

# “YOU’RE FIRED”: CRIMINAL USE OF PRESIDENTIAL REMOVAL POWER

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*If Donald Trump wins the 2024 election, his first order of business would be to use his power as president to halt the criminal investigations against him. In the case of federal indictments, he would likely begin by removing the special counsel, and then proceeding to remove anyone else who had control over the investigations or prosecutions. Such removal would likely constitute the crime of obstruction of justice. May a President do this?*

*This Article addresses a narrow but critically important aspect of presidential authority: the intersection between the President’s power to remove executive branch officers and criminal laws that are generally applicable to both officeholders and non-officeholders alike. The Article asks whether a President can freely exercise his removal power under Article II, even when in so doing he commits a crime.*

*The core case is the situation described above, namely that of a President under investigation who exercises his removal power to fire the special counsel or federal prosecutor in charge of that investigation. Can the President be charged with obstruction of justice under such circumstances? Can the President remove an appointee who refuses to work on behalf of his reelection campaign, even though it is a crime for anyone—including a President—to order or coerce a federal employee to engage in partisan politics? Can a President remove Department of Justice officials who refuse to declare him the winner of a legally valid election he in fact lost? Can he remove military officers who refuse to obey illegal orders to seize ballot boxes to overturn the election, replacing them with officers who will? These are all felonies under federal law: obstruction of justice, coercion of political activity, using the military to interfere with federal elections, seditious conspiracy, and more. But a President who argues that he truly has unlimited power to remove federal officers will say that criminal statutes are subordinate to a President’s powers under Article II of the U.S. Constitution, and that this includes the power to fire federal officers who refuse to comply with his orders, including those conducting investigations into presidential misconduct. This Article examines the presumed theoretical and constitutional basis for such an expansive approach to presidential removal powers. It also addresses the separate but related question of whether a*

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*President's removal of a federal officer is void if the removal is performed in furtherance of a crime.*

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"If any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the law."

James Madison, 1789

"You're Fired"

Donald Trump, The Apprentice

## INTRODUCTION

In recent years, there has been a steady evolution in the understanding of presidential power among courts, public servants, legislators, and constitutional law experts in favor of the executive branch. In the early days of the republic, debate focused on issues like whether a new President must turn over a commission made by his immediate predecessor,<sup>1</sup> or whether customary international law should be used to tie the hands of the executive branch in war.<sup>2</sup> Both were live issues in the late eighteenth and early nineteenth centuries but have long since been resolved by Article III courts.<sup>3</sup> Today, by contrast, debates about presidential authority presuppose that the President is entitled to exercise extraordinary powers, both in and outside the context of war. From war powers to detainee treatment relating to torture<sup>4</sup> and indefinite detention,<sup>5</sup> to testimonial immunity,<sup>6</sup> executive privilege,<sup>7</sup> state

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1. *Marbury v. Madison*, 5 (1 Cranch) U.S. 137 (1803).

2. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

3. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Kavanaugh, J. concurring) (arguing customary international law is not applicable after *Erie* because there is no general federal common law).

4. See Letter from John C. Yoo, Deputy Assistant Att’y Gen., Off. of Legal Couns., U.S. Dep’t of Just., to Honorable Alberto R. Gonzales, Couns. to the President (Aug. 1, 2002) [hereinafter Yoo Letter], <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf> [<https://perma.cc/KA5L-QC4H>] (opining that interrogation methods used on al Qaeda operatives that do not violate the United States federal torture prohibition would also not violate international obligations under the Torture Convention or create a basis for prosecution by the ICC under the Rome Statute).

5. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that prisoners held in Guantanamo Bay, Cuba had a constitutional right to the writ of habeas corpus and that the Military Commissions Act of 2006 unconstitutionally suspended that right). Now, over twenty years after 9-11, over the terms of four Presidents, legal questions surrounding indefinite detention remain unresolved. See CTR. FOR ETHICS AND RULE L. AT U. PA, *BEYOND GUANTANAMO: RESTORING THE RULE OF LAW TO THE LAW OF WAR* (2022), <https://www.penncerl.org/wp-content/uploads/2022/09/Beyond-Guantanamo-Restoring-the-Rule-of-Law-to-the-Law-of-War.pdf> [<https://perma.cc/JAP8-KX62>].

6. See *Testimonial Immunity Before Cong. of the Former Couns. to the President*, 43 Op. O.L.C., 2019 WL 2315338, at \*1 (May 20, 2019) (slip opinion) (“Because Congress may not constitutionally compel the former Counsel to testify about his official duties, he may not be civilly or criminally penalized for following a presidential directive not to appear.”).

7. See *Assertion of Exec. Privilege Concerning the Dismissal and Replacement of U.S. Atty’s*, 31 Op. O.L.C. 1, 1 (2007) [hereinafter *The Bush OLC Memo*] (“Executive privilege may properly be asserted over the documents and testimony concerning the dismissal and replacement of U.S. Attorneys that have been subpoenaed by congressional committees.”); *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 758–59, 767 (1982) (documenting refusals by Presidents Jackson, Tyler, and Cleveland to provide information related to decision to remove Executive Branch officials, including a U.S.

secrets<sup>8</sup> and classification, presidential control over the vast array of administrative agencies,<sup>9</sup> emergency powers,<sup>10</sup> immigration,<sup>11</sup> and more; U.S. constitutional jurisprudence increasingly favors empowering the executive branch, specifically the President, over Congress or Article III courts.

Indeed, at no point since Watergate has the need for clarification surrounding presidential authority and its relationship to congressional delegation been greater. The country is currently struggling with sweeping claims of presidential privilege asserted by a former President and presidential candidate who himself is under criminal indictment and ongoing criminal investigation in multiple jurisdictions. Two such investigations, as of the time of this writing, have ripened into a criminal indictments, and a third is likely to follow shortly. Questions such as whether a former President can assert executive privilege over

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Attorney). The Bush OLC Memo related to the subject of this Article, use of the President's removal power, and arguably with the core subject of this Article, criminality, because Members of Congress in issuing the subpoena alleged that Administration officials had lied to Congress about the reasons for removing the U.S. Attorneys.

8. *United States v. Zubaydah*, 595 U.S. \_\_\_, 142 S. Ct. 959 (2022) (refusing to order release of U.S. "state secrets" concerning CIA torture sites in Poland to facilitate a related criminal investigation in Poland). One of the authors of this Article has strongly criticized the majority opinion in *Zubaydah*. See Claire O. Finkelstein, *How the State Secrets Doctrine Undermines Democracy*, BLOOMBERG L. (Mar. 28, 2022, 4:00 AM). <https://news.bloomberglaw.com/us-law-week/how-the-state-secrets-doctrine-undermines-democracy> [<https://perma.cc/9V3N-W23J>].

9. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing examples of tightening presidential control over executive branch agencies during the Clinton Administration).

10. President Trump, for example, used emergency powers to circumvent Congress' refusal to fund his border wall. See Memorandum from Donald J. Trump, Pres. of the U.S., to the Sec'y of Def., the Att'y Gen., and the Sec'y of Homeland Sec. (Apr. 4, 2018), [<https://perma.cc/9PVK-ZJ78>]. And President Biden recently used emergency powers, afforded to him under the post-9/11 2003 HEROES Act, to forgive billions in student loans in 2022. See *Biden v. Nebraska*, 600 U.S. \_\_ (2023) (holding that the Secretary of Education does not have authority under the HEROES Act to establish a student loan forgiveness program cancelling roughly \$430 billion in debt principal). President Biden's executive order is grounded in a 2003 statute that gives the President broad powers in an emergency, coupled with President Trump's still-in-effect declaration of an emergency in the COVID-19 pandemic. See *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, 46 Op. O.L.C. 2022 WL 3975075, at \*1 (Aug. 23, 2022) (slip opinion) ("The Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003) (codified at 20 U.S.C. §§ 1098aa–1098ee) ('HEROES Act of 2003,' or 'HEROES Act'), vests the Secretary of Education ('Secretary') with expansive authority to alleviate the hardship that federal student loan recipients may suffer as a result of national emergencies.").

11. See Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [<https://perma.cc/9VDN-UHGM>].

documents created during his tenure in office, or claim the right to block the testimony of others or resist subpoenas himself on grounds of prior testimonial immunity, drive the point home: executive privilege attaches to the current occupant of the Oval Office and to him alone. An expanding doctrine of presidential privilege for *former*, as opposed to *current*, Presidents raises a significant number of complex legal and political issues, ones courts are often ill-equipped to address. In recent years, it has become increasingly clear that the unwritten, judge-made concept of presidential privilege has evolved in ways that would have alarmed the framers. The untethered drift of a number of concepts related to presidential power now poses a profound risk to the stability of the rule of law and the integrity of democratic governance in the United States.

In addition to privilege, other areas of presidential power raise similar concerns. For example, since the 9/11 attacks, the sweeping exercise of presidential war powers has increasingly caused alarm among commentators. Yet there are at present no serious attempts to impose limits on presidential war powers. Prior law reform efforts, such as the 1973 War Powers Resolution, have failed to clarify the relationship between the U.S. Congress and the President, and Presidents continue to feel free to ignore congressional constraints in the domain of war. Presidential unilateral action in war has received support from the Office of Legal Counsel (OLC), which recognizes few to no limits on presidential war powers under the U.S. Constitution. In turn, Congress has colluded in the degradation of its own authority with remarkable alacrity, rarely objecting to presidential assertions of Article II war powers and readily providing monetary support for military action initiated without congressional approval, even in cases in which the President has ignored congressionally imposed limits.

Other domains, such as emergency powers and the state secrets doctrine are undergoing similar upheaval. As the Supreme Court made clear in a recent case involving state secrets, courts display increasingly broad deference to the executive branch in matters of governmental secrecy, demanding little by way of explanation from the DOJ in cases in which the administration chooses to assert the privilege.<sup>12</sup>

One area, however, has flown somewhat under the radar screen, yet it plays an outsized role in the exercise of presidential power: the President's ability to remove or order the removal of subordinate executive branch officials.<sup>13</sup> Despite the fact that the Senate plays an

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12. See generally Finkelstein, *supra* note 8.

