17]

In addition to the constitutional due process protection against a serious risk of actual bias at issue in those cases, the Supreme Court has left no doubt that there is a separate and independent compelling interest in protecting against the perception of bias—an interest strong enough to overcome what would otherwise be a First Amendment violation. In *Williams-Yulee v. Florida Bar*, the Court upheld a Florida rule that prohibits judicial candidates from directly soliciting campaign contributions (although the rule permits solicitation via the candidate's campaign committee).[18] The Court reasoned that direct solicitation of campaign funds by judicial candidates could undermine public confidence in the fair and impartial administration of

[10] 556 U.S. 868, 884 (2009).
[11] *See id.* at 872-73.
[12] *Id.* at 874-75.
[13] *Id.* at 884.
[14] 136 S.Ct. 1899 (2016).
[15] *Id.* at 1903.
[16] *Id.* at 1909.
[17] *Id.*
[18] 135 S.Ct. 1656 (2015).

justice.[19] It bears emphasis that the Court in *Williams-Yulee* was not simply acting to protect a private litigant from unfair, or apparently unfair, deprivation of life or liberty. Instead, it was acting to protect the legal system itself from the corrosive effects of decision by a judge with an apparent interest in a matter. The fact that the decision arose in a context not involving recusal as such is immaterial to the decision's relevance in demonstrating the systemic constitutional values driving this line of cases.[20]

The Court's reasoning in these cases draws on thousands of years of legal tradition. Since at least ancient Roman times, judges have been required to step aside from certain cases where they reasonably appear to be biased.[21] As articulated in the Federalist Papers, the judiciary possesses the power neither of the purse (reserved for the legislature) nor of the sword (wielded by the executive).[22] Instead, judicial legitimacy rests on the public's confidence in a fair and impartial judicial system. To pursue a course that will predictably erode that confidence is to undermine the very foundation of an independent judiciary.

As former Chief Justice Rehnquist once said, our country's impartial judiciary is "one of the crown jewels of our system of government."[23] Justice Kennedy has echoed this sentiment: "One of the very objects of law is the impartiality of its judges in fact and appearance."[24] While public opinion polls suggest that Americans have lost a measure of trust in our courts, in comparison to other branches of government, federal courts still measure up favorably.[25] But it would be folly to take that trust for granted.

In *Caperton*, the majority opinion by Justice Kennedy articulated a powerful constitutional guarantee. In Anglo-American jurisprudence, it has been widely accepted that "no person can be a judge in his own case."[26] (*Nemo iudex in causa sur*) *Caperton* extends the principle by an

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[19] *Id.* at 1667.

[20] *See id*. We discuss in Section II.C the extension of the *Caperton* and *Williams* decisions, founded on the due process rights of the appellants in those cases, to the instant circumstances. As we explain, while governmental litigants like the United States or the special counsel do not enjoy due process rights, at least of which we are aware, the particular issues requiring recusal implicate a number of individuals who do. Moreover, the rationale of the two earlier precedents is in our view logically extended to governmental entities via the compelling interests articulated in *Williams-Yulee* as well as by 28 U.S.C. § 455.

[21] Matthew Menendez and Dorothy Samuels, Judicial Recusal Reform: Toward Independent Consideration of Disqualification, *Brennan Center for Justice*, 2016, at 3, *available at* https://www.brennancenter.org/publication/judicial-recusal-reform-toward-independent-consideration-disqualification.

[22] The Federalist No. 78 (Alexander Hamilton), *available at* http://avalon.law.yale.edu/18th_century/fed78.asp.

[23] Linda Greenhouse, Rehnquist Joins Fray on Rulings, Defending Judicial Independence, *New York Times*, Apr. 10, 1996, *available at* https://www.nytimes.com/1996/04/10/us/rehnquist-joins-fray-on-rulings-defending-judicial-independence.html.

[24] *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring).

[25] Jeffrey M. Jones, Trust in Judicial Branch Up, Executive Branch Down, *Gallup*, Sept. 20, 2017, *available at* https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx (68% of survey respondents reported a "great deal" or a "fair amount" of trust in the federal judiciary in 2017; this is down from a high of 80% in 1999 but substantially higher than the 2017 levels for the executive (45%) and legislative (35%) branches.).

[26] *See* Evan Bernick, Is Judicial Deference to Agency Factfinding Unlawful?, *Georgetown Journal of Law and Public Policy*, at 54, *available at* https://www.law.georgetown.edu/public-policy-journal/wp-content/uploads/sites/23/2018/05/16-1-Is-Judicial-Deference-to-Agency-Fact-Finding-Unlawful.pdf.

additional step befitting the American Republic, explaining that due process requires that no person can choose the judge in his or her own case.

Justice Kennedy's majority opinion explained that there "is a serious risk of actual bias … when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[27] The majority concluded that in such a circumstance, the justice could owe a "debt of gratitude" to the benefactor, and therefore recusal was required.[28]

It goes without saying that one who owes his or her seat as a Supreme Court Justice to a particular president owes just such a debt to that benefactor. This is not, of course, to say that no justice should participate in any matter involving the interests or the person of the president who nominated that justice. But when the justice was nominated with an apparent eye on how he would resolve a matter that appears to be bound up with the president's personal fate and that is already looming on the legal horizon at the time of the nomination,[29] and when the nominee's speeches and writings distinguish him as particularly solicitous of presidential prerogative on the very issues likely to come before him in the foreseeable future, the scales surely tip in favor of recusal. Those are, of course, the exceedingly rare circumstances in which we now find ourselves.

A. A Strong Probability of Bias Regarding Cases Involving President Trump in His Personal Capacity Exists, Requiring Recusal Under Caperton

While Supreme Court justices are not bound by the normal codes of judicial conduct regarding recusal, they are bound by the Constitution. It was that reality to which Chief Justice John Marshall pointed when justifying the power of judicial review in the great case of *Marbury v. Madison*.[30] And under the principles articulated in *Caperton*, there is a compelling case that

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[27] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

[28] *Id*.

[29] By the time that President Trump nominated Judge Kavanaugh on July 9, 2018, the president had already been identified as a subject of the special counsel investigation that had already yielded guilty pleas from President Trump's former national security adviser, former deputy campaign chairman, and former campaign adviser as well as two multi-count indictments of his former campaign chairman. *See* Carol D. Leonnig and Robert Costa, Mueller told Trump's attorneys the president remains under investigation but is not currently a criminal target, *Washington Post*. Apr. 3, 2018, *available at* https://www.washingtonpost.com/politics/mueller-told-trumps-attorneys-the-president-remains-under-investigation-but-is-not-currently-a-criminal-target/2018/04/03/d7832cf0-36c1-11e8-acd5-35eac230e514_story.html; Brennan Weiss, Ellen Cranley and Bryan Logan, Here's everyone who has been charged and convicted in Mueller's Russia probe so far, *Business Insider*, Aug. 21, 2018, *available at* https://www.businessinsider.com/who-has-been-charged-in-russia-investigation-mueller-trump-2017-12#michael-flynn-trumps-former-national-security-adviser-4. In addition, in conjunction with a separate investigation being conducted by the United States Attorney for the Southern District of New York, federal agents had searched the office, hotel room, and residence of the president's personal attorney, Michael Cohen, and seized more than 1.3 million pieces of evidence. *See* Matt Apuzzo, F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen; Trump Calls It 'Disgraceful', *New York Times*, Apr. 3, 2018, *available* at https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html; Kevin Johnson and John Bacon, Court-ordered review in Cohen raid yields 1.3M items for government, *USA Today*, Jul. 2, 2018, *available at* https://www.usatoday.com/story/news/politics/2018/07/02/feds-get-1-3-mil-items-seized-trump-attorney-michael-cohen/753279002/.

[30] *See* 5 U.S. 137, 176-80 (1805).

Judge Kavanaugh, if confirmed, must recuse himself from any case involving President Trump in his personal (rather than solely his head of the executive branch) capacity.

The Kavanaugh nomination represents an extraordinary and unprecedented confluence of factors that dictate a recusal under *Caperton.* First, the conditions are present for drawing the reasonable conclusion that there is a substantial risk of actual bias. Second, the nominee has expressly indicated a clear set of strongly held opinions suggesting he has prejudged many of the specific matters directly and imminently involving President Trump. Third, those matters involve not just President Trump's actions as head of the executive branch but his personal interests in remaining in office. Fourth, the matters in question did not arise years after the president nominated Judge Kavanaugh to the Court but were reasonably understood to be at issue at the time of the nomination. It is also highly relevant that confirmation hearings are moving forward before the Senate has obtained and the public has had an opportunity to review documentary materials integral to evaluating Judge Kavanaugh and his record not only on the broad range of questions bound to come before him during his tenure on the Court but also, and specifically, on the questions that are of particular pertinence to President Trump's personal interests in the executive branch investigations that are going on as this report is released.[31]

Each of the *Caperton* factors for evaluating whether a there is a substantial probability of objective, actual bias necessitating recusal closely fits the current situation. We will evaluate the *Caperton* factors slightly out of order.

1. Caperton Factor One: President Trump Has Had a "Significant and Disproportionate Influence" on Judge Kavanaugh's Elevation to the Court

The *Caperton* analysis concerns the relationship between two key factors: did an individual or entity have "significant and disproportionate influence" in placing a judge on a court and did that individual or entity have a "personal" stake in a "particular" matter that, at the time of the judge's elevation, was likely to come before the court?

With respect to the first question, the answer is manifestly and indisputably yes for Judge Kavanaugh.

In *Caperton*, the influence stemmed from third-party "independent expenditures" in support of the candidate's election. In the case of Judge Kavanaugh and President Trump, the nexus is obviously more straightforward. Here, the decision to nominate Judge Kavanaugh was ultimately President Trump's alone. But for President Trump, Judge Kavanaugh could not become a Supreme Court justice. In *Caperton,* Benjamin's sense of loyalty was not necessarily exclusive. He had other donors. He had voters to persuade. Judge Kavanaugh on the other hand would not even be poised to be a justice without President Trump. He had to meet with President Trump in a job interview as part of convincing President Trump to make the nomination.[32] To be sure, he has to persuade a majority of the Senate to vote for him—but even his efforts to do that rely on the support of President Trump.

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[31] *See* Grace Segers, National Archives may not finish reviewing Kavanaugh documents before end of October, *CBS News*, Aug. 2, 2018, *available at* https://www.cbsnews.com/news/national-archives-may-not-finish-reviewing-kavanaugh-documents-before-end-of-october/.

[32] Ashley Parker and Robert Costa, "All a little misdirection": Inside Trump's sometimes wavering decision on Kavanaugh, *Washington Post*, July 10, 2018, *available at* https://www.washingtonpost.com/politics/all-a-little-misdirection-inside-trumps-sometimes-wavering-decision-on-kavanaugh/2018/07/10/6bfd8c44-8452-11e8-8f6c-46cb43e3f306_story.html.

President Trump's role in Judge Kavanaugh's elevation to the Supreme Court thus extends well beyond the *Caperton* scenario of paying for ads in favor of a judicial candidate who had already announced his own campaign. And there is more: in addition to the job interview and an appearance at the Rose Garden to announce the nomination, the White House selected and provided him a "sherpa," former Republican Senate Whip Jon Kyl, to oversee a comprehensive and resource-intensive effort to have Judge Kavanaugh confirmed.[33] In addition, a team of White House and Department of Justice lawyers have engaged in "extensive prep work including hours of mock hearings complete with staged protests" for Judge Kavanaugh.[34] The White House has put out a stream of press releases touting Judge Kavanaugh's nomination and qualifications, serving in effect as his official communications team.[35] Moreover, President Trump has indicated in the past that his ongoing support through the nomination process is contingent upon the nominee's loyalty. In 2017, President Trump considered withdrawing the nomination to the Court of Neil Gorsuch after learning that Gorsuch had called his attacks on the judiciary "disheartening."[36]

In short, Kavanaugh's dependence on President Trump in his nomination is all encompassing.

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[33] Laurie Kellman, Senate Veteran Returns to Action as Supreme Court Sherpa, *Associated Press*, July 13, 2018, *available at* https://www.realclearpolitics.com/articles/2018/07/13/senate_veteran_returns_to_action_as_supreme_court_sherpa_137519.html; Eli Watkins, GOP ex-Sen. Jon Kyl will be the 'sherpa' for SCOTUS nominee, *CNN*, Jul. 9, 2018, *available at* https://www.cnn.com/2018/07/09/politics/jon-kyl-supreme-court-sherpa/index.html; Chad Pergram, Kavanaugh getting confirmation help from Senate 'sherpa' Jon Kyl, *Fox News*, Aug. 14, 2018, *available at* http://www.foxnews.com/politics/2018/08/14/kavanaugh-getting-confirmation-help-from-senate-sherpa-jon-kyl.html.

[34] Hunter Walker, Mock hearings and staged protests: Inside the White House's intense preparations for Brett Kavanaugh's confirmation, *Yahoo!*, Aug. 29, 2018, *available at* https://www.yahoo.com/news/mock-hearings-staged-protests-inside-white-houses-intense-preparations-brett-kavanaughs-confirmation-195739409.html.

[35] *See, e.g.*, President Donald J. Trump Announces Intent to Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States, *White House*, Jul. 9, 2018, *available at* https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/; The Legal Community is Giving Rave Reviews to Judge Brett Kavanaugh's Nomination to the Supreme Court, *White House*, Jul. 12, 2018, *available at* https://www.whitehouse.gov/briefings-statements/legal-community-giving-rave-reviews-judge-brett-kavanaughs-nomination-supreme-court/; Statements of Support for Judge Brett Kavanaugh Pour In, *White House*, Jul. 13, 2018, *available at* https://www.whitehouse.gov/briefings-statements/statements-support-judge-brett-kavanaugh-pour/.

[36] Ashley Parker, Josh Dawsey, and Robert Barnes, Trump talked about rescinding Gorsuch's nomination, *Washington Post*, Dec. 19, 2017, *available at* https://www.washingtonpost.com/politics/trump-reportedly-considered-rescinding-gorsuchs-nomination/2017/12/18/ad2b3b68-e1c7-11e7-9eb6-e3c7ecfb4638_story.html. President Trump's comments suggest he may also expect loyalty and deference from sitting judges where a case involves his interests. He publicly derided a Bush appointee who struck down the Trump Administration's travel ban as a "so-called judge" and suggested—to bipartisan disapprobation—that an American-born judge who ruled against his company was biased because of his "Mexican heritage." Tom Kertscher, Trump's Racial Comments about a Hispanic Judge in Trump University Case, *Politifact*, Jun. 8, 2016, *available at* https://www.politifact.com/wisconsin/article/2016/jun/08/donald-trumps-racial-comments-about-judge-trump-un/. Just recently he seemingly directed the chief justice to order a FISA judge to convene a hearing on the Steele Dossier that alleges inappropriate conduct involving the president, his associates, and Russian officials. *See* https://twitter.com/realDonaldTrump/status/1034979892524457985; https://twitter.com/realDonaldTrump/status/1034981992692166658.

2. Caperton Factor Two: President Trump Had a Significant "Personal Stake in a Particular Case…Pending or Imminent" When He Nominated Judge Kavanaugh

The second *Caperton* factor is whether President Trump had a significant "personal stake in a particular case…pending or imminent" when he nominated Judge Kavanaugh. The answer to this question is also "yes." President Trump is personally involved in several cases that are pending or imminent and that are likely to come before the Supreme Court.

To begin with, President Trump is currently embroiled in a number of high-profile pending criminal matters involving a Department of Justice investigation led by Special Counsel Robert S. Mueller, III, of Russian interference in the 2016 election campaign and "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump."[37] According to press reports, President Trump has been named by Special Counsel Mueller as a subject of the investigation.[38]

At the time of the Kavanaugh nomination announcement on July 9, 2018, the Mueller inquiry had already resulted in indictments of several of President Trump's close associates. The president's campaign chairman, Paul Manafort, was facing two imminent trials for multiple federal criminal charges—and has since been convicted of eight felonies in the Eastern District of Virginia.[39] The president's former top national security advisor, Michael Flynn, and deputy Trump campaign manager, Richard Gates, had both already pleaded guilty to serious federal crimes.[40]

A number of questions arising from the Mueller inquiry are reasonably likely to reach the Supreme Court:

- In four separate pending cases or matters, defendants or witnesses have asserted that the special counsel's appointment is unconstitutional. In one instance, a subpoenaed grand jury witness, Andrew Miller, raised the argument and, after being denied, was held in contempt for refusing to testify.[41] His lawyer indicated that "we asked him to be [held in contempt] in order for us to appeal the judge's decision to the court of appeals." The lawyer went on to state: "this case is likely to end up in the United States Supreme

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[37] Deputy Attorney General Rod Rosenstein, Order No. 3915-2017, *Office of the Deputy Attorney General*, May 17, 2017, *available at* https://www.justice.gov/opa/press-release/file/967231/download.

[38] Carol D. Leonnig and Robert Costa, Mueller told Trump's attorneys the president remains under investigation but is not currently a criminal target*, Washington Post*, April 3, 2018, *available at* https://www.washingtonpost.com/politics/mueller-told-trumps-attorneys-the-president-remains-under-investigation-but-is-not-currently-a-criminal-target/2018/04/03/d7832cf0-36c1-11e8-acd5-35eac230e514_story.html.

[39] Sharon LaFraniere, Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts, *New York Times*, Aug. 21, 2018, *available at* https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html.

[40] Brennan Weiss, Ellen Cranley and Bryan Logan, Here's everyone who has been charged and convicted in Mueller's Russia probe so far, *Business Insider*, Aug. 21, 2018, *available at* https://www.businessinsider.com/who-has-been-charged-in-russia-investigation-mueller-trump-2017-12#michael-flynn-trumps-former-national-security-adviser-4.

