

Breaking US News and Analysis: William Barr Will be a Loyal Foot Soldier in King Trump's Army

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Region: [USA](#)

Theme: [History](#)

At his attorney general confirmation hearing, William Barr sought to [reassure](#) senators on the Judiciary Committee that Robert Mueller's probe would be allowed to continue, saying, "I believe it is vitally important that the Special Counsel be allowed to complete his investigation."

But Barr, who champions a disturbing radical right-wing theory of all-encompassing presidential power called the "unitary executive," refused to say whether Congress would see Mueller's report when his investigation is complete, instead pledging only to provide a summary of it.

Federal regulations do not prohibit the release of the special counsel's report to Congress or the public. They simply [state](#) that,

"At the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel."

What the attorney general does with the report is up to him.

Professor Neil J. Kinkopf, who testified at Barr's confirmation hearing, [predicts](#) that,

"Barr will take the position that any discussion or release of the Mueller report — relating to the president, who again cannot be indicted — would be improper and prohibited by [Department of Justice] policy and regulations."

Kinkopf [noted](#) that in 1989, Barr opposed legislation requiring executive officials to submit concurrent reports to Congress. Barr claimed they "prevented the President from exercising his constitutionally guaranteed right of supervision and control over executive branch officials," infringing "on the President's authority as head of a unitary executive to control the presentation of the executive branch's views to Congress."

The Justice Department's Office of Legal Counsel has twice determined that a sitting president can't be indicted. Although Barr admitted he hadn't read those opinions in a long time, he told senators he saw no reason to reverse them.

During both the [Richard Nixon](#) and [Bill Clinton](#) administrations, the Office of Legal Counsel took the position that sitting presidents are immune from criminal prosecution for policy — if not for constitutional — reasons.

But Watergate Special Prosecutor Leon Jaworski's office [concluded](#) that "the Framers did not specifically provide for Presidential immunity from indictment." Further, a 1998 [memo from independent counsel Kenneth Starr's investigation of Clinton](#) resolved that a president could be indicted for criminal activity: "It is proper, constitutional, and legal for a federal grand jury to indict a sitting president for serious criminal acts that are not part of, and are contrary to, the president's official duties. In this country, no one, even President Clinton, is above the law."

Barr's Memo Criticizing the Mueller Probe

Barr likely came to Trump's attention after writing an unsolicited 19-page [memo](#) in June 2018, criticizing the Mueller probe and claiming the president has total control over the executive branch. In it, Barr maintained the president has authority over all law enforcement, including matters involving his own conduct and those in which he has a personal stake.

That theory likely endeared Barr to Trump, who fired former Attorney General Jeff Sessions for recusing himself from the Russia investigation. Trump wants an attorney general who will have his back.

In his memo, Barr [wrote](#),

"Mueller should not be permitted to demand that the President submit to interrogation about alleged obstruction [of justice]." Although he has not been privy to the details of Mueller's investigation, Barr opined, "Mueller's obstruction theory is fatally misconceived."

Trump cannot be guilty of obstruction of justice, in Barr's opinion, unless Trump and his campaign are guilty of collusion. "Mueller should not be permitted to interrogate the President about obstruction until [he] has enough evidence to establish collusion," Barr wrote. He denies that Trump's firing of former FBI Director James Comey after suggesting that Comey should "let" the investigation of former National Security Adviser Michael Flynn "go" constitutes obstruction of justice.

Barr's memo demonstrates he has prejudged Mueller's case against Trump and found it wanting — without even knowing what it is. Barr assumes the Comey-Flynn matter is all that Mueller has against Trump.

In his memo, Barr writes that subornation of perjury (causing a witness to lie under oath), knowingly destroying or altering evidence, inducing a witness to change testimony, or committing any act deliberately impairing the integrity or availability of evidence could establish obstruction of justice. But Barr notes, "as far as I know," the president isn't being accused of that.

The Unitary Executive Theory of Total Presidential Power

Barr wrote in his [memo](#),

Constitutionally, it is wrong to conceive of the President as simply the highest officer within the Executive branch hierarchy. He alone is the Executive branch.

As such, he is the sole repository of all executive powers conferred by the Constitution.