13. Presidents have the power to remove officers appointed by the President with or without cause, subject to the few statutory restrictions on presidential removal that

important role in executive branch appointments by way of confirmation, it was settled early in U.S. history that the Senate does not need to be consulted on removals.<sup>14</sup> A President's ability to remove executive branch officers thus resides solely within the purview of the President and his appointees. As such, presidential removal power has critical implications for separation of powers and the rule of law. It can serve as an important means of ensuring the coordination and effectiveness of the executive branch, but it can also serve as a means of coercion and a method for forcing others to participate in corrupt or illegal activities. Whether for good or for ill, removal is a critical tool for the consolidation of executive branch power.

The true extent of presidential removal powers would likely be put to the test were Donald Trump to win the 2024 presidential election, assuming that he was either still under indictment, under investigation, or had been found guilty of federal crimes. For it would then be available to him, as head of the executive branch, to remove or threaten to remove any federal official attempting to hold him accountable, and thus permit Trump to bring any federal criminal justice process to a halt merely by exercising the power of removal. Yet removing a federal official for the sole purpose of avoiding accountability would arguably constitute obstruction of justice. A Trump second term, then, would likely present the clearest clash between presidential removal power and the authority of the other two branches to create and enforce federal criminal law.

Part II of this Article provides a brief history of the debate over presidential removal power, discussing some of the better-known scenarios where removal has been used. Part III delves into commentary and caselaw on removal power, first focusing on removal of a federal officer for policy or political reasons, and then distinguishing situa-

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have been upheld by the courts. See discussion of *Humphrey's Executer*, *infra* Part III. Many inferior officers are protected by civil service laws. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); Act to Regulate and Improve the Civil Service of the United States, ch. 27, 22 stat. 403 (1883). Others such as political appointees are not afforded job protection and can be removed by agency heads who may remove an officer of their own accord or upon orders from the President, for example the 1973 firing of Special Prosecutor Archibald Cox by Acting Attorney General Robert Bork upon orders from President Nixon, discussed *infra* Part IV of this Article.

14. See 1 ANNALS OF CONG. 499-507 (1789) [hereinafter Madison Speech] (testimony of James Madison). The speech pertained to a bill that provided that the secretary to the department of foreign affairs would be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President. The view to which he was responding was that the Senate ought to play a role in removal decisions, given that they played a role in the appointment decision.

tions where a President removes a federal officer for the purpose of committing or assisting in the commission of a crime. Part IV addresses the situation imagined in a Trump second term above, namely the removal of a federal officer in order to commit the particular crime of obstruction. Part V discusses removal conducted for the purpose of coercing federal officers to engage in partisan political activity in violation of the criminal provisions of the Hatch Act. Part VI turns to even more dangerous situations where removal power is used to overturn the results of a legally valid election as part of a seditious conspiracy or insurrection. Part VII turns to the difficult question of whether the criminality of an act of presidential removal makes the removal itself void. If President Donald Trump had fired Special Counsel Robert Mueller, for example, for the purpose of avoiding an investigation, would the fact that Trump had used his removal power to commit the crime of obstruction mean that the removal had no legal effect? Would Mueller still have been special counsel under those circumstances?

## I.

### THE PROBLEM OF PRESIDENTIAL REMOVAL POWER

The Constitution does not expressly address the power of the President to remove executive branch officers, and it is ambiguous about the broader separation of powers issues at stake. Contemporary sources typically view presidential removal power as flowing from the Vesting Clause,<sup>15</sup> although the Take Care Clause<sup>16</sup> is also interpreted as a foundation for presidential removal. In the absence of specific constitutional guidance on presidential removal, debates over its scope tend to fall back on broad principles of constitutional structure, rather than turning on specific sources of law. There is a general consensus that the President has broad removal powers under these provisions. However, the margins of that power are subject to continuing debate, with arguments centering on Congress' ability to limit the President's prerogative over the removal of executive branch officials. A critical question that arises is whether Congress has the right to create agen-

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15. U.S. CONST. art. 2, § 1, cl. 1 (stating that the executive power shall be vested in a President of the United States of America); *see also* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. \_\_\_, 140 S. Ct. 2183, 2205 (2020) (“[A]s we have explained many times before, the President’s removal power stems from Article II’s vesting of the ‘executive power’ in the President.”); *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

16. U.S. CONST. art. 2, § 3, cl. 1 (stating that the President shall “take care that the laws be faithfully executed.”); *see Seila Law*, 140 S. Ct. at 2191 (“Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”).

cies whose heads cannot be removed by the President except for cause.

The Supreme Court considered such a case in 2020 in *Seila Law v. Consumer Finance Protection Bureau*,<sup>17</sup> in which the Supreme Court struck down a statutory provision sharply limiting the President's ability to remove the head of the Consumer Finance Protection Bureau (CFPB). The majority opinion, written by Chief Justice John Roberts, concluded that the provision in the CFPB statute limiting the President's removal power was unconstitutional.<sup>18</sup> As Chief Justice Roberts wrote, quoting the brief of *amicus curiae* in *Seila Law*: "It is true that 'there is no 'removal clause' in the Constitution,' but neither is there a 'separation of powers clause' or a 'federalism clause.'"<sup>19</sup> And as Justice Elena Kagan asked in her dissent in that same case: "What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.)"<sup>20</sup> Presidential removal is highly subject to interpretation. Since the power must be inferred from the broad language of Article II along with more general principles pertaining to presidential authority, there is no clear legal standard by which to assess the collision that can occur between presidential removal power and other federal law.

This Article addresses an even more fundamental question about presidential removal power, namely whether a President forfeits or is otherwise limited in his removal power when he uses it to further a criminal enterprise or aim. This question is orthogonal to the issue the Court addressed in *Seila Law* and may seem to be simply a common-sense limitation on presidential removal on which all sides of the CFPB debate could agree. Yet there is an extreme interpretation of Article II that rejects it. According to proponents of a certain version of the so-called "unitary executive theory," the President's constitutional removal power is unlimited, and in particular, being constitutional in nature, presidential removal cannot be limited by ordinary statute. It follows that the President cannot violate the law when he removes an executive branch official from office, not because the President is constrained by ordinary criminal law, but because if the President does it, the conduct cannot be criminal. Reminiscent of President Richard Nixon's comment in his famous interviews with journal-

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17. *Seila Law*, 140 S. Ct. at 2183.

18. *Id.*

19. *Id.* at 2205.

20. *Id.* (Kagan, J., concurring in the judgment and dissenting in part).



ist David Frost, "if the President does it, it's not a crime,"<sup>21</sup> some proponents of the unitary executive theory take the position that a criminal statute that conflicts with inherent Article II powers is necessarily unconstitutional if it cannot be construed in a way that eliminates the conflict.<sup>22</sup> As applied to presidential removal power, this view would maintain that obstruction laws do not apply to the President when he exercises his Article II powers of removal.

Consider how this applies to the debate about the legal posture of Donald Trump's removal in 2017 of James Comey, the then Director of the FBI who was engaged in an investigation of the President and his 2016 campaign's contacts with Russia.<sup>23</sup> Since the most robust version of presidential removal power states that the President can re-

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21. David Frost, Interview with Richard Nixon (1977), <https://www.congress.gov/116/meeting/house/110331/documents/HMKP-116-JU00-20191211-SD408.pdf> [<https://perma.cc/3BMB-J3PV>]; *Transcript of Frost's Television Interview*, N.Y. TIMES (May 5, 1977), <https://www.nytimes.com/1977/05/05/archives/transcript-of-frosts-television-interview-with-nixon-about.html> [<https://perma.cc/DP5N-3YEN>].

22. In a memorandum signed by Jay Bybee, but substantially written by OLC attorney John Yoo, the Department of Justice adopted the extreme position that if the federal torture statute constrained the President's Commander in Chief authority by conflicting with his right to make determinations regarding effective interrogation, the federal statute itself would be unconstitutional. Memorandum from Off. of the Assistant Att'y Gen. to Alberto R. Gonzales, Couns. to the President (Aug. 1, 2002) (on file with George Washington University Archives). As discussed *infra*, text accompanying notes 32–33, a similar argument could be made regarding presidential removal power and federal crimes such as obstruction. *See also* Memorandum from John Yoo, Deputy Assistant Att'y Gen. to William J. Haynes II, Gen. Couns., Dep't of Def. (Mar. 14, 2003) (on file with the American Civil Liberties Union) [hereinafter *Torture Memos*], [https://www.aclu.org/sites/default/files/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/yoo_army_torture_memo.pdf) [<https://perma.cc/8SFW-HFDA>].

23. Michael D. Shear, Jennifer Steinhauer & Matt Flegenheimer, *Sense of Crisis Deepens as Trump Defends F.B.I. Firing*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/us/politics/trump-comey-firing.html> [<https://perma.cc/2W6A-39H7>] ("On Capitol Hill, at least a half-dozen Republicans broke with their leadership to express concern or dismay about the firing of James B. Comey, who was four years into a decade-long appointment as the bureau's director. Still, they stopped well short of joining Democrats' call for a special prosecutor to lead the continuing investigation of Russian contacts with Mr. Trump's aides."). Privately, some of these Congressional Republicans may have sent a different message to the White House and the DOJ. In any event Special Counsel Robert Mueller was appointed soon thereafter. Press Release, U.S. Dep't of Just., Appointment of Special Counsel (May 17, 2017), <https://www.justice.gov/opa/pr/appointment-special-counsel> [<https://perma.cc/X49T-R5HH>]. In some ways, the political reaction to the 2017 Comey firing resembled the reaction to Nixon's firing of special counsel Archibald Cox in 1973 and DOJ's subsequent appointment of Leon Jaworski as Cox's replacement under considerable pressure from Congress, discussed in Part IV *infra*. In other respects, the 2017–19 scenario played out differently than in 1973–74 because Mueller was himself constantly threatened with removal. Toward the end of the investigation, Mueller was overseen by Trump's new Attorney General William Barr, who replaced Attorney General Jeff Sessions.

move any political appointee in the executive branch for any reason or for no reason at all,<sup>24</sup> strong proponents of the unitary executive theory will argue that the President had every right to remove Comey, regardless of his motivations. On a more limited view of presidential removal powers, however, this exercise of presidential removal would be impermissible if the motive for the firing was to interfere with an investigation, since removal under these circumstances would constitute obstruction. On the former view, then, federal obstruction law does not limit the President's removal powers under Article II, while on the latter view it does. Which view is correct?

The Supreme Court's endorsement in *Seila Law* of broad powers of the unitary executive and the extensive nature of presidential removal powers does not suffice to answer the question of whether a President's Article II removal power shields the President from ordinary criminal laws. Few commentators would overtly endorse the Nixonian view of privilege. However, that position reasserts itself in the context of the doctrine of constitutional avoidance as applied to removal: if the President has unfettered removal powers within the executive branch, obstruction rules must contain an exception for removal, even when the removal is part of a broader pattern of criminal conduct to cover up wrongdoing. On this view, though firing Comey may technically have been obstruction, obstruction laws are interpreted not to apply to the President when he exercises his removal powers, given the breadth of the entitlement Article II provides. However, on a more moderate view—a view this Article defends—the Constitutional arguments in support of presidential removal power do not exempt the President from the reach of ordinary criminal statutes.

Criminal use of removal power has arisen several times in recent memory. Consider, for example, the firing of Watergate Special Prosecutor Archibald Cox by President Nixon in 1973. This move on Nixon's part sparked a national outcry and calls for DOJ reform. The matter came up again not only with Comey's firing, but also when Trump threatened to fire Robert Mueller in 2017 and 2018. Does the President have the right to fire a special counsel investigating him or his administration, when 1) it is clear the President is doing so for the purpose of preventing public scrutiny of his own wrongdoing, and 2)

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24. See *supra* note 13 and accompanying text. See also *infra* Part IV (discussing the position taken by professors Akhil Amar and Alan Dershowitz on Trump's constitutional right to remove Mueller).

the removal would otherwise constitute obstruction of justice under federal law?<sup>25</sup>

The question has also arisen in recent memory regarding a President who wanted to fire the acting attorney general in order to install a loyalist who would support his campaign to reverse the results of a presidential election.<sup>26</sup> Here removal powers are pitted against a different set of federal laws—those relating to the peaceful transition of power and the election rules set out by the Constitution, as well as by state and federal law. Will proponents of the unitary executive theory defend the President's removal power when a President fires an attorney general as part of a plan to overthrow the U.S. government? Will they argue that general laws relating to criminal sedition and insurrection take a backseat to a non-enumerated Article II power, even when the exercise of the power forms part of a widespread criminal conspiracy to undermine the government? Or would the doctrine of constitutional avoidance suggest that the various substantive criminal laws in question must not be construed in a way that limits the President's power to remove an executive branch officer?

Although this Article will limit its focus to conflicts between presidential removal and criminal statutes, parallel questions arise about other instances in which presidential privileges or powers conflict with criminal statutes. Consider, for example, the tension between claimed presidential privilege and obstruction laws that came to the fore during the search of the former President's home at Mar-a-Lago.<sup>27</sup> The FBI affidavit and additional filings reveal that the gov-

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25. See *infra* Part IV for a discussion of whether removal of federal officers could violate the obstruction of justice statute; see also *Special Counsels and the Separation of Powers, Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 1–2 (2017) [hereinafter Amar Testimony] (statement of Akhil Reed Amar, Sterling Professor of L. and Pol. Sci., Yale L. Sch.) (opining that Trump had the right to fire Special Counsel Mueller under constitutional removal power but not discussing whether this would violate the obstruction of justice statute).

26. *Here's Every Word From the Fifth Jan. 6 Committee Hearing on Its Investigation*, NAT'L PUB. RADIO (June 23, 2022), <https://www.npr.org/2022/06/23/1106700800/jan-6-committee-hearing-transcript> [<https://perma.cc/J2RK-SCC9>] (transcript of the Hearing Before the H. Select Comm. Investigating the Jan. 6 Capitol Attack, 117th Cong. (2022)) (describing President Trump's efforts to coerce the Justice Department to declare the 2020 election invalid (testimony of Jeffrey Rosen, Former Acting Att'y Gen.; Richard Donoghue, Principal Associate Deputy Att'y Gen.; Steven Engel, Assistant Att'y Gen.)).

27. See Aruna Viswanatha, *Mar-a-Lago Search Turned Up Potentially Privileged Documents, DOJ Says*, WALL ST. J. (Aug. 29, 2022), <https://www.wsj.com/articles/some-attorney-client-protected-documents-found-in-mar-a-lago-search-justice-department-says-11661788066> [<https://perma.cc/CZG6-UNRT>]. Additional evidence of obstruction came to light in early 2023. Devlin Barrett, Josh Dawsey, & Perry Stein, *Justice Department Said to Have More Evidence of Possible Trump Obstruc-*

ernment was not only concerned about improper handling of highly classified material, but that they were also focused on a possible violation of federal obstruction laws with regard to interactions with the Department following the subpoena issued to recover the documents.<sup>28</sup> According to a DOJ filing on August 30, 2022, and a criminal indictment filed by the DOJ against the former President on June 8, 2023, he concealed or removed documents from a Mar-a-Lago storage area to obstruct the investigation.<sup>29</sup> Trump has claimed that his removal of the documents from the White House upon leaving office was privileged, and that therefore his refusal to surrender them after leaving office could not be a crime.<sup>30</sup> But government documents, whether classified or not, are the property of the United States and must be handled according to generally applicable statutes and regulations. Mar-A-Lago is not a presidential library and the safe in Donald Trump's bathroom is not a Sensitive Compartmented Information Facility (SCIF).<sup>31</sup> While other Presidents and Vice Presidents have left office with classified documents, for example former Vice President and now President Joe Biden and former Vice President Mike Pence and perhaps others,<sup>32</sup> Trump alone refused to return them when re-

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*tion at Mar-a-Lago*, WASH. POST (Apr. 2, 2023), <https://www.washingtonpost.com/national-security/2023/04/02/trump-mar-a-lago-obstruction-classified/>[<https://perma.cc/33KB-RLMR>].

28. Charlie Savage, *The Affidavit for the Search of Trump's Home Annotated*, N.Y. TIMES (Aug. 26, 2022), <https://www.nytimes.com/interactive/2022/08/26/us/trump-search-affidavit-release.html> [<https://perma.cc/PDQ6-CP57>].

29. United States' Response to Motion for Judicial Oversight and Additional Relief at 10, *Trump v. United States*, 2022 WL 4015755, No. 22-CV-81294 (S.D. Fla. Sept. 5, 2022), *vacated*, 54 F.4th 689 (11th Cir. 2022) (alleging that documents were "likely concealed and removed" from a Mar-a-Lago storage area in an effort to "obstruct" the FBI and DOJ investigation into Trump's mishandling of classified documents).

30. See Byron Tau, *Trump Lays Out Executive-Privilege Claims on Mar-a-Lago Documents*, WALL ST. J. (Nov. 14, 2022), <https://www.wsj.com/articles/trump-lays-out-executive-privilege-claims-on-mar-a-lago-documents-11668449766> [<https://perma.cc/P2BC-UH9E>].

31. See, e.g., DAVID R. SHEDD, OFF. OF THE DIR. OF NAT'L INTEL., ICS 705-1, PHYSICAL AND TECHNICAL SECURITY STANDARDS FOR SENSITIVE COMPARTMENTED INFORMATION FACILITIES (2010), <https://www.dni.gov/files/NCSC/documents/Regulations/ICS-705-1.pdf> [<https://perma.cc/CD5B-QTRJ>]; See Off. of the Dir. of Nat'l Intel., Sensitive Compartmented Information Facilities, ICD 705, (May 26, 2010), [https://www.dni.gov/files/documents/ICD/ICD\\_705\\_SCIFs.pdf](https://www.dni.gov/files/documents/ICD/ICD_705_SCIFs.pdf) [<https://perma.cc/63JG-S7LC>].

32. Glenn Thrush & Peter Baker, *National Archives Asks Ex-Presidents and Vice Presidents to Scour Their Files*, N.Y. TIMES (Jan. 26, 2023), <https://www.nytimes.com/2023/01/26/us/politics/presidents-classified-files-national-archives.html> [<https://perma.cc/7H9W-5BNQ>] (discussing the government's concern other former Presidents and Vice Presidents may be in possession of classified materials).

quested, and Trump alone appears to have acted from the motive of obstruction of justice.

There is an unfortunate precedent for the foregoing reasoning relating presidential Article II powers to federal criminal law, albeit in a completely different domain. As part of the justification for the use of torture on foreign belligerents captured during the war on terror, lawyers in the OLC issued a memorandum in which they argued, among other things, that Section 2340A of Title 18, the federal statute prohibiting the use of torture,<sup>33</sup> would be unconstitutional if it constrained the President's ability as Commander-in-Chief to authorize the use of any interrogation technique he deemed appropriate in times of war (the "torture memos").<sup>34</sup> Although the torture memos were withdrawn by the DOJ in 2009 with the incoming Obama Administration, this argument has inflicted lasting damage. This misguided handling of the clash between the President's inherent Article II powers and the ordinary criminal law created a weighty precedent, one that arguably set the stage for Presidents like Donald Trump to misuse the notion of presidential privilege.<sup>35</sup>

The view that inherent Article II power can by itself nullify federal legislation or that federal criminal laws must be interpreted in such a way as to exempt the President from their reach is nowhere supported by the text of the Constitution. Nor is there any support for such a view in the history of constitutional debate about presidential powers, or in the theory of democratic governance. Instead, it makes a great deal more sense of text, history, and the principles of a democracy to think that the framers saw the exercise of presidential powers as compatible with the treatment of the President as subject to ordinary law. The framers believed that a current President must obey the law along with everyone else. They also believed that a former President reverts fully to his ordinary, civilian status after he leaves federal office.

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33. 18 U.S.C. § 2340A.

34. See generally *Torture Memos*, *supra* note 22.

35. See Yoo Letter, *supra* note 4. Both authors of this Article have strongly criticized the Bush Administration Justice Department's approach to torture. See Claire Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. ONLINE 195 (2009); CLAIRE FINKELSTEIN & STEPHEN N. XENAKIS, *Repairing the Damage from Illegal Acts of State: The Costs of Failed Accountability in the U.S.*, in INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY (Steven Barela, Mark Fallon, Gloria Gaggioli & Jens David Ohlin eds., Oxford Univ. Press 2019); RICHARD W. PAINTER, *GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE*, at 129 (2009) (discussing illegality of the OLC torture memos).

These authors addressed the question of whether a sitting President can be indicted for a crime in a previous article—a question we previously answered in the affirmative despite longstanding DOJ policy to the contrary.<sup>36</sup> The concern of that article was not the nature of a President’s crime but whether a President can be indicted and even prosecuted for any crime at all while in office. This Article asks the further question of what happens if the President simply removes an official who is investigating him or threatens to prosecute any individual who attempts to hold him accountable. If the President’s inherent Article II powers extend so far that they enable Presidents to override duly enacted criminal laws, then the ability to indict a sitting President would make no difference since a President determined to commit a crime could protect himself by simply obstructing any investigation into his own wrongdoing. Moreover, many assertions of criminal obstruction could be countered by an assertion that the obstructive conduct was protected by the President’s Article II powers.

Note that on the expansive view of presidential removal powers, there would also be no remedy for such abuses of Article II power in criminal law even after the President left office, because it could be argued that the President did not commit a crime given that he was acting pursuant to his Article II powers. Removal power, on such an interpretation, would exempt the President from obstruction laws for firing those authorized to investigate him, including when they are investigating obstruction itself, as Robert Mueller did. The question of the President’s power to remove officials tasked with investigating him was addressed in Part II of the Mueller Report<sup>37</sup> and was the subject of sharp disagreement between Mueller and William Barr, who even before he became Trump’s Attorney General, insisted that the President could freely remove a DOJ official under any circumstances.<sup>38</sup> Trump once again asserted his right to remove federal officials who refused to go along with his plan to overturn the 2020 election when, as the United States House Select Committee on the January 6 Attack uncovered, Trump pressured the DOJ to announce that the election was fraudulent, threatened to remove acting Attorney General Jeff Rosen for refusing his request, and planned to replace

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36. Claire O. Finkelstein & Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity If He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93 (2022).

37. See *infra* Part IV.

38. See *infra* Part IV for a discussion of William Barr’s 2018 memorandum on “Mueller’s Obstruction Theory.”

him with Jeffrey Clark, who appeared all too eager to please the President.<sup>39</sup>

Even more frightening was Trump's plan to use the military to rerun the presidential election, according to which the Army was to seize the voting machines in order to repeat the vote. This dangerous and deranged plan was apparently the subject of a meeting in December 2020 in the Oval Office with Trump's inner circle, to which his own White House lawyers strenuously objected.<sup>40</sup> Trump never ultimately gave the order to the Department of Defense to proceed with this criminal plan, but if he had, and if he had simply removed and replaced anyone who refused to go along, how could he ever have been stopped?

## II.

### A BRIEF HISTORY OF PRESIDENTIAL REMOVAL

#### A. *The Constitution and Early History of Removal*

As discussed above, the question the Court confronted in *Seila Law* was whether Congress can restrict the power of the President to remove a federal officer at will, allowing removal of the officer only for cause or with the consent of one or more houses of Congress.<sup>41</sup> The Vesting Clause provides that "[t]he executive power shall be vested in a President of the United States," and this has generally been found to be the source of the view that the executive branch is "unitary" under the control of the President, even if eighteenth century usage of the word "vesting" may not have made that clear.<sup>42</sup> But the Vesting Clause does not define exactly what the executive power is and hence whether it encompasses the power of removal. Also, the question of the "unitary" nature of the executive branch and the question of the power of the President under Article II are not the same. As Michael McConnell has helpfully written about the concept of the uni-

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39. See *infra* Part VI.

40. Greg Walters, *Trump's White House Lawyer Thought Seizing Voting Machines was Unhinged*, VICE (July 12, 2022), <https://www.vice.com/en/article/y3pdey/pat-ci-pollone-jan-6-testimony-trump-voting-machines> [<https://perma.cc/US75-Q4R6>].

41. This question is generally understood to apply to principal federal officers appointed by the President and inferior federal officers who are political appointees without job protection. It generally does not refer to inferior officers who are protected in their positions by civil service laws. An absolutist view of the unitary executive might call into question the constitutionality of job protection in the civil service laws as well.

42. See Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022) (examining eighteenth-century usage and context of the words "vest" and "vesting" and finding that these terms did not connote exclusivity or indefeasibility or provide special constitutional status for official power).

tary executive in his recent book on presidential power, “[t]his term is often misunderstood to imply unlimited executive power, but unitary executive theory, properly understood, has nothing to do with the extent of executive branch authority. It simply means that whatever authority is vested in the executive branch is subject to the control of the President.”<sup>43</sup> It is also worth noting, as McConnell argues, that the word “all” does not appear before “executive power” in Article II’s Vesting Clause but does appear in Article I’s Vesting Clause (“All legislative Powers herein granted shall be vested in a Congress”).<sup>44</sup> Arguably, this textual difference provides a basis for rejecting the “unitary” nature of the executive branch and gives other executive branch officials a measure of independence.

Some commentators also see support for the unitary executive, and the removal power with it, in the Take Care Clause, which refers to both the “laws” and the fact that the President is responsible for making sure the laws are “faithfully” executed.<sup>45</sup> McConnell, for example, suggests that the duty on the part of the President to take care that the laws are faithfully executed implies the power to meet that duty.<sup>46</sup> Arguably the removal power is part of the story about how the President can satisfy that obligation. Other commentators, by contrast, see the Take Care Clause as cutting against broad removal power rather than in favor of it. They see the Take Care Clause as obligating the President to constrain the exercise of presidential powers to the four corners of the law and as requiring his fidelity to the Constitution rather than as a basis for exceeding it. On both views, the Take Care Clause provides a basis for thinking that presidential removal power must not contravene generally applicable criminal law.

As is so often the case, originalist methodology yields few results, though there are bits and pieces of evidence to suggest that the framers were divided along similar lines as modern scholars. Commentators who favor the unitary executive theory, for example, have made much of comments by James Madison, Fisher Ames, and others

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43. MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING*, at 341 (2020).

44. Shugerman, *supra* note 42, at 1488 (“Such modifiers suggest that by itself, “vest” was merely a basic delegation, but adding the word “all” in Article I may point to a more formal separation of legislative power than Article II’s separation of executive power.”)

45. See Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Penn L. Rev. (forthcoming 2023) (manuscript at 11, 14–15); see also Shugerman, *supra* note 42, at 1499.

46. MCCONNELL, *supra* note 43, at 343.



regarding the nature of the executive power of the President.<sup>47</sup> Such remarks are viewed as supporting the idea that the removal power stems from the very nature of presidential authority.<sup>48</sup> Indeed, at first glance even Madison appears to support the view that the President should have sole control over removals, despite Congress' role in appointments. Yet at the same time, Madison's suspicion of the strongest forms of unitary executive is apparent from Federalist No. 48 as well as from Federalist No. 51. In the former, Madison writes: "These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other," referring to the relationship between the executive and the legislative branches.<sup>49</sup> And in Federalist No. 51, he writes: "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments."<sup>50</sup>

As suggested above, commenters who take an expansive view of presidential removal power regard that power as constitutionally unlimited,<sup>51</sup> a view apparently embraced by the signatories of an *amicus* brief in *Seila Law*.<sup>52</sup> By contrast, those who disagree with this view of executive power see removal as limited precisely because it is incident to specific presidential duties delegated by Congress and protected by the President's power under the Take Care Clause. Taking a more functionalist view of the removal power, the latter side with the dissent in *Seila Law* and regard Congress' authority to limit presidential removal as a legitimate clarification of presidential authority over the relevant agency.<sup>53</sup>

Another source of originalist evidence lies in debates about whether Congress should have a say in the removal of federal officers,

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47. Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 *Cato Sup. Ct. Rev.* 157, 173-74 (2020).

48. *Id.*

49. THE FEDERALIST NO. 48 (James Madison).

50. *Id.*

51. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *CORNELL L. REV.* 1021 (2006). Prakash, however, distinguishes inferior executive officers from quasi-executive officers, where he takes the view that the Necessary and Proper Clause gives Congress the right to regulate the removal power in certain respects, such as establishing officers that are removable only for cause.

52. Brief for Separation of Powers Scholars as Amici Curiae Supporting Petitioner, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 59 U.S. \_\_\_, 140 S. Ct. 2183 (2020) (No. 19-7). The signatories to this *amicus* brief were Steven G. Calabresi, Michael W. McConnell, Saikrishna Prakash, Jeremy A. Rabkin, Michael D. Ramsey, Michael B. Rappaport, and Ilan Wurman.

53. One commentator has identified two different versions of the former view, which he calls the "Cross-Reference Theory" and the "Residual Theory." He refers to the latter view as the "Functionalist" view. See Wurman, *supra* note 47; see also Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 *YALE J.L. & HUMAN.* 125 (2022).

given that the Constitution gives Congress a role in confirming presidential appointments. Since the Senate must confirm high-level appointments to the executive branch, many in the early days of the republic believed that the President is obligated to consult the Senate prior to removal of a federal employee.<sup>54</sup> Alexander Hamilton, for example, wrote in Federalist No. 77 that “[t]he consent of [the Senate] would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices.”<sup>55</sup> Ironically, the framer who is most associated with strong executive power nevertheless argued for a limitation on presidential removal power that would be unheard of today. Constitutional historians debate whether Hamilton later changed his mind.<sup>56</sup>

This view did not prevail in Congress, at least since the First Congress in the “Decision of 1789,” in which Congress imposed no requirement that the President consult the Senate or any member of Congress before deciding to remove an executive branch official.<sup>57</sup> This decision by Congress was fortunate for the modern administrative state: given the many non-Senate confirmed officials that now occupy the executive branch, requiring Senate confirmation of removals would be wholly unworkable. Arguably, an echo of that view can be heard among opponents of the strong unitary executive theory, who point out that the power of the Senate to confirm presidential nominees, as well as the power of Congress to create executive branch offices, suggests a less than unitary executive in the first place. The argument, therefore, of those who seek to limit presidential removal powers is that the framers always intended that many of the powers of the executive branch be articulated through congressional acts, rather than through unilateral exercises of presidential authority without congressional involvement in laws passed by Congress.<sup>58</sup>

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54. James Madison responded to some of these arguments in his speech of June 1789. See Madison Speech, *supra* note 14; see also Shugerman, *supra* note 45 (manuscript at 45-49).

55. THE FEDERALIST NO. 77 (Alexander Hamilton).

56. Shugerman, *supra* note 45 (manuscript at 13, 42).

57. Wurman, *supra* note 47, at 173.

58. Arguably, the passive construction of the Take Care Clause supports this reasoning, since the clause suggests that the President has the power to ensure that *others* carry out the laws faithfully; not that he always carries them out himself. See McCONNELL, *supra* note 43, at 345. For this reason, McConnell says that the executive “is ultimately but not immediately unitary.” *Id.* at 342.

For this reason, some scholars, lawyers, and judges turn to deliberations in Congress after ratification of the Constitution, particularly in setting up the departments of Foreign Affairs, War, and Treasury in the "Decision of 1789."<sup>59</sup> It is difficult to extrapolate from these deliberations a coherent post-ratification understanding as to whether Congress had the power to constrain the President's removal power. Although the "Decision of 1789," after lengthy debate, established these offices with removal by the President at will, it is a leap to conclude that Congress did this because Congress had no choice in the matter. Indeed, as Professor Jed Shugerman points out in a recent article, the debate in 1789 was complicated by an enormous number of proposals with significant disagreement among members. The 1789-91 Diary of William Maclay recounted Senate deliberations over the removal question during the "Decision of 1789." It was clear that the First Congress disagreed over whether they *should* restrain presidential removal power, but this does not imply that Congress believed constitutionally it *could not* restrain presidential removal power.<sup>60</sup>

This Article will not delve further into the Foreign Affairs Bill or the other bills that the First Congress considered as part of the "Decision of 1789." The essential point for purposes of the present analysis is that many members of the First Congress believed that Congress had the right to constrain "at will" removal of superior officers. That explains debates over whether the removal process should mirror the appointments process, as well as other remarks about presidential removal. Little can be discerned from the fact that one faction advocating for broad presidential removal powers carried the day when Congress voted in 1789. That decision by itself does not mean that the Constitution constrains future Congresses from protecting the tenure of officers in the executive branch. Proponents of the unitary executive theory can circle back and try to find support in the text of the Constitution or in the Federalist Papers, but they will receive little help from the "Decision of 1789."

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59. See generally Shugerman, *supra* note 42; Shugerman, *supra* note 45.

60. Shugerman, *supra* note 45, at 40. In the Foreign Affairs Bill: "When the Senate debated the bill in July, Maclay's diary reveals that the Senators who sponsored the bill began with clear statements of presidentialism, but gradually retreated to the strategy of ambiguity. Maclay recorded in his diary that he spoke first, arguing against the bill because the clause disempowered the Senate." Presumably none of this debate would have taken place in 1789 if it had been clear from Article II of the Constitution that Congress could not restrict a President's removal power.

### *B. Some Historical Examples of Non-Criminal Removals*

As defenders of the unitary executive theory know, the power to remove executive branch officers is a critical part of the President's ability to govern. It is also the power that is among the most subject to abuse. Not all removal is abusive and not all abusive removals are criminal. For example, President Andrew Johnson was impeached in part over perceived abuse of his removal power in his struggle with Congress over reconstruction policy after the Civil War. Abraham Lincoln had chosen Johnson, a Democrat from Tennessee with Southern sympathies, as his running mate in 1864 to unify the country after the war. Upon assuming the presidency after Lincoln's assassination, Johnson sought to remove federal officers who supported reconstruction and political reform in the South. A prime antagonist of Johnson was Secretary of War Edwin Stanton, who was instrumental in the implementation of Republicans' reconstruction policy of protecting newly emancipated and enfranchised Black citizens from retaliation by White southerners. A Republican-dominated Congress, overriding Johnson's veto, passed the Tenure in Office Act,<sup>61</sup> which prohibited removal of a Senate confirmed federal officer without Senate approval. Johnson, insisting of his own accord that the law was unconstitutional, first suspended and then fired Secretary of War Stanton. Congress responded with Johnson's impeachment in the House and acquittal by one vote in the Senate.

As wrong as Johnson was on Reconstruction policy, he was arguably right about the unconstitutionality of the Tenure in Office Act, which was repealed in 1887 and which the Supreme Court later in 1926 said had been "invalid."<sup>62</sup> The idea that Senate confirmation implied that the Senate could veto presidential removals has been recognized as specious since that time, just as Senate authority to ratify international treaties does not imply Senate ability to veto presidential treaty withdrawals. Our constitutional jurisprudence could have taken a different path, but without constitutional amendment the lack of senatorial authority over removals is firmly settled.

Moreover, it is not difficult to see that presidential control over executive branch removals, when exercised non-corruptly, is a critical part of the President's ability to carry out core parts of his other Article II duties, particularly in the area of foreign and military policy. By 1940, for example, President Franklin Roosevelt had decided to provide military assistance to Great Britain in its war with Nazi Germany,

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61. Tenure of the Off. Act, ch. 153–154, 14 Stat. 430, 432 (1867).

62. *Myers v. United States*, 272 U.S. 52 (1926).

but Secretary of War Harry Woodring, an isolationist, resisted. When Woodring tried to obstruct delivery of B-17 bombers to Britain in June 1940, Roosevelt fired Woodring and replaced him with Henry Stimson.<sup>63</sup> Roosevelt also wanted the U.S. Ambassador to the U.K.—Joseph Kennedy, to support U.S. policy toward helping Great Britain against Germany. Yet Kennedy was sufficiently determined that the United States avoid taking sides in the war that he sought to undermine the President's foreign and military policy. There was no statute giving ambassadors tenure in office, and nobody questioned the President's ability to remove Kennedy, including Kennedy himself who chose to resign rather than be fired.<sup>64</sup> Had there been a statute protecting the tenure of either an ambassador or defense secretary, the Supreme Court very likely would have ruled it unconstitutional.<sup>65</sup> Military officers have more evident tenure in office than these civilian officers, as Congress has enacted a statute protecting commissioned officers in the military from dismissal from the armed forces, except for cause,<sup>66</sup> but the President can easily circumvent that statute by relieving a military officer of his or her command without removing that individual from the military altogether.

In 1951, President Harry Truman did just that when he fired General Douglas MacArthur. MacArthur had made unauthorized public statements and sent a letter to a member of Congress that was also made public, recommending escalation of U.S. military operations in Korea and China. President Truman, who was trying to deescalate the war and negotiate for peace, determined that MacArthur was, "unable to give his wholehearted support to the policies of the United States government and of the United Nations in matters pertaining to his offi-

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63. See KEITH D. MCFARLAND, *HARRY H. WOODRING: A POLITICAL BIOGRAPHY OF FDR'S CONTROVERSIAL SECRETARY OF WAR*, 229 (U. Kan. Press 1975).

64. *Kennedy Resigns as London Envoy to Combat War; Reveals Action of Nov. 6 After Talk with President—Will Await Naming of Successor Won't Return to Britain. Ambassador Says He Will Now Help Roosevelt 'Keep the United States Out of War'*, N.Y. TIMES (Dec. 2, 1940), <https://www.nytimes.com/1940/12/02/archives/kennedy-resigns-as-london-envoy-to-combat-war-reveals-action-of-nov.html> [https://perma.cc/3VFR-4DQ2].

65. The Supreme Court in *Myers* had already said that the Tenure in Office Act was "invalid." The Court's ruling in *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935) (upholding a statute that barred Roosevelt from firing a member of the Federal Trade Commission (FTC)), was distinguishable for several reasons, including the fact that the FTC was a multi-member commission.

66. 10 U.S.C. § 1161 ("Commissioned officers: limitations on dismissal (providing that "(a) No commissioned officer may be dismissed from any armed force except— (1) by sentence of a general court-martial; (2) in commutation of a sentence of a general court-martial; or (3) in time of war, by order of the President.").

cial duties.”<sup>67</sup> Despite MacArthur’s extraordinary military accomplishments in both World War II and Korea and his popularity with the public, public statements by a high-ranking general airing disagreements with the President undermine the chain of command and compromise the critical principle that the military should be under civilian control with the President as its Commander-in-Chief. It also undermines the principle that the U.S. military should be apolitical. Truman’s use of his removal power in this instance was arguably vital to preserving the constitutional order.

In other countries, particularly those without a written constitution, the use of removal power may exacerbate existing political conflicts. In Israel, for example, Prime Minister Benjamin Netanyahu fired Defense Minister Yoav Gallant for Gallant’s statement publicly disagreeing with the Prime Minister’s bid to enact controversial judicial reforms.<sup>68</sup> That removal magnified an already contentious situation in Israel, resulting in yet more Israelis taking to the streets to protest Netanyahu’s judicial reforms.<sup>69</sup>

### C. *When Removal is Criminal*

There is an important difference between Truman’s removal of MacArthur, which was clearly politically motivated by disagreements over military policy, and the removals that most concern us in this Article: those that are threatened or carried out in order to obstruct an

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67. Statement and Order by the President on Relieving General MacArthur of His Commands, PUB. PAPERS (Apr. 11, 1951) <https://www.trumanlibrary.gov/library/public-papers/77/statement-and-order-president-relieving-general-macarthur-his-commands> [https://perma.cc/8T2S-AU9U]. General MacArthur violated President Truman’s orders not to make press statements about the Korean conflict that had not been cleared by the State Department, and General MacArthur also circumvented this order by writing a letter to Representative Joseph Martin, House Minority Leader, recommending that the United States enlist Chinese forces on Formosa (now the Island of Taiwan) to attack China. Letter from Gen. Douglas MacArthur, Supreme Commander of the U.N. Command, to Rep. Joseph William Martin Jr. of Mass. (Mar. 20, 1951), [https://perma.cc/VFV5-8N9R]. Representative Martin had made the letter public by inserting it in the congressional record, and it was cited in President Truman’s letter firing MacArthur. Although MacArthur was relieved of his command, he kept his commission and returned home to speak before a very enthusiastic Congress on April 19, 1951. Gen. Douglas MacArthur, Supreme Commander of the U.N. Command, *Old Soldiers Never Die*, Speech Before a Joint Session of Congress (Apr. 19, 1951) (on file with the Library of Congress) (“Old soldiers never die. They just fade away.”).

68. See generally Patrick Kingsley, *Israel Boils as Netanyahu Ousts Minister Who Bucked Court Overhaul*, N.Y. Times (Mar. 26, 2023), <https://www.nytimes.com/2023/03/26/world/middleeast/judiciary-overhaul-benjamin-netanyahu-israel-parliament.html> [https://perma.cc/3CY5-N5LQ].

69. *Id.*

investigation of a crime or to facilitate the commission of a crime. Truman did not remove MacArthur to commit or conceal a crime, and no matter how significant the policy differences between a President and his generals or other executive branch officials, there is a bright line between presidential removal exercised for political, and perhaps even unsavory, purposes and presidential removal exercised for illegal purposes. If a President were to remove a general as part of the commission of a crime—for example removing a general in exchange for a bribe or a foreign adversary helping the President win re-election—the removal would stand on a different footing. Protecting presidential removal power in a case like Truman and MacArthur is vital to preserving a representative democracy; allowing removal of a general or other federal officer as part of a criminal scheme will destroy any democracy that permits such abuses to go unchecked.

Use of executive power to remove officials who refuse to condone or participate in the crimes of the administration can be an early stage on the path towards authoritarianism. Elected leaders who want to cling to power target two institutions in particular: the justice system and the military, seeking to gain control of both. The United States has never experienced a successful self-coup by an elected leader<sup>70</sup> and has never before experienced abuse of the removal power as extreme as under President Trump, but under President Nixon the country came dangerously close to the full-blown crisis that materialized nearly fifty years later. Like Nixon, who targeted the DOJ with his removal of Special Prosecutor Archibald Cox during the "Saturday Night Massacre" of October 1973, Trump repeatedly targeted the DOJ with removals and threats of removals, first to obstruct the Russia investigation, as described in Part II of the Mueller Report, and next in his bid to overturn the 2020 election.

Trump also schemed to use the military to support his cause. Although he never gave the order for the military to interfere in the election, and never removed a civilian or military officer for refusing to obey such orders, the country is left with the frightening question of what would have happened if he had. If Trump's efforts to coerce the DOJ to bend to his will had succeeded, his next target might well have been the Department of Defense. The United States might have experienced a purge of the entire upper echelons of the military and the rest of the executive branch with it in January of 2021, with the aim of

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70. See *infra* Part VI for a discussion of sedition, the risk of self-coup by an elected President, and examples where this has occurred in other countries.

keeping Trump in power well past January 20, 2021 and perhaps indefinitely.

There is no question that Article II confers powers and privileges on Presidents that ordinary citizens lack. Members of Congress also have some extraordinary privileges that ordinary citizens do not have.<sup>71</sup> But to notice the extraordinary powers of other government officials, in addition to the President, is to recognize that presidential powers and privileges do not create an exemption from ordinary criminal law. Members of Congress, for example, can be prosecuted and go to jail.<sup>72</sup> So can governors and police officers. Corrupt governors,<sup>73</sup> even corrupt governors who become federal judges,<sup>74</sup> can be arrested, tried, convicted, and sent to jail. While a police officer may use force in a situation where an ordinary citizen may not, there is no reasonable argument that police officers by virtue of the powers and privileges of their office are exempt from criminal statutes. Derek Chauvin, the Minneapolis police officer who murdered George Floyd in 2020, is serving twenty-two years in prison for that crime.

On the other hand, prosecutors who are reluctant to constrain the discretionary use of force by police officers may bend over backwards to interpret criminal statutes, as well as the facts of particular cases, to

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71. See U.S. CONST., Art. 1, § 6, cl. 1 (providing that representatives and senators “shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.”).

72. In 2020, President Trump pardoned a New York congressman who had been convicted of insider trading while in office. See Jerry Zremsky, *Critics Outraged, Republicans Silent as Trump Pardons Ex-Rep. Chris Collins*, BUFFALO NEWS (Dec. 22, 2020), [https://buffalonews.com/news/critics-outraged-republicans-silent-as-trump-pardons-ex-rep-chris-collins/article\\_fef6b3cc-44b2-11eb-9842-f7428af473ae.html](https://buffalonews.com/news/critics-outraged-republicans-silent-as-trump-pardons-ex-rep-chris-collins/article_fef6b3cc-44b2-11eb-9842-f7428af473ae.html) [<https://perma.cc/C7QR-Z7EM>].

73. See Jeff Coen, Rick Pearson & David Kidwell, *Blagojevich Arrested; Fitzgerald Calls It a ‘Political Corruption Crime Spree,’* CHI. TRIB. (Dec. 10, 2008, 2:00 AM). <https://www.chicagotribune.com/news/chi-rod-bлагоjevich-1209-story.html> [<https://perma.cc/RKB9-WLQR>] (reporting the arrest of the sitting Governor Blagojevich by federal agents on corruption charges). He was later impeached and removed from office. See Ray Long & Rick Pearson, *Impeached Illinois Gov. Rod Blagojevich Has Been Removed from Office*, CHI. TRIB. (Jan. 30, 2009, 2:00 AM), <https://www.chicagotribune.com/news/chi-bлагоjevich-impeachment-removal-story.html> [<https://perma.cc/5WWA-XQRX>] (reporting senators unanimously voted to remove Blagojevich).

74. United States Court of Appeals Judge Otto Kerner, former Governor of Illinois, was indicted by a federal grand jury on charges of bribery, perjury, and tax evasion. Seth S. King, *Federal Judge Kerner Indicted on Bribe, Perjury, Tax Charges*, N.Y. TIMES (Dec. 16, 1971), <https://www.nytimes.com/1971/12/16/archives/federal-judge-kerne-indicted-on-bribe-perjury-tax-charges-judge.html> [<https://perma.cc/6Z2A-SMGR>].



avoid concluding that a police officer has committed a crime.<sup>75</sup> This strategy of avoidance is not the same as a jurisprudential assertion that those police officers are exempt from potential criminal liability. One can observe similar avoidance strategies at work with respect to Presidents. While very few lawyers or legal commentators would agree with Nixon that if the President does it, it is not illegal,<sup>76</sup> some go out of their way to interpret criminal statutes and the facts of particular cases to avoid concluding that a President has committed a crime. The next Part discusses cases where prosecutorial law avoidance influenced the DOJ's thinking with respect to obstruction law.<sup>77</sup> Our concern is that such thinking also could condone a criminal presidency in other areas, including coercion of political activity by federal employees and even insurrection and sedition.<sup>78</sup>

### III.

#### FROM PRIVILEGE TO ABUSE: WHEN DOES PRESIDENTIAL REMOVAL BECOME A CRIME?

Although court cases addressing presidential removal power have produced varying results over the past century, not a single one has taken the position, even in dicta, that it is permissible for the President to remove a federal officer for the purpose of committing a crime. Debate has focused on the extent of the President's removal power, with some cases taking a more extensive view of presidential removal than others. What is largely unexamined in the cases, however, and what is the focus of this Article, is the intersection between presidential removal and presidential crime. Many of the cases have implications for that question despite the fact that they do not address it directly. These cases are surveyed below.

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75. As in the case of DOJ lawyers evaluating allegedly criminal conduct of Presidents, conflicts of interest can influence prosecutors' discretionary determinations about criminal conduct of police officers, leading some commentators to call for appointment of independent prosecutors. *See, e.g.,* Kami Chavis, *Increasing Police Accountability: Restoring Trust and Legitimacy through the Appointment of Independent Prosecutors*, 49 WASH. U.J.L. & POL'Y 151 (2015).

76. *But see* Amar Testimony, *supra* note 25; *see also infra* Part IV and accompanying text (discussing Amar's claims that the Supreme Court agreed with Nixon that if the President does something then it is not illegal). John Yoo's position is that any laws that constrain the Commander in Chief power must, on their face, be unconstitutional, and therefore at least in the domain of war, it is impossible for the President to violate the law. *See* Yoo Letter, *supra* note 4; Torture Memos, *supra* note 34.

77. *See infra* Part IV for a discussion of the 2018 memo written by William Barr and the 2019 OLC memo, both concluding that President Trump did not commit obstruction in connection with the Russia investigation.

78. *See infra* Parts V–VI.

### A. *Non-Criminal Removal Cases Prior to Seila Law*

In *Myers v. United States*,<sup>79</sup> the Court struck down a statute that prevented the President from removing postmasters without consent of the Senate. Section 6 of the Act of July 12, 1876 had provided that: “Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law.” There was some logic behind this statute. Postmaster positions were important political plumbs, and the statute prevented Presidents from firing and replacing postmasters throughout the country in order to reward local political supporters with the position or to retaliate against postmasters who had been rewarded with the position for supporting an earlier President. The Court, however, in 1926 held this statute to be an unconstitutional attempt to make the President’s removal power dependent on consent of the Senate. The Court cited the Vesting Clause of Article II, Section 1 for the proposition that the President is empowered to remove any executive officer he appoints with the advice and consent of the Senate, that this power is not subject to the assent of the Senate, and that it cannot be made so by an act of Congress.<sup>80</sup>

Notice that the holding in *Myers* says nothing about the potential use of removal to commit a crime. Consider some, admittedly unlikely, examples: it does not address whether a President can lawfully remove a postmaster if he does so in exchange for a bribe, as part of a criminal conspiracy to prevent delivery of the mail, or in order to prevent federal law enforcement from investigating alleged corruption in the United States Post Office. As one of us pointed out in congressional testimony in September 2020,<sup>81</sup> presidential control over the U.S. Postal Service poses dangers for democracy when elections use mail in ballots. The outer limits of unrestrained presidential control over the Postal Service or any other agency can be debated. But whichever position one takes regarding the legitimate scope of presidential removal with regard to the U.S. Post Office, there are no constitutional grounds for extending presidential removal to include acts that make up a criminal conspiracy in violation of federal law.

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79. *Myers v. United States*, 272 U.S. 52 (1926).

80. *Myers*, 272 U.S. at 119.

81. *House Oversight Subcommittee Hearing on the Postal Service and the 2020 Elections*, C-SPAN (Sept. 14, 2020), <https://www.c-span.org/video/?475718-1/house-oversight-panel-told-obligation-investigate-postmaster-general&live=> [<https://perma.cc/ABT6-UKLT>] (testimony of Richard W. Painter before Subcommittee of the U.S. House Committee on Oversight and Government Reform).

In contrast to *Myers*, in *Humphrey's Executor v. United States*, the Supreme Court upheld a statute providing that members of the Federal Trade Commission (FTC) (in this case Mr. Humphrey) could only be removed by the President "for cause." The Court used phrases such as "quasi-legislative" and "quasi-judicial" to describe the FTC, suggesting that the agency did not reside squarely within the executive branch.<sup>82</sup> The Court also emphasized that the FTC is a multi-member board with Democratic and Republican Commission members, and it has an adjudicative role in particular party matters in addition to its regulatory role.<sup>83</sup>

*Humphrey's Executor* is a reminder that views about the removal question, like presidential power questions in general, are distributed along shifting political lines.<sup>84</sup> Although the unitary executive theory today is often associated with conservative legal commentary<sup>85</sup> and in recent cases<sup>86</sup> has attracted support from the Court's more conservative justices, in *Humphrey's Executor* the removal power of F.D.R. was curtailed by a very conservative Court that was at loggerheads with the President over use of presidential power during much of his first two terms. William Humphrey, a Herbert Hoover appointee to the FTC, was rabidly pro-business. He insisted that the role of the FTC was to "help business help itself." He favored informal resolution of cases with businesses instead of imposing enforceable sanctions, and when his fellow commissioners pursued allegations of collusion between DuPont, U.S. Steel, and General Motors, Humphrey accused them of being "drunk with their own greatness."<sup>87</sup> Roosevelt obviously wanted him gone, and the same conservative Supreme Court that repudiated Roosevelt's use of presidential power as well as his New Deal legislation in other cases<sup>88</sup> made it clear that at least in the

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82. *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935).

83. *Id.*

84. See Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 356 (2020) (discussing reasons for the recent shift toward support for the unitary executive theory on the right of the political spectrum and opposition to it on the left).

85. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 275–76 (1996) (discussing the unitary executive theory).

86. See *Seila L. LLC v. Consumer Financial Protection Bureau*, 591 U.S. \_\_\_\_, 140 S. Ct. 2183 (2020).

87. David A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1841 (2016).

88. *Id.* at 1845 (pointing out the *Humphrey's Executor* was decided the same day the Court handed down its opinion in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that regulation of the poultry industry was beyond Congress's authority under the Commerce Clause)).

case of a multi-member commission such as the F.T.C., Congress could constitutionally restrict the President's removal power.<sup>89</sup>

Finally in *Free Enterprise Fund v. PCAOB*,<sup>90</sup> the Court struck down a provision of the Sarbanes-Oxley Act of 2002 that granted broad powers to the Public Company Accounting Oversight Board (PCAOB), while preventing the President from appointing or removing members of that Board. The Court held that the "for-cause" limitation on removal of Board members is an unconstitutional violation of separation of powers because it denies the President the power to make the decision about cause and hold Board members accountable. The Court said this violated the President's Article II powers. A unique feature of this case is that the statutory structure set up by Congress allowed the Securities and Exchange Commission, not the President, to make the determination that a Board member should be removed for cause. The 2010 PCAOB case comes closest to *Seila Law* because both cases involved a new federal agency that had been given broad powers to regulate significant figures in the financial sector—auditors of public companies and consumer lenders respectively. As with *Seila Law*, the Court's holding in *PCAOB* repudiates restrictions on presidential removal power. Unlike the Court's 1935 deference in *Humphrey's Executor* to Congress's plan in establishing the FTC, in *PCAOB* the Court said "no" to encroachment upon the President's right to remove a federal officer at will.

Once again, this trio of cases—*Myers*, *Humphrey's Executor*, and *PCAOB*—are all compatible with a view of executive authority that restricts presidential removal to *legal* purposes. None of these cases embraces a version of the unitary executive theory that would result in the rejection of restrictions on sittings Presidents imposed by ordinary criminal statutes. A President who takes a bribe to remove a member of the PCAOB is guilty of bribery. A President who removes or threatens to remove a member of the PCAOB in order to prevent that Board member from reporting fraud by an accounting firm to the F.B.I. may commit the crime of obstruction of justice.

There is a broader point here that is worth emphasizing: imbuing a President with broad Article II powers under the U.S. Constitution

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89. Unsurprisingly, some proponents of unitary executive theory want to see *Humphrey's Executor* overturned. Justices Thomas and Gorsuch, for example, called for overturning *Humphrey's Executor* in their concurring opinion in *Seila Law*. *E.g.*, *Seila L.*, 140 S. Ct. at 2216 (Thomas, J., concurring). As discussed in the next subsection below, the Court in *Seila Law* chose a more nuanced path: Chief Justice Roberts abided by *Humphrey's Executor* but he distinguished it from cases involving single directors of large agencies.

90. *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U. S. 477 (2010).

was justified under the view of the framers and continues in contemporary jurisprudence precisely because the President is fully answerable under the law. He is answerable under the Impeachment Clause for "high crimes and misdemeanors," and he is answerable under federal and state law for ordinary crimes. In jurisprudential terms, one might frame this by saying that in its embrace of presidential removal authority in *Myers* and *PCAOB*, and its restriction in *Humphrey's Executor*, the Court draws lines defining presidential removal power in the noncriminal context, and regardless of whether one agrees or disagrees with these holdings, nowhere does the Court say a President can remove a federal officer in order to commit a crime. All of these holdings are fully consistent with the 2020 holding in *Trump v. Vance*, which maintains that the President is answerable to criminal process under the law.<sup>91</sup> It seems reasonable to conclude that far from having identified a tension between the removal cases and the holding of the *Vance* case with regard to presidential amenability to criminal process, these two concepts are dependent upon one another. Without a constitutional design that mandates presidential accountability to the law, the founders would never have agreed to imbue the new President with such broad control over the executive branch—vastly more than the King of England held at the time over the British Parliament.<sup>92</sup> Whether or not one agrees with the Supreme Court's recent jurisprudence relating to presidential removal power cases, the "unitary executive" must be law-abiding. The unitary executive cannot engage in criminal conduct and hope to retain his Article II powers and privileges.

### B. *Seila Law v. Consumer Financial Protection Bureau*

In 2020, the Supreme Court decided yet another removal power case, namely *Seila Law v. Consumer Financial Protection Bureau*,<sup>93</sup> in which the majority opinion expressed support for an expansive view of unitary executive theory by comparison with previous cases.

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91. *Trump v. Vance*, 591 U.S. \_\_\_, 140 S. Ct. 2412 (2020).

92. See Finkelstein & Painter, *supra* note 36, at 117 ("But because the President is not a king, and therefore is not above the law, the constraint of a privy council was deemed unnecessary and thus was not included in the Constitution. If [James] Iredell's account of the constitutional deliberations is accurate, the Framers gave the President unfettered control over the executive branch because he would not be allowed to commit crimes in office."). Iredell participated in the North Carolina convention to ratify the U.S. Constitution and was later appointed by President Washington as a Justice of the Supreme Court. *Id.*

93. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. \_\_\_, 140 S. C. 2183 (2020).

The Consumer Financial Protection Bureau (CFPB) is an entity that was created by Congress in 2010 after the 2008 financial collapse, whose charter contains a provision that the Director could only be removed “for cause.” The question that arose in *Seila Law* was whether this limitation on the President’s removal power was constitutional or whether it violated the president’s Article II prerogative. The majority opinion by Chief Justice Roberts articulates a seemingly broad vision of the unitary executive theory, a view he supports with reference to both the Vesting Clause and the Take Care Clause.<sup>94</sup>

*Seila Law* was perhaps more important symbolically than doctrinally, as the Court predictably reinforced the unitary executive theory jurisprudence of *Myers* and *PCAOB*. Although *Seila Law* had nothing to do with a President’s criminal use of removal power, the case was decided in 2020, a year in which President Trump used and threatened to use removal power in other agencies, particularly the DOJ, in order to cover up or commit crimes. Regardless of its holding, the way the Court described presidential power in dicta suggested that the Court was not serious about constraining presidential privilege, as it had only one week earlier in *Trump v. Vance*. The Court used language that may seem to have encouraged, rather than discouraged, criminal use of removal power by a President who had already proven himself prone to abuse that power, and that suggests a superficial tension with the principle the Court defended in *Trump v. Vance* that no President is above the law.

While reasonable minds may differ on the question of the legislative scheme at issue in *Seila Law*, the case is striking for reasons other than its holding. Chief Justice Roberts writes for the majority:

The Framers deemed an energetic executive essential to “the protection of the community against foreign attacks,” “the steady administration of the laws,” “the protection of property,” and “the security of liberty.” Accordingly, they chose not to bog the Executive down with the “habitual feebleness and dilatoriness” that comes with a “diversity of views and opinions.” Instead, they gave the Executive the “[d]ecision, activity, secrecy, and dispatch” that “characterise the proceedings of one man.”<sup>95</sup>

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94. “Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’ . . . Because no single person could fulfill that responsibility alone, the [f]ramers expected that the President would rely on subordinate officers for assistance.” *Seila Law*, 140 S. Ct. at 2191 (citing Art. II, §1, cl. 1).

95. *Id.* at 2203 (quoting THE FEDERALIST PAPER NO. 70, at 471-72 (Alexander Hamilton)).

Roberts goes on to quote James Madison approvingly for the proposition that divided power should not be allowed to affect the executive branch:

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community."<sup>96</sup>

Such broad characterizations of presidential authority were not a necessary part of the Court's rejection of the removal component of the CFPB statutory scheme. A statute creating a new agency that makes its director removable only for cause is arguably constitutionally problematic, but there was no need to reject the CFPB's hybrid structure on separation of powers grounds, particularly when the majority of the Court was not willing to overturn *Humphrey's Executor*, which had upheld just such a hybrid structure in the case of the FTC.

Leaving to one side the merits of the majority opinion in *Seila Law*, it is worth pointing out that the dicta in the majority opinion could be misused in the future to justify a President removing a federal officer for illegal reasons, including to commit a crime. As discussed above, this position is inconsistent with *Trump v. Vance*<sup>97</sup> and the principle that no President is above the law as well as with *United States v. Nixon*.<sup>98</sup> It would also be inconsistent with *Morrison v. Olson*,<sup>99</sup> discussed below,<sup>100</sup> in which the Court held in an eight to one decision that the President cannot remove an independent counsel empowered by Congress to investigate the President himself and persons close to the President. Nothing in *Seila Law* states or implies that the President can remove a federal officer, including a CFPB Director, in order to commit a crime, but unfortunately some of the language in the opinion could be distorted to argue just that, nullifying the Court's other opinions which, unlike *Seila Law*, do address the intersection of Article II power with federal and state investigations of alleged presidential crime.

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96. *Id.* (citing Madison Speech, *supra* note 14, at 499).

97. *Trump v. Vance*, 591 U.S. \_\_\_, 140 S. Ct. 2412 (2020).

98. *United States v. Nixon*, 418 U.S. 683 (1974).

99. *Morrison v. Olson*, 487 U.S. 654 (1988).

100. *See infra* Part IV.A.

While the Court's language suggests that removal is the emblematic power for Presidents, one that could not be limited by Congress without striking at the heart of the President's authority over the executive branch, the majority was not willing to follow through with what that language might suggest: the overruling of *Humphrey's Executor*. Justice Kagan, joined by three other justices, said as much in her concurrence, in which she agreed with the Court's judgment that the CFPB was a constitutionally valid federal agency, but dissented with respect to removal power.<sup>101</sup> The majority opinion, she claimed, distorted the constitutional history on questions of presidential power, including removal power:

Blackstone, whose work influenced the Framers on this subject as on others, observed that "every branch" of government "supports and is supported, regulates and is regulated, by the rest." Therefore, as James Madison stated, the creation of distinct branches "did not mean that these departments ought to have no partial agency in, or no control over the acts of each other . . . ."

The majority . . . [asserts] that its muscular view of "[t]he President's removal power has long been confirmed by history." But that is not so. The early history—including the fabled Decision of 1789—shows mostly debate and division about removal authority. And when a "settle[ment of] meaning" at last occurred, it was not on the majority's terms. Instead, it supports wide latitude for Congress to create spheres of administrative independence.<sup>102</sup>

Regardless of one's reaction to the holding in *Seila Law*, there must be some outer limits on Congressional restraint on presidential removal power. Imagine a GOP controlled House and Senate in 2018 passing a law installing the Attorney General of the United States for a ten-year term removable only by impeachment, and President Trump then appointing a Republican Attorney General who would then serve until 2028, fully vested with the investigative powers capable of affecting three presidential elections regardless of whether a Republican or Democrat were in the White House. Or what if Congress in 2018 had passed a law providing that all cabinet members and heads of other federal agencies who are confirmed by the Senate shall serve ten-year terms and not be subject to removal by the President except for cause? In that instance President Biden now would be President in name only, with many federal agencies taking de facto orders from the Commander-in-Chief of Mar-a-Lago.

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101. See *Seila L v. Consumer Fin. Prot. Bureau*, 591 U.S. \_\_\_, 140, S. Ct. 2183, 2234–36 (2020) (Kagan, J., concurring in the judgment and dissenting in part).

102. *Id.*



Regardless of how one comes out on the removal power question in *Seila Law*, this question is tangential to the central theme of this article, namely that the President cannot use Article II power to obstruct justice, violate any other criminal law or evade accountability under criminal law. And arguably, while the tone in *Seila Law* is very different from that in *Vance*, and if taken out of context could invite misinterpretation, nothing in the majority opinion suggests approval of presidential crime. The *Seila Law* Court strikes down part of a particular law creating the CFPB, but it does not say that the President's Article II powers immunize him against the consequences of violating a criminal statute. The President cannot take a bribe to fire the Director of the CFPB without violating the bribery statute. A President who fires or threatens to fire the Director of the CFPB to prevent the Director from reporting a bank's financial crime to a federal prosecutor is likely guilty of obstruction of justice.

### C. *The Firing of U.S. Attorneys*

The discussion thus far has distinguished between noncriminal and criminal removals, where the former may be political—even corrupt—but not criminal. There is one category of removals, however, that does not fall so neatly into the above distinction, namely the removal of officials who investigate and prosecute crimes, and potentially affect the willingness of others to violate the law. Should a President have the ability to threaten law enforcement through removals that have a significant effect on the law-abiding nature of the conduct of others? Such removals, even if unconnected to a broader pattern of criminal conduct, may warrant special handling, given their systemic impact on enforcement of criminal norms.

U.S. Attorneys are appointed by the President and serve at the pleasure of the President. However, the removal of U.S. Attorneys is a particularly delicate matter, given their role in the administration and enforcement of the law. At the beginning of his administration, in March 1993, President Bill Clinton fired all of the United States Attorneys from the George H.W. Bush Administration,<sup>103</sup> a controversial use of removal power that was politically motivated but legally permissible. In his second term, President George W. Bush fired several U.S. Attorneys that he himself had appointed, allegedly because powerful GOP politicians complained that they failed to pursue election

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103. David Johnston, *Attorney General Seeks Resignations from Prosecutors*, N.Y. TIMES (Mar. 24, 1993), <https://www.nytimes.com/1993/03/24/us/attorney-general-seeks-resignations-from-prosecutors.html> [<https://perma.cc/6BCG-MHQY>].

fraud cases.<sup>104</sup> Absent criminality, these firings also were within the purview of the President's Article II powers. However, these highly politicized instances of widespread removals of officers responsible for enforcing the law, despite their validity, may shake the public's faith in the objectivity of the prosecutorial function.

Moreover, these controversial firings could easily have been criminal if the facts had been even slightly different—for example if the election fraud cases the U.S. Attorneys had refused to pursue had been frivolous and the political pressure brought to bear on the U.S. Attorneys had been part of a seditious scheme to overturn the results of a valid election. In any event, Congress had the right to demand an explanation, and Attorney General Alberto Gonzales later resigned after giving congressional testimony about the U.S. Attorney firings that some Members of Congress found to be misleading.<sup>105</sup>

Unsurprisingly, President Trump was quick to assert his power over U.S. Attorneys, removing or causing the resignation of forty-six U.S. Attorneys in March 2017, most noticeably that of Preet Bharara, the U.S. Attorney in the Southern District of New York (S.D.N.Y.) who had refused to resign when asked as other U.S. Attorneys had done.<sup>106</sup> S.D.N.Y. of course was the venue of several investigations that were politically and personally sensitive for Trump, and when his own appointee, U.S. Attorney Geoffrey Berman, displeased him (likely by pursuing some of these investigations too aggressively) he too was fired in 2020.<sup>107</sup> Investigations pending in Berman's office at the time of his firing included that of Rudy Giuliani and Lev Parnas;<sup>108</sup> Jeffrey Epstein and Prince Andrew;<sup>109</sup> Deutsche Bank

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104. OFF. OF THE INSPECTOR GEN. & OFF. OF PERS. RESP., U.S. DEP'T OF JUST., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), <https://www.justice.gov/opr/page/file/1206601/download> [<https://perma.cc/3ZW8-G7ZY>]; Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, WASH. POST (May 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/13/AR2007051301106.html> [<https://perma.cc/SR2B-CJKQ>].

105. Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES (Aug. 27, 2007), <https://www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html> [<https://perma.cc/EUN9-5XRQ>].

106. See Maggie Haberman & Charles Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html> [<https://perma.cc/U2RU-XF49>].

107. Claire O. Finkelstein & Richard W. Painter, *This Friday Night Massacre Spells the End of William Barr*, NEWSWEEK (June 23, 2020), <https://www.newsweek.com/friday-night-massacre-spells-downfall-william-barr-opinion-1512935> [<https://perma.cc/66AA-ZY94>] (discussing the firing of United States Attorney Geoffrey Berman apparently over several investigations politically sensitive to Donald Trump).

108. See Rosalind S. Helderman & Tom Hamburger, *As Impeachment Trial Ended, Federal Prosecutors Took New Steps in Probe Related to Giuliani, According to Peo-*

and<sup>110</sup> Halkbank, a bank owned by the Turkish government that Trump had discussed previously with President Recep Tayyip Erdogan;<sup>111</sup> illegal use of money by the presidential inauguration committee;<sup>112</sup> an obstruction of justice prosecution of a Russian agent who had visited the Trump Tower in 2016;<sup>113</sup> and Trump private attorney Michael Cohen's arrangements of the Stormy Daniels payoffs on behalf of an unindicted co-conspirator a/k/a Donald Trump.<sup>114</sup> Berman's firing clearly raised the specter of obstruction of justice, a crime discussed in Part IV of this Article; although to date, nobody has been charged with that crime for Berman's firing.

In September 2022, Berman published a book that disclosed yet another reason for his firing—he had refused to prosecute Trump's enemies, including former Secretary of State John Kerry, for allegedly

*ple Familiar with Case*, WASH. POST (Feb. 14, 2020), [https://www.washingtonpost.com/politics/as-impeachment-trial-ended-federal-prosecutors-took-new-steps-in-probe-related-to-giuliani-according-to-people-familiar-with-case/2020/02/14/7893bfb0-4e8a-11ea-bf44-f5043eb3918a\\_story.html](https://www.washingtonpost.com/politics/as-impeachment-trial-ended-federal-prosecutors-took-new-steps-in-probe-related-to-giuliani-according-to-people-familiar-with-case/2020/02/14/7893bfb0-4e8a-11ea-bf44-f5043eb3918a_story.html) [https://perma.cc/2TU7-EW3R].

109. See Press Release, Dep't of Just., Statement of U.S. Attorney Geoffrey S. Berman Responding to Statement Issued Today by Law Firm Representing Prince Andrew (June 8, 2020), <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-responding-statement-issued-today-law-firm> [https://perma.cc/2E34-YGK8].

110. See Shubham Ghosh, *The problem with Jay Clayton: Trump's New SDNY Attorney Nominee's Link to Deutsche Bank's \$10 Billion Problem*, MEAWW NEWS (June 19, 2020), <https://meaww.com/jay-clayton-donald-trump-nominee-next-sdny-new-york-attorney-defended-deutsche-bank-corruption-case> [https://perma.cc/YC7P-YGH8].

111. Alexander Mallin, *Bolton Suggests Possible 'Obstruction' by Trump in SDNY Turkey Investigation*, ABC NEWS (June 20, 2020), <https://abcnews.go.com/Politics/bolton-suggests-obstruction-trump-sdny-turkey-investigation/story?id=71362785> [https://perma.cc/L2UN-QC2H].

112. Kenneth P. Vogel & William K. Rashbaum, *Donor to Trump Inauguration Charged with Obstructing Investigation*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/us/politics/imaad-zuberi-trump-inauguration.html> [https://perma.cc/HE9