[41] Spencer S. Hsu and Devlin Barrett, Judge holds Roger Stone associate in contempt for refusing to testify in Russia investigation, *Washington Post*, Aug. 10, 2018, *available at* https://www.washingtonpost.com/world/national-security/witness-in-mueller-probe-refuses-to-appear-before-grand-jury/2018/08/10/73e27130-9ca4-11e8-843b-36e177f3081c_story.html.

Court."[42] Miller's attorneys stated as early as June that "they plan[ned] to seek an appeal …ultimately to the Supreme Court." [43] *POLITICO* further reported at the same time that "the conservative nonprofit that is paying for Miller's challenge" explained that it had "'been looking for a vehicle' to challenge the constitutionality of Mueller's appointment.'"[44]

- President Trump himself was, and at the date of this publication still is, in conversations with the Office of Special Counsel Mueller about whether he will sit voluntarily for an interview.[45] His personal lawyer Rudolph Giuliani has recently indicated that, if a grand jury subpoena is issued to compel him to sit, he intends to "move to quash the subpoena. And we're pretty much finished with our memorandum opposing a subpoena." Giuliani added that President Trump's attorneys are ready to "argue it before the Supreme Court, if it ever got there."[46] The question whether President Trump would agree to an interview with Mueller or force a subpoena has been pending since at least January 2018.[47]

Meanwhile, in a separate case in the U.S. Attorney's Office in the Southern District of New York, at the time of the Kavanaugh nomination, the FBI had recently executed a search warrant against the office and residences of President Trump's former long-time confidante and attorney, Michael Cohen.[48] A few weeks after the nomination announcement, Cohen pleaded guilty and made the stunning statement under oath that when he was a candidate the president personally directed Cohen's conduct on two of the criminal campaign finance violations admitted in the plea.[49]

All of these matters involve President Trump personally and profoundly, even if they of course also raise questions regarding his official privileges and powers deriving from his role as president. His personal stake is reflected in President Trump's running and often emotional

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[42] Kathryn Watson, Ex-Roger Stone aide refuses to testify before grand jury in Mueller probe, *CBS News*, Aug. 10, 2018, *available at* https://www.cbsnews.com/news/roger-stone-ally-andrew-miller-refuses-to-testify-before-grand-jury-in-mueller-probe/.

[43] Darren Samuelsohn, Former Roger Stone aide makes bid to oust Mueller after subpoena, *Politico*, June 28, 2018, *available at* https://www.politico.com/story/2018/06/28/roger-stone-aide-robert-mueller-subpoena-682318.

[44] *Id*.

[45] Michael S. Schmidt and Maggie Haberman, Trump's Lawyers Counter Mueller's Interview Offer, Seeking a Narrower Scope, *New York Times*, Aug. 8, 2018, https://www.nytimes.com/2018/08/08/us/politics/trump-mueller-interview.html.

[46] Robert Costa, Trump's lawyers prepare to fight subpoena all the way to the Supreme Court, *Washington Post*, Aug. 15, 2018, *available at* https://www.washingtonpost.com/politics/trumps-lawyers-prepare-to-fight-subpoena-all-the-way-to-the-supreme-court/2018/08/15/c65b638c-a0cc-11e8-93e3-24d1703d2a7a_story.html.

[47] Gloria Borger and Evan Perez, Trump's legal team discussed January interview with Mueller, *CNN*, May 25, 2018, *available at* https://www.cnn.com/2018/05/24/politics/trump-legal-team-january-2018-interview-robert-mueller/index.html.

[48] Matt Apuzzo, F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen; Trump Calls It 'Disgraceful', *New York Times*, Apr. 9, 2018, *available at* https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html.

[49] Sarah Fitzpatrick, Joe Valiquette, Jonathan Dienst and Tom Winter, Michael Cohen pleads guilty, says he paid hush money at Trump's direction, *NBC News*, Aug. 21, 2018, *available at* https://www.nbcnews.com/news/crime-courts/ex-trump-lawyer-michael-cohen-discussing-plea-deal-prosecutors-n902571.

public commentary on the criminal investigations and those conducting them on his personal Twitter account and elsewhere. Over the course of the Mueller inquiry, he has repeatedly tweeted that it is a "rigged witch hunt"[50] and asserted that there was "no collusion" between his campaign and Russia in over 90 separate tweets[51] over the past year—in addition to deriding the investigation at rallies and in other public appearances.[52] In the months immediately preceding his nomination of Kavanaugh, his agitation[53] about the investigation reportedly intensified "to a different level."[54] Indeed, his tweets using the term "witch hunt" escalated to nine per week in late June and over 60 in just the three months between April and July.[55]

Nor are those the only currently pending cases regarding President Trump personally. To take only one of many other examples, President Trump is currently being sued personally in New York state court for libel in *Zervos v. Trump.*[56] President Trump has appealed a lower court decision in that case that he is required to be deposed. President Trump asserts that "a sitting United States President is immune under the Supremacy Clause of the United States Constitution, Article VI, Section II, from suit in state court during his or her term in office." The case is currently on appeal to the New York Supreme Court, Appellate Division.

President Trump is also defending a lawsuit, *Nwanguma v. Trump*, brought against him in his personal capacity that alleges he incited violence at a campaign rally that resulted in the assault and battery of the plaintiffs.[57] The case is currently on appeal in the Sixth Circuit. Other cases, including those concerning the president's acceptance of allegedly unconstitutional emoluments (in certain of which two of the authors of this paper act as co-counsel), present similar issues.[58]

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[50] *See, e.g.* https://twitter.com/realdonaldtrump/status/1035154621357064192; https://twitter.com/realdonaldtrump/status/1032495180530835456; https://twitter.com/realdonaldtrump/status/1031154974942810114; https://twitter.com/realdonaldtrump/status/1027585937163931648.

[51] Alana Abramson, How President Trump's Defense Went From 'No Collusion' With Russia to 'Collusion Is Not a Crime', *Time,* July 31, 2018, *available at* http://time.com/5352628/donald-trump-rudy-giuliani-collusion-crime/.

[52] *See, e.g.,* Jeremy Diamond, "Where is the collusion?" Trump asks, *CNN*, Aug. 21, 2018, *available at* https://www.cnn.com/politics/live-news/trump-rally-west-virginia-08-21-18/h_3007bf7581c1974c02284e07dc5242cb; Rebecca Harrington, Trump holds boisterous Saturday night rally in '110-degree' hot high school in Ohio*, Business Insider*, Aug. 4, 2018, *available at* https://www.businessinsider.com/trump-rally-ohio-highlights-quotes-2018-8; Linda Qiu, Truth-Testing Trump's 250-Plus Attacks on the Russia Inquiry, *New York Times*, Aug. 18, 2018, *available at* https://www.nytimes.com/2018/08/18/us/politics/fact-check-trump-russia-election-interference-.html.

[53] Julie Hirschfeld Davis and Maggie Haberman, At the White House, Trump Takes Selfies and Seethes Over Mueller, *New York Times*, Apr. 10, 2018, *available at* https://www.nytimes.com/2018/04/10/us/politics/at-the-white-house-trump-takes-selfies-and-seethes-over-mueller.html.

[54] Andrew Restuccia and Nancy Cook, White House puts Mueller on notice after raids, *Politico*, Apr. 10, 2018, *available at* https://www.politico.com/story/2018/04/10/trump-skipping-summit-of-the-americas-512221.

[55] John W. Shoen, Trump is tweeting 'witch hunt' a lot more than he used to, as Mueller probe grinds on and Manafort goes on trial, *CNBC,* Aug. 1, 2018, *available at* https://www.cnbc.com/2018/08/01/trumps-witch-hunt-tweets-are-getting-more-frequent-as-mueller-probe.html.

[56] *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. Mar. 20, 2018).

[57] *Nwanguma v. Trump,* No. 17-6290 (6th Cir. filed Nov. 1, 2017).

[58] *See District of Columbia v. Trump*, No. 17-cv-1596 (D. Md. 2017); *Blumenthal v. Trump*, No. 17-cv-1154 (D.D.C. 2017); *Citizens for Responsibility and Ethics in Washington v. Trump*, No. 17-cv-458 (S.D.N.Y. 2017); *K&D LLC v. Trump Old Post Office LLC*, No. 17-cv-00731 (D.D.C. 2017).

All of these matters are imminent within the meaning of *Caperton*. There, the pending case was a lawsuit brought against A.T. Massey Coal Company, of which Blankenship was the Chief Executive Officer. At the time Blankenship rendered his support to judicial candidate Benjamin, the case was still pending at the state district court level. Indeed, it was not finally disposed of on that level until 2005, after the judicial election. The petition for appeal to the West Virginia Supreme Court was not filed until December 2006, more than two years after the election where Blankenship had so significantly supported Benjamin. And the first West Virginia Supreme Court decision on the matter was not issued until November 2007, three years after the election.[59]

The cases involving President Trump are clearly imminent under this standard. Given the status of the Mueller inquiry and the pending discussions about the special counsel's request for an interview of the president, there is little dispute that the Supreme Court is poised to face key constitutional questions concerning President Trump's exercise of presidential powers as a subject of the special counsel inquiry. As discussed above, at least two lawyers in two matters have indicated an intent to take their arguments to the Supreme Court, two cases involving the president in his personal capacity have reached the federal appeals court level, and another has reached a state appeals court level.

The recent history of special or independent counsel inquiries and personal lawsuits against presidents also demonstrate that these matters are very likely bound for the Supreme Court.[60] Finally, no one can read the news today and fail to be aware that the investigations, lawsuits, and inquiries surrounding the president are going at full throttle and that critical legal questions about them are around the corner. Many assess that "the walls are closing in" on the president, however uncertain their speed. We are among their number.

3. Additional Evidence Reinforces the Objective Risk that Judge Kavanaugh's Impartiality Will Be Affected

In *Caperton*, Justice Kennedy's majority opinion emphasized that the case presented an "extraordinary situation" where the circumstances required recusal under the Constitution. In that case, the two "extraordinary" facts were that one man with a case likely to appear before the West Virginia Supreme Court provided the bulk of support to a candidate for that court. Not only does the Kavanaugh nomination exhibit the same fact pattern, but the circumstances are even more troubling and vastly more extraordinary than they were in *Caperton.*

a. Judge Kavanaugh's Views on Executive Power May Have Been Relevant to the Trump Vetting Process

In the course of deciding whether to nominate Judge Kavanaugh, President Trump's team reportedly reviewed Judge Kavanaugh's views on executive power matters including the issue of whether a sitting president can be indicted.[61] All the authors having worked on Supreme

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[59] 556 U.S. 868, 874.

[60] See *United States v. Nixon*, 418 U.S. 683 (1974); *Clinton v. Jones*, 520 U.S. 681 (1997).

[61] https://twitter.com/acosta/status/1016360494431694848?s=21 ("Trump SCOTUS team has looked at Kavanaugh's past comments on indicting a sitting president, we've confirmed. In 2009, Kavanaugh wrote: 'The indictment and trial of a sitting President, moreover, would cripple the federal government...'"). *See also* Mark Landler and Matt Apuzzo, Brett Kavanaugh, Supreme Court Front-Runner, Once Argued Broad Grounds for Impeachment, *New York Times*, Jul. 5, 2018, *available at* https://www.nytimes.com/2018/07/05/us/politics/brett-kavanaugh-supreme-court-impeachment.html.

Court nominations, we have no doubt that those responsible for the nomination thoroughly examined the remainder of Judge Kavanaugh's record, including his writings. They indicate he may view favorably critical aspects of the president's expansive view of executive power.

The president's views on executive power are not, at this time, abstract, nor do they relate to impersonal policy matters, such as whether a president can impound appropriated funds. Rather, they directly concern his acute, personal vulnerability to criminal and civil investigation. And Judge Kavanaugh, to a degree unlike any other sitting federal judge of whom we are aware, has written extensively about the very issues that so personally concern the president.

President Trump and his legal team at the time of Judge Kavanaugh's nomination had made a number of assertions regarding his authority to take actions that would potentially impede or halt the special counsel inquiry and potentially other proceedings personally involving the president. These include claims that the president:

- May issue a pardon of himself;[62]
- Is immune from a subpoena for testimony;[63]
- Is immune from indictment;[64]
- Cannot obstruct justice;[65] and
- Can fire the special counsel.[66]

President Trump also has suggested in his own public statements and reportedly through lawyers that he is considering pardoning former Trump campaign chair and convicted felon Paul Manafort, and earlier discussed the possibility of a pardon for former National Security Advisor Michael Flynn.[67]

Judge Kavanaugh's writings and his rulings as a D.C. Circuit Court judge demonstrate that he favors broad executive authorities. Judge Kavanaugh served from 2001 to 2006 as a counsel and top White House aide to President Bush, where his responsibilities included advising on

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[62] Caroline Kenny, Trump: "I have the absolute right to pardon myself", *CNN*, June 4, 2018, *available at* https://www.cnn.com/2018/06/04/politics/donald-trump-pardon-tweet/index.html.

[63] Fred Barbash, Giuliani claims Trump 'immune' from Mueller subpoena, *Washington Post*, May 3, 2018, available at https://www.washingtonpost.com/news/morning-mix/wp/2018/05/03/giuliani-claims-trump-immune-from-mueller-subpoena/.

[64] Dana Bash, Giuliani: Mueller's team told Trump's lawyers they can't indict a president, *CNN*, May 17, 2018, *available at* https://www.cnn.com/2018/05/16/politics/rudy-giuliani-robert-mueller-indictment/index.html.

[65] *See* Mike Allen, Trump lawyer claims the "President cannot obstruct justice", *Axios*, Dec. 4, 2017, *available at* https://www.axios.com/exclusive-trump-lawyer-claims-the-president-cannot-obstruct-justice-1513388369-032ba40d-55c3-42d6-bdf9-d6399ed7a2ce.html; *but see* Aaron Blake, Rudy Giuliani makes a big, new concession: A president can commit obstruction of justice, *Washington Post*, May 18, 2018, *available at* https://www.washingtonpost.com/news/the-fix/wp/2018/05/18/rudy-giuliani-makes-a-big-new-concession-a-president-can-obstruct-justice/?utm_term=.ca14e8523b16.

[66] Charlie Savage, With Scant Precedent, White House Insists Trump Could Fire Mueller Himself, *New York Times*, Apr. 10, 2018, *available at* https://www.nytimes.com/2018/04/10/us/politics/trump-firing-authority-mueller.html.

[67] Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman and Adam Goldman, Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort, *New York Times*, Mar. 28, 2018, *available at* https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html; *see also* Libby Nelson, Trump sure sounds like he's thinking about whether to pardon Paul Manafort, *Vox*, Aug. 23, 2018, *available at* https://www.vox.com/policy-and-politics/2018/8/23/17772528/trump-fox-interview-manafort-pardon.

separation of powers matters, monitoring litigation involving the White House, and working on the confirmation of federal judicial nominees.[68] After joining the bench in 2006, Judge Kavanaugh noted in a 2009 *Minnesota Law Review* article that this service informed his perspective on executive power.[69] In that same article, Judge Kavanaugh argued that a sitting president should not have to face deposition questioning and should be able to defer until presidential service ends any civil suits and criminal prosecutions.[70]

More particularly, in 1998 he expressed a clear view on relevant Constitutional principles in the *Georgetown Law Journal*:

> The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. 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.[71]

In this *Georgetown Law Journal* piece, Kavanaugh embraced an interpretation of constitutional law answering a question that no court has ever faced—can a sitting president be prosecuted?

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[68] Robert O'Harrow, Jr., Brett Kavanaugh: Bush's intellectual body man, *Washington Post*, Aug. 24, 2018, *available at* https://www.washingtonpost.com/investigations/brett-kavanaugh-bushs-intellectual-body-man/2018/08/24/7c6b989e-a0d8-11e8-b562-1db4209bd992_story.html.

[69] Brett M. Kavanaugh, Separation of Powers During the Forty-Fourth Presidency and Beyond, 93 Minn. L. Rev. 1454, 1459 (2009), *available at* http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf. Judge Kavanaugh's views may have shifted since the early days of his career. As a counsel for an attorney on Independent Counsel Kenneth Starr's investigation of President Bill Clinton in the 1990's, he did not always adopt a deferential posture toward presidential authority. In a 1995 memo he reportedly argued a president may have to comply with a subpoena for presidential testimony before a grand jury, and in a 1998 memo on interviewing President Clinton, he recommended a list of sexually graphic questions and urged his colleagues "not to give the President 'any break' … unless he resigned, confessed perjury or issued a public apology to Starr." Maegan Vazquez, Kavanaugh argued a president would have to testify before a grand jury if subpoenaed, *CNN*, Aug. 11, 2018, *available at* https://www.cnn.com/2018/08/11/politics/brett-kavanaugh-subpoena-indictment-memos/index.html; Kevin Frecking, Kavanaugh in memo pushed graphic sex questions for Clinton, *Associated Press*, Aug. 20, 2018, *available at* https://apnews.com/9557360d689e4593a8788369672e30d6.

[70] *Id.* at 1459-62.

[71] Brett M. Kavanaugh, The President and the Independent Counsel, 86 Geo. L.J. 2133, 2158 (Jul. 1998), *available at* http://online.wsj.com/public/resources/documents/2018_0628_kavanaugh_1998_president_independent_counsel.pdf.

To be sure, opinions to this effect have been issued by the Department of Justice.[72] But there is no case law directly addressing this point.[73]

Likewise, Kavanaugh has stated that a special counsel "should never be appointed to prosecute the president (because a sitting president should never be subject to criminal indictment until he leaves office or is removed by impeachment proceedings)."[74]

In addition, Judge Kavanaugh has suggested that the *United States v. Nixon*[75] case, which limits the president's right to assert executive privilege to resist a grand jury subpoena, might have been wrongly decided. In 1999, he was quoted as saying:

> But maybe *Nixon* was wrongly decided—heresy though it is to say so. *Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implications to this day that most people do not appreciate sufficiently…Maybe the tension of the time led to an erroneous decision.[76]

Other writings by him appear to indicate approval of the ruling,[77] making it all the more important that a full documentary record be produced and the time taken to examine it before he is questioned on these subjects.

As a judge, he has also been a proponent of expanded presidential control over executive agencies under a "unitary executive" theory which provides that the president has exclusive control over the actions of any executive branch official.[78] Pursuant to this view, he has argued

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[72] *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, *Office of Legal Counsel, Department of Justice*, Oct. 16, 2000, *available at* https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf; *but see* Charlie Savage, Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes, *New York Times*, Jul. 22, 2017, *available at* https://www.nytimes.com/2017/07/22/us/politics/can-president-be-indicted-kenneth-starr-memo.html.

[73] Garrett Epps, The Only Way to Find Out If the President Can Be Indicted, *The Atlantic*, May 23, 2018, *available at* https://www.theatlantic.com/politics/archive/2018/05/presidential-indictment/560957/.

[74] *Id.* at 2153. *See also* Robert J. Bittman and Brett M. Kavanaugh, Indictment of an Ex-President?, *Washington Post*, Aug. 31, 1999, *available at* https://www.justsecurity.org/wp-content/uploads/2018/07/Brett-Kavanaugh-Indictment-of-an-Ex-President-Washington-Post-1999.pdf.

[75] *United States v. Nixon,* 418 U.S. 683, 706 (1974) ("Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.")

[76] Mark Sherman, Kavanaugh: Watergate tapes decision may have been wrong, *Associated Press*, Jul. 22, 2018, *available at* https://apnews.com/3ea406469d344dd8b2527aed92da6365/High-court-nominee-gets-started-answering-questions.

[77] Greg Stohr, Kavanaugh Once Questioned Supreme Court's Nixon Tapes Ruling, *Bloomberg*, July 21, 2018, available at https://www.bloomberg.com/news/articles/2018-07-21/kavanaugh-eyed-end-to-affirmative-action-new-documents-indicate (noting a 1998 article in which Kavanaugh called on Congress to codify *Nixon* and a 2016 article in which he listed *Nixon* among "the greatest moments in American judicial history").

[78] *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 5 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

that limits on the president's power to remove members of an independent agency violate separation of powers principles.[79] He also has suggested that he favors overturning the Supreme Court's seven-to-one decision in *Morrison v. Olson* to uphold the constitutionality of the statute providing for an independent counsel,[80] and has referenced the lone dissenting opinion with approval in one of his legal decisions.

b. Senators Are Being Kept in the Dark About Kavanaugh in Part by the White House

Judge Kavanaugh's publicly available writings do not directly address each authority that President Trump has indicated he believes he may wield in defending against the special counsel inquiry. For example, constitutional experts across the political spectrum have drawn differing conclusions about the implications of Judge Kavanaugh's writings for presidential assertions of immunity from criminal investigation and indictment.[81]

One set of documents that could further elucidate Judge Kavanaugh's views on presidential authority are materials relating to his tenure in the Bush Administration. During his White House service, the Bush Administration was pressing to expand executive powers, arguing that the president may exercise certain powers relating to detention and torture without constraint by Senate-approved treaties, the judiciary, and Congress.[82] Based on his duties as counsel regarding separation of powers matters and his three years as Staff Secretary, a high-level position that involves reviewing and weighing in on critical issues before the president,[83] the documentary record concerning his White House service would show his unvarnished perspective on executive powers.

However, that record is not available to the public or the Senate at this time. As of late August 2018, members of the Senate Judiciary Committee assert they had received only 6% of the documents relating to Judge Kavanaugh's executive branch service.[84] And on August 31, 2018, a document review team directed by a lawyer for the Bush Presidential Library stated that it was

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[79] *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd*., 537 F.3d 667, 688-91 (D.C. Cir. 2008) (Kavanaugh, J., *dissenting)*, *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

[80] Manu Raju, Trump Supreme Court pick: I would 'put the nail' in ruling upholding independent counsel, *CNN*, Jul. 18, 2018, *available at* https://www.cnn.com/2018/07/18/politics/brett-kavanaugh-independent-counsel-comments/index.html.

[81] Norm Eisen and Ryan Goodman, Kavanaugh Must Explain His Views on Presidential Immunity, *Slate*, Jul. 15, 2018, *available at* https://slate.com/news-and-politics/2018/07/brett-kavanaugh-supreme-court-nomination-his-presidential-immunity-writings-are-worrisome.html (citing and discussing conflicting analyses on the issue).

[82] *See* Memo for Alberto Gonzales, Counsel to the President, *Office of Legal Counsel, Department of Justice*, Aug. 1, 2002, *available at* https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf; Brief for Respondents, *Rasul v. Bush*, 2004 WL 425739 (U.S. Mar. 3, 2004) (Nos. 03-334, 03-343), *available at* https://www.justice.gov/osg/brief/rasul-v-bush-al-odah-v-united-states-brief-merits.

[83] Igor Bobic, "Not Just A Paper Pusher": Former White House Staff Secretaries Weigh In On Kavanaugh Fight, *Huffington Post*, July 30, 2018, *available at* https://www.huffingtonpost.com/entry/brett-kavanaugh-trump-staff-secretary_us_5b5f4fb5e4b0de86f4999a8b.

[84] William Cummings, Senate Democrats officially call for Kavanaugh postponement, cite possible crimes by Trump, *USA Today*, Aug. 14, 2018, *available at* https://www.usatoday.com/story/news/politics/2018/08/24/brett-kavanaugh-senate-democrats-call-postponement-hearing/1085047002/. On the last business day and the night before hearings were to start, an additional 86,000 pages were produced. William A. Burck, Letter to Senator Charles E. Grassley, Sept. 3, 2018.

withholding over 100,000 pages of documents from the Senate Judiciary Committee "because the White House believes they are protected by the presidential privilege and, after discussions with the Justice Department, 'has directed that we not provide these documents for this reason.'"[85] That sweeping invocation of the privilege does not appear to be consistent with its parameters and is certainly not adequately substantiated.[86]

Although the Kavanaugh nomination clearly calls out for vigorous Senate scrutiny of Judge Kavanaugh's written record under these circumstances, the Senate has instead compounded accountability issues by rushing the nomination process. The Committee is moving forward with confirmation hearings starting on September 4, 2018.

As part of its constitutional advise and consent responsibilities in confirming Supreme Court justices, the Senate in the past has requested the production of relevant documents that elucidate the views of the nominee. In the nomination proceedings for Elena Kagan, the Senate Judiciary Committee requested and received broad access to all documents relating to Kagan's prior tenure in the Clinton White House as associate counsel and deputy director of the Domestic Policy Council, in advance of her confirmation proceedings.[87] All told, the Committee received over 170,000 pages of documents concerning her White House service, with no assertions of executive privilege by the Obama Administration.[88]

Nonetheless, the Senate Judiciary Committee chairman has declined to request production of any materials relating to Judge Kavanaugh's service as Staff Secretary, asking the National Archives only for White House documents concerning his work there as a counsel.[89] Further, the Committee has allowed an unusual review process under which a former colleague of Judge Kavanaugh's in the Bush White House, William Burck, is involved in screening and producing records from the Bush Presidential Library to the Committee.[90] Burck also represents former

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[85] Seung Min Kim, Trump to withhold 100,000 pages of Kavanaugh's White House records, *Washington Post*, Sept. 1, 2018, *available at* https://www.washingtonpost.com/politics/trump-to-withhold-100000-pages-of-kavanaughs-white-house-records/2018/09/01/217cf9e0-adf9-11e8-8f4b-aee063e14538_story.html.

[86] For a discussion of the elements of the applicable privileges, procedural requirements surrounding them, and the history of their applicability and inapplicability to the president and the White House, see Norman L. Eisen and Andrew M. Wright, Evidentiary Privileges Can Do Little to Block Trump-Related Investigations, ACS-CREW White Paper, June 29, 2018, *available at* https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/06/28214023/ACS-CREW-Report-Evidentiary-Privileges-Can-Do-Little-to-Block-Trump-Related-Investigations.pdf.

[87] National Archives, Clinton Presidential Records Pertaining to Elena Kagan, *available at* https://www.archives.gov/news/elena-kagan (last accessed Aug. 30, 2018).

[88] Senator Leahy, Jun. 23, 2010 (noting that vast majority of requested paper records had been produced to the Committee two weeks before the start of confirmation hearings and the email records were produced one week prior; and that fewer than 2,000 documents were withheld by the Clinton Library on personal privacy grounds)*;* Elena Kagan – Privilege and Release of Kagan Documents, *SCOTUSBlog*, June 30, 2010, *available at*: http://www.scotusblog.com/wp-content/uploads/2010/06/Kagan-issues_privilege-June-301.pdf.

[89] Senator Charles E. Grassley, Letter to The Honorable Patrick X. Mordente, Brigadier General, Jul. 27, 2018, *available at* https://www.judiciary.senate.gov/imo/media/doc/2018-07-27%20Grassley%20to%20General%20Mordente%20-%20Special%20Access%20to%20Kavanaugh%20Records.pdf.

[90] Charles S. Clark, National Archives Plays Unusual Role in Kavanaugh Nomination Battle, *Government Executive*, Aug. 22, 2018, *available at* https://www.govexec.com/oversight/2018/08/national-archives-plays-unusual-role-kavanaugh-nomination-battle/150744/.

senior Trump aides Steve Bannon and Reince Priebus, and current Trump White House Counsel Don McGahn, in matters relating to the special counsel's Russia inquiry.[91]

The National Archives is responding to a request for materials from the Chairman on a parallel track and expects initial review of these documents to be complete by late October.[92] Nobody has offered a persuasive reason for rushing the confirmation process to a degree obviously precluding Senate assessment of these documents.

B. There is a Need to Recuse Under the Appearance of Bias Standard

In addition, even if the *Caperton* probability of bias standard for a due process violation were not met, the concerns articulated in *Williams-Yulee v. Florida Bar* would certainly obtain. The Supreme Court made it abundantly clear in that case that public confidence in the courts depends on public confidence in judicial impartiality, and that this confidence is a compelling state interest even in the extraordinary context of restricting rights of free expression in the context of a political campaign. Were Judge Kavanaugh to rule on a case directly impacting President Trump personally, the appearance of bias would be overwhelming and the adverse impact on faith in the Supreme Court and the judicial process incalculable. The only solution is for Judge Kavanaugh to publicly and clearly promise at his confirmation hearing to recuse himself from any case in the categories identified in this paper.

Currently, Judge Kavanaugh as a Circuit Court judge is bound by 28 U.S.C. § 455, which states "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).[93] As

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[91] Darren Samuelsohn, Russia probe's most popular lawyer risks conflicts, *Politico*, Jan. 25, 2018, *available at* https://www.politico.com/story/2018/01/25/mueller-russia-investigation-bannon-lawyer-juggles-clients-367521.

[92] Clark, *Government Executive*, Aug. 22, 2018.

[93] The provision also enumerates particular circumstances under which a judge must recuse:

> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
> (ii) Is acting as a lawyer in the proceeding;
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

written, the statute applies to Supreme Court justices. However, Supreme Court justices have indicated that they do not feel bound by the law, citing separation of powers concerns.[94] Nevertheless, the Chief Justice has stated, "Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455."[95] In other words, although the Court's members do not concede that they are legally bound to follow the provision's mandate, in practice they do use it.[96]

According to the Court, the focus in § 455(a) "is not the reality of bias or prejudice, but its appearance."[97] Judge Kavanaugh in his own words has explained his adherence to this law as a Circuit Court judge as follows: "I recuse myself in cases as required by law, and I also recuse myself in my discretion consistent with the law from cases that present sufficient appearance issues."[98]

If Judge Kavanaugh were confirmed to the Supreme Court, appearance issues would be particularly acute on questions involving the president's defenses in a criminal inquiry in which he was already a subject at the time he nominated Judge Kavanaugh, as well as the president's personal legal liability in other litigation pending at the nomination. The same would, of course, be true with respect to impeachment of the president, a matter which has been much discussed and may lie ahead.

It is appropriate for Judge Kavanaugh to deal with these matters during his confirmation hearing and it would be inappropriate for him not to do so. Because the Supreme Court lacks any mechanism for objective (or any) review of recusal motions, avenues for appeal, or reconsideration by the full Court, the only opportunity to ensure that Judge Kavanaugh, if appointed, will meet his constitutional obligations will occur at his confirmation hearing.

Once on the Court, there is no mechanism to review any decision Judge Kavanaugh may make. The failure of the Supreme Court to grant independent review of recusal decisions not only threatens public confidence in the judiciary, it very likely results in justices hearing cases where they should not. There is ample social science confirming that judges are not exempt from the human tendency to discount bias in themselves.[99] And since the very nature of the judicial role

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> (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

28 U.S.C. § 455(b)-(c).

[94] See Chief Justice John G. Roberts, Jr., 2011 Year-end Report on the Federal Judiciary (2011), *available at* http://www.supremecourt.gov/publicinfo/year-end/2011yearendreport.pdf.

[95] *Id.* at 7-8.

[96] The presumption of the applicability of Section 455 is evident in other statements by justices. *See, e.g.*, *United States v. Will*, 449 U.S. 200, 211–12 (1980) ("Jurisdiction being clear, our next inquiry is whether 28 U.S.C. § 455 or traditional judicial canons operate to disqualify all United States judges, including the Justices of this Court, from deciding these issues."). In another case that involved a decision denying a motion to recuse, Chief Justice Rehnquist stated: "Title 28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (Rehnquist, C.J, statement denying motion).

[97] *Liteky*, 510 U.S. at 548.

[98] Judge Brett M. Kavanaugh, Questionnaire for Nominee to the Supreme Court, *Senate Judiciary Committee*, accessed Sept. 2, 2018, at 65, *available at* https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20(PUBLIC).pdf.

[99] *See, e.g.,* Deborah Lynn Bassett, Three Reasons Why The Challenged Judge Should Not Rule On A Judicial Recusal Motion, 18 N.Y.U. J. Legis. & Pub. Pol'y 659, 662 (2015). For example, a study of

is to rule impartially and without bias, judges understandably feel an additional pressure to avoid grappling with the possibility they may be seen as conflicted by others. (For these reasons, we believe quite independent of the matter at hand, that the Supreme Court should establish a fair and independent mechanism for resolving calls for recusal, and the decisions should be committed to writing to hold their position to public account and to provide guidance in future cases where recusal becomes an issue.)

Judge Kavanaugh should be required to commit under oath during his confirmation hearings that he will recuse himself should the Mueller inquiry or other criminal investigation or civil litigation pending at Kavanaugh's confirmation reach the Supreme Court in a manner that personally implicates the president.

C. Caperton Due Process Concerns Are Implicated in Matters that May Come Before Putative Justice Kavanaugh

The *Caperton* and *Williams* decisions were written in terms of the due process rights of the appellants in those cases. "[D]ue process is denied by circumstances that create the likelihood or the appearance of bias."[100] As Justice Kennedy wrote in *Caperton:* "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[101]

Several of the parties in the imminent matters surrounding President Trump are individuals with due process rights, including those in *Zervos v. Trump* and *Nwanguma v. Trump*. They would therefore be entitled to make a recusal motion on due process grounds if any matters regarding their cases reached the Supreme Court.

However, in *South Carolina v. Katzenbach*,[102] the Supreme Court held that sovereigns are not considered "persons" for purposes of the Due Process Clauses of the Fifth and Fourteenth Amendments. In *Katzenbach,* the state of South Carolina asserted that certain provisions of the Voting Rights Act of 1965, including those for using federal examiners to qualify applicants for registration and requiring the state to suspend its use of literacy tests, violated the state's Due Process rights. The Supreme Court has not directly addressed its constitutional-recusal jurisprudence in the context of an actual or apparent bias against the government.

Assuming for the sake of argument that the United States does *not* possess a right to due process in a particular case, the injury of biased justice goes far beyond the parties to the case. As the Court explained in *Williams-Yulee*, states and the federal government have an independent "compelling interest in preserving public confidence in the integrity of the

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federal magistrate judges found that 87.7 percent of the 155 judges surveyed believed that they were reversed less often on appeal than the average magistrate judge. *See, e.g.,* Chris Guthrie, Jeffrey Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell L. Rev. 777 (2001). In a survey of federal Administrative Law Judges, 97 percent believed they were in the top 50 percent for avoiding bias, and not one judge ranked his or herself in the bottom quartile. *See* Chris Guthrie *et al.*, The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice, 58 Duke L.J. 1477, 1519 (2009). People in general are far better in detecting potential bias in others than in themselves. Joyce Ehrlinger *et al.*, Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others, 31 Personality & Soc. Psychol. Bull. 680, 681 (2005).

[100] *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

[101] 556 U.S. at 876.

[102] 383 U.S. 301, 323–24 (1966), abrogated on other grounds by *Shelby County v. Holder*, 570 U.S. 529 (2013); *United States v. City of Jackson*, 318 F.2d 1, 8–9 (5th Cir. 1963).

judiciary."[103] Other judges have recognized this principle in other circumstances. For example, in *Levine v. U.S. District Court for the Central District of California*, the Ninth Circuit Court of Appeals found that "The sixth amendment . . . does not give the prosecution the right to a fair trial . . . . [Nevertheless, the court] must consider the fundamental interest of the government and the public in insuring the integrity of the judicial process. Society has the right to expect that the judicial system will be fair and impartial to all who come before it."[104]

In addition, the government, and the people it represents, have a fundamental interest in the impartiality of the Court. In *Williams-Yulee*, the Court upheld a Florida state bar rule prohibiting candidates for judicial seats from personally soliciting funds for their campaigns.[105] It is our view that recusal is also constitutionally mandatory because a neutral mandate of judicial impartiality—irrespective of the parties—is implied by due process and is considered to exist interstitially throughout the Constitution. Moreover, we believe that the precedents requiring recusal under due process reflect circumstances under which Section 455 imposes an independent recusal obligation — one that does not rely on any party's private injury or deprivation of any private entitlement without due process of law.

III. Scope of Recusal

As a general matter, Supreme Court justices are not expected to recuse themselves from any and every case involving the president who nominated them. We do not here reach any other conclusion. As noted above, however, the Kavanaugh matter represents an unprecedented and extraordinary convergence of factors that trigger a *Caperton* or § 455(a) recusal.

We are unaware of any previous Supreme Court nominee who was nominated by a president who had so many and so pointed pending personal matters that the justice might imminently be called upon to rule on. President Trump's selection of Judge Kavanaugh on July 9, 2018, occurred over a year after the May 17, 2017, appointment[106] of Special Counsel Robert Mueller. In contrast, the Senate received the nomination of Judge Neil Gorsuch for the Supreme Court on February 1, 2017 and confirmed him over a month before the Mueller appointment.[107] President Clinton's Supreme Court appointments, Judge Ruth Bader Ginsburg, and Judge Stephen Breyer, were both nominated and confirmed before Independent Counsel Kenneth Starr's appointment in August 1994[108] (and more than a year before the affair and subsequent

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[103] *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015).

[104] 64 F.2d 590, 596–97 (9th Cir. 1985). *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (plurality opinion) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."); *Richmond Newspapers*, 448 U.S. at 598 (Brennan, J. concurring) ("What countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now, for the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties."); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969) ("The public has an overriding interest that justice be done in a controversy between the government and individuals and has the right to demand and expect 'fair trials designed to end in just judgments.'") (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

[105] 135 S. Ct. at 1659.

[106] *See* Deputy Attorney General Rosenstein, May 17, 2017.

[107] Supreme Court Nominations: present-1789, *United States Senate*, accessed Sept. 3, 2018, *available at* https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm.

[108] Susan Schmidt, Judges Replace Fiske as Whitewater Counsel, *New York Times*, Aug. 6, 1994, *available at* https://www.washingtonpost.com/archive/politics/1994/08/06/judges-replace-fiske-as-whitewater-counsel/4ca08c66-62cd-4ef3-a44f-9835399ed0ee/?noredirect=on&utm_term=.ee621d5b51bb

accusations of perjury that led to Clinton's impeachment).[109] All of President Nixon's Supreme Court appointments—including Justice Rehnquist—were made and confirmed before the Watergate break in and before the appointment of a special prosecutor.[110]

In litigation challenging official actions by the federal government, the president at times may be a named defendant in his official capacity as the head of the executive branch. In such a case, the fact that a justice may have a "debt of gratitude" for nomination to the Court by that president would not inherently necessitate recusal, because the case implicates the interests of the government, not the president as an individual.

But the situation is meaningfully different when a president has a particular, personal interest in the case (and indeed, in many such cases that may come before the justice). Here, the recusal approach taken by former Supreme Court Justice William Rehnquist may be instructive. Justice Rehnquist famously was the lone justice who recused from the Supreme Court's review in *United States v. Nixon*[111] of the president's refusal to comply with a grand jury subpoena from a special prosecutor for tape recordings in the Watergate investigation. While Justice Rehnquist did not issue a public statement explaining his recusal, Bob Woodward and Scott Armstrong in their book *The Brethren* later suggested that Justice Rehnquist's personal relationships with individuals involved in the Watergate scandal played a role in this decision:

> [Justice] Rehnquist had worked closely with [former Attorney General] John Mitchell and [Counsel to the President] John Ehrlichman. They were all under indictment, and Richard Kleindienst, Mitchell's successor, had resigned at the same time as Haldeman and Ehrlichman. Kleindienst was one of Justice Rehnquist's closest friends in Washington.[112]

In his book *The Wars of Watergate: The Last Crisis of Richard Nixon*, Stanley Kutler stated that "Rehnquist recused himself … citing his past association with the Nixon Administration." [113] Other reporting from the period asserted that Justice Rehnquist's relationship with Mitchell at least in part led to his recusal in *Nixon*.[114]

Justice Rehnquist did articulate his rationale for recusing from a subsequent case, *Kissinger v. Halperin,* which involved the wiretapping of Morton Halperin's home and in which Mitchell was also a defendant.[115] In a May 1981 memo to the Court, Justice Rehnquist explained this was

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(as the article notes, Attorney General Janet Reno appointed Robert Fiske as special counsel in January 1994 to investigate the suicide of deputy White House counsel Vincent W. Foster Jr. in July 1993).

[109] *See* Articles of Impeachment Against William Jefferson Clinton, H. Res 611 (105th Cong. 1998), *available at* https://www.congress.gov/bill/105th-congress/house-resolution/611/text.

[110] Supreme Court Nominations: present-1789, *United States Senate*, *supra* n. 113.

[111] 418 U.S. 683 (1974).

[112] Bob Woodward and Scott Armstrong, The Brethren, Simon & Schuster (2005), at 348-350.

[113] Stanley I. Kutler, The Wars of Watergate: The Last Crisis of Richard Nixon, W.W. Norton & Co. (1992), at 508. While Judge Kavanaugh and Justice Rehnquist share in common a history of executive branch service prior to their Supreme Court nominations, unlike Justice Rehnquist, Judge Kavanaugh did not serve in the administration of the president who appointed him to the Court.

[114] Warren Weaver, Jr., Relative youth and long sideburns notwithstanding, he has become the point man of the Supreme Court's right wing, *New York Times*, Oct. 13, 1974, *available at* https://www.nytimes.com/1974/10/13/archives/mr-justice-rehnquist-dissenting-relative-youth-and-long-sideburns.html ("…[I]t was widely assumed that he stepped aside because of his past association with former Attorney General John Mitchell, one of the Watergate cover-up defendants.").

[115] 452 U.S. 713 (1981).

because of "the fact that John Mitchell [was] a party individually, and not simply as an attorney for a client."[116] In other words, Justice Rehnquist felt compelled to recuse where individuals with whom he had close professional or personal relationships faced personal liability or were criminally implicated in the case before the Court.

Over 30 years after the *Nixon* case, Justice Antonin Scalia echoed aspects of this recusal principle, albeit when explaining why he did not feel compelled to recuse from a case involving then-Vice President Richard Cheney. Justice Scalia was pressed by parties to the case to recuse when news accounts reported that he had recently gone duck-hunting with Vice President Cheney.[117] In a memo detailing his rationale, Justice Scalia emphasized that what was at stake in the case at issue was an official action of the vice president, not his "personal fortune" or "personal freedom."[118]

The president's potential posture in a proceeding by the special counsel is potentially precisely a situation that threatens his "personal fortune or freedom"—as with Mitchell and Kleindienst in the cases where Rehnquist recused. And if appointed, Judge Kavanaugh will have life tenure as "Justice Kavanaugh, Trump appointee." Surely he has a personal interest in preserving his own reputation and perceived legitimacy.

IV. Arguments Suggesting Judge Kavanaugh Need Not Recuse Do Not Pass Muster

A. The "Duty to Sit" Is Outweighed by The Constitutional Principles Urging Recusal

Some have argued that recusal of U.S. Supreme Court justices is generally inappropriate because no jurist can sit in their stead and because judges have a "duty to sit" in cases that come before their court. This principle was articulated by Justice Rehnquist in *Laird*, where he declared all federal circuit courts had accepted the principle that a judge's "duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."[119] While it is a valid proposition that a judge should not avoid a case where there is no legitimate reason to avoid it (for example, in order to avoid issuing an unpopular decision), this principle has no application to cases in which there exists an appearance of impropriety. Indeed, Congress's 1974 adoption of the Code of Judicial Conduct with the requirement that judges step aside whenever their impartiality might reasonably be questioned, has been interpreted to seriously cabin the duty to sit.[120]

And any argument that a Supreme Court justice must hear a case in which his or her impartiality may reasonably be questioned is belied by past practice and the Court's opinion in *Williams*. Under the "duty to sit" argument, because there is no mechanism to replace justices, no

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[116] *See* Justice William H. Rehnquist, Memorandum to the Conference Re: No. 79-880 Kissinger v. Halperin, May 27, 1981, *reprinted at* Tuan Samahon, Rehnquist's Recusals, *Green Bag*, Winter 2007, *available at* http://www.greenbag.org/v10n2/v10n2_articles_samahon.pdf; *see also* Adam Liptak and Jonathan D. Glater, Papers Offer Close-Up of Rehnquist and the Court, *New York Times*, Nov. 17, 2008, *available at* https://www.nytimes.com/2008/11/18/washington/18rehnquist.html.

[117] Michael Janofsky, Scalia Refusing to Take Himself Off of Cheney Case, *New York Times*, Mar. 19, 2004, *available at* https://www.nytimes.com/2004/03/19/us/scalia-refusing-to-take-himself-off-cheney-case.html.

[118] *Id*.

[119] *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Mem of Rehnquist, J.).

[120] See James J. Alfini, Steven Lubet, Jeffrey M. Shaman & Charles Gardner Geyh, Judicial Conduct and Ethics, § 4.02 (4th ed. 2007).

Supreme Court justice should ever recuse. But Supreme Court Justices obviously have done so, and often.

The risk of a 4-4 outcome does not outweigh the damage done to justice, the principles implicit in due process and the rule of law, and the public's confidence in the judiciary from the participation by a consciously or unconsciously biased judge. Indeed, *Williams* made clear that the participation of even one biased judge on a multi-member panel violates due process even when that panel rules unanimously.

As Justice Kennedy explained in *Williams*, there can be no harmless error when a judge participates in a case despite a serious risk of bias:

> A multi-member court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.[121]

B. The Fact That President Trump May Have Had Multiple Motives, Some Non-Personal, To Nominate Judge Kavanaugh Does Not Eliminate Caperton Concerns

There is to be sure a difference between President Trump's role in the Kavanaugh nomination and Blankenship's in Benjamin's judicial election. It is President Trump's job to nominate judges. Blankenship, on the other hand, was a private citizen who overtly injected himself into the election process. In addition, Blankenship's motivations were purely personal and pecuniary. President Trump's motivations may have included more than simply his personal matters.

This distinction does not obviate the need for a *Caperton* recusal, however. It does, as we noted in Section III above affect the scope of recusal. There are several reasons why.

First, as *Caperton* noted, the "debt of gratitude" is what binds the two factors together and drives the probability of actual bias. This debt can exist as strongly vis-à-vis an official government patron as it can toward a private patron. Indeed, it may be stronger in Judge Kavanaugh's case. He was personally selected by the president, who cast aside other candidates. In *Caperton*, Benjamin had already chosen to run. And in fact, there is no evidence in the record that he and Blankenship ever met or spoke.

Second, *Caperton* does not require a subjective examination of the benefactor's motivation or whether the recipient understood it. It does not ask whether Blankenship supported Benjamin's campaign because of his looming case or possibly because he cares about many issues the West Virginia court rules on. Indeed, some of the ads Blankenship funded in the campaign attacked Benjamin's opponent for his rulings about a sex offender, for being a "radical," and for being "soft on crime."[122] Yet it was clear to a reasonable observer that Benjamin may have owed

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[121] *Williams*, 136 S. Ct. at 1909-10.

[122] Adam Liptak, Case May Alter Judge Elections Across Country, *New York Times*, Feb. 14, 2009, *available at* https://www.nytimes.com/2009/02/15/washington/15scotus.html; David Savage, Judicial

a debt of gratitude to his benefactor. *Caperton* establishes an objective standard: "significant and disproportionate influence" plus an imminent matter before the court.

Finally, while it is likely that President Trump may have also been concerned with many other matters that may come before the Court, it is abundantly clear to a reasonable person that the specific personal matters we detail in Section II(A)(2) occupy a dominant position in the president's public pronouncements. Moreover, as we noted in Section II(A)(3)(a), there are press reports indicating that the White House reviewed Judge Kavanaugh's thinking on matters directly pertinent to the President's personal matters.

C. There Is Precedent Among Numerous Justices For Providing Specific Recusal Commitments During Confirmation Hearings

A general statement of commitment to future recusal where appropriate is not sufficient in these circumstances and would fall far short of the level of accountability provided in previous confirmation proceedings. In the case of President Trump's nomination of Judge Kavanaugh, the issues of concern are not abstract hypotheticals, but very rapidly approaching and real possibilities that have been taking shape over the past 19 months.

Indeed, in previous Supreme Court confirmation hearings, Senators have requested prospective justices to address their recusal position on specific issues and nominees have responded with direct answers on the record. Most recently, in 2010 Elena Kagan was asked by Senator Patrick Leahy (D-VT) to explain her approach to recusal. She did more than explain. She committed to particular recusals that she felt were clearly required by ethics standards and then went further to indicate a broader set of recusals she would make.

> Senator Leahy: Tell me about, what principles are you going to use to make recusal decisions? If you can, do it just briefly. But then tell us some of the cases...
>
> Kagan: Senator Leahy, I think certainly as I said, in that questionnaire answer, that I would recuse myself from any case in which I've been counsel of record at any stage of the proceedings, in which I've signed any kind of brief. And I think that there are probably about 10 cases. I haven't counted them up particularly. But I think that there are probably about 10 cases that are on the docket next year, in which that's true, in which I've been counsel of record on a petition for certiorari or some other kind of pleading.
>
> So that's a flat rule. In addition to that, I said to you on that questionnaire that I would recuse myself in any case in which I've played any kind of substantial role in the process. I think that that would include – I'm going to be a little bit hesitant about this, because one of the things I would want to do is talk to my colleagues...But I think that that would include any case in which I've officially, formally approved something. So one of the things that the solicitor general does is approve appeals or approve amicus briefs to be filed, in lower courts, or approve interventions.[123]

conflict of interest at crux of Supreme Court case, *Los Angeles Times*, Feb. 23, 2009, *available at* http://articles.latimes.com/2009/feb/23/nation/na-scotus-biased23.

[123] Video: Kagan Confirmation Hearing, Day 2, Part 1, *C-SPAN*, Jun. 29, 2010, *available at* https://www.c-span.org/video/?294264-2/kagan-confirmation-hearing-day-2-part-1.

In addition during his confirmation hearings in 1994, Judge Stephen Breyer promised to recuse himself from cases involving a business he had substantial investments in. He also engaged in a colloquy about the matter with Senator Howard Metzenbaum (D-OH).[124]

D. Telling an Individual Senator a Recusal Position During Confirmation Hearings Is Not an Unethical Promise In Exchange For a Vote

It is entirely appropriate for Judge Kavanaugh to discuss recusal involving the specific question of cases involving President Trump's personal liability. In so doing he would not be committing unethically to vote one way or another on a substantive matter in order to obtain a Senator's favorable vote. He would simply be committing to recuse in matters involving the personal interests of the president whatever they may be—much as he might were he to commit to recuse on cases that directly involve a family member or a company in which he has specific identifiable financial holdings. For example, were Judge Kavanaugh to agree to recuse from all cases involving a company that he hypothetically had 25% of his life savings invested in, we would agree that this is simply his legally required answer to the question and not an attempt to curry favor. If, as we have argued, the standard for recusal at least in this particular case is abundantly clear, then Judge Kavanaugh's agreeing to recuse and follow the law cannot be fairly characterized a *quid pro quo* with a Senator, and the prior precedents we cite in Section IV.B above were not viewed that way by the nominees, by the Senators questioning them, or by observers.

Furthermore, it should be noted that recusal questions differ from those regarding the merits of specific substantive legal questions brought to the Supreme Court for resolution. Expecting Judge Kavanaugh to commit in advance to recusal in matters involving the fate of the Trump presidency bears no resemblance to expecting him to commit in advance to recusal in matters involving presidential power generally or matters involving culturally divisive issues of one sort or another. To be sure, asking for such a commitment is less ministerial or purely administrative than asking whether a prospective justice will support placing cameras in the Supreme Court, agree to implement anti-sexual harassment policies for Court employees, and the like, but it is on the clearly permissible side of whatever line one might draw between permissible and impermissible confirmation inquiries.

V. Conclusion

We began this paper by emphasizing the need for a pause in proceedings on President Trump's nomination of Judge Kavanaugh to the Supreme Court. We have explained why the law of recusal, and the need for an examination of the application of that law to Judge Kavanaugh's prospective service, further supports the necessity for a hiatus at this time. We are advocating this approach so that recusal issues can be properly explored and relevant documents produced to enable deliberation in a manner commensurate with the seriousness of the circumstances of this nomination.

The insistence on moving forward at this juncture threatens great damage to our constitutional system of checks and balances. With this nomination, a president with increasing personal legal exposure has chosen a potential judge for his own legal proceedings who appears to adhere to positions on presidential power and immunities that would insulate the president from

[124] Nomination of Steven G. Breyer to Be an Associate Justice of the Supreme Court of the United States, *U.S. Senate Committee on the Judiciary*, at 22, 310-311, Jul. 12-15, 1994, *available at* https://www.loc.gov/law/find/nominations/breyer/hearing.pdf.

accountability. In this extraordinary set of circumstances, it is imperative that the Senate take the time to address the myriad of questions swirling around Judge Kavanaugh's recusal. Nothing less is required by the exercise of its Constitutional advice and consent oversight of presidential nominations.