The unitary executive scheme claims to emanate from Article II of the Constitution, which states, “The executive power shall be vested in a President of the United States of America.” [Proponents of the unitary executive say](#) that Article II establishes a “hierarchical, unified executive department under the direct control of the President” who “alone possesses *all* of the executive power and ... therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.”

The ramifications of this philosophy are frightening. Barr [wrote](#) that the president “has illimitable discretion to remove principal officers carrying out his Executive functions.”

Kinkopf has [said](#) that Barr’s “manifesto of imperial power” threatens the independence of federal agencies, including the Federal Communications Commission and the Federal Trade Commission. If Trump demands the chairman of the Federal Reserve raise interest rates (or not) and he refuses, Kinkopf [testified](#), Trump could fire him under Barr’s regime.

But, Kinkopf notes, the Supreme Court has rejected this theory in every case, beginning with [Humphrey’s Executor v. United States](#) in 1935. That case determined that a president can’t remove an appointee to a regulatory agency except for reasons Congress has established.

Trump lawyer Marc Kasowitz [wrote in a confidential memo](#) to Mueller on June 23, 2017, that “the President also possesses the indisputable authority to direct that any executive branch investigation be open or closed because the Constitution provides for a unitary executive with all executive power resting with the President.” Kasowitz was warning Mueller that Trump could fire the special counsel and end his investigation whenever he liked.

But in [Morrison v. Olson](#), the Supreme Court upheld congressional limitations on the president’s power to fire subordinate officers. In that case, the high court analyzed the attorney general’s ability to dismiss the independent counsel, holding that the president does not necessarily have the power to direct inferior officers’ interpretations of the law.

Although the unitary executive theory has not gained traction in mainstream legal circles, at least three current Supreme Court justices adhere to it.

In 2000, Justice Samuel Alito told the conservative Federalist Society that the Constitution “makes the president the head of the executive branch, but it does more than that. The president has not just some executive powers, but the executive power — the whole thing.” Justice Clarence Thomas used the phrase “unitary executive” in his dissent in *Hamdi v. Rumsfeld*, a case in which the high court upheld due process rights for US citizens held as enemy combatants. Lastly, newly minted Justice [Brett Kavanaugh](#) is a proponent of the unitary executive.

After 9/11, George W. Bush’s legal mercenary John Yoo saw to it that his boss included the words “unitary executive” in several of his signing statements, which purported to limit the parameters of congressional statutes. Yoo [made the astounding claim](#) that a president could legally crush the testicles of the child of a person under interrogation, notwithstanding US laws categorically prohibiting torture.

Barr Advocated Cruel Treatment During the Bush Administration

Barr's views on torture and cruel treatment are also alarming. In 2005, he took the [position](#) that detainees in the war on terror were not protected by the Geneva Convention's prohibitions on torture and cruel treatment. He further advocated the use of military commissions, which provide a reduced form of due process, to try war crimes at Guantánamo.

The following year, in [Hamdan v. Rumsfeld](#), the Supreme Court struck down the military commissions because their procedures did not comply with the Geneva Conventions and the Uniform Code of Military Justice. The Court ruled that members of al-Qaeda are entitled to the protections of Geneva's [Common Article 3](#), which outlaws torture, cruel treatment and outrages upon personal dignity, in particular humiliating and degrading treatment.

Barr had [advocated](#) "coercive interrogation, applying pain, discomfort and other things to make people talk, as long as it doesn't cross the line and involve the gratuitous barbarity that's involved in torture."

But when [queried](#) at his hearing by Sen. Dianne Feinstein (D-California) about whether waterboarding constitutes torture, Barr demurred. Waterboarding, which [Trump favors](#), has long been considered torture, a war crime. In fact, after World War II, the United States tried, convicted and hanged Japanese leaders for the war crime of torture based on waterboarding.

"William Barr's view of the Constitution exalts presidential power, ignores Congress's legitimate legislative powers, and minimizes the role of the judiciary," Kinkopf stated in his [written testimony](#). "What remains is an executive power of breathtaking scope, subject to negligible limits. This is not the presidency our founders contemplated; this is not the presidency our Constitution meant to embody."

The Senate should reject Barr's nomination for attorney general. His long-standing commitment to the dangerous unitary executive theory may well lead him to support unfettered power by Trump. That is intolerable.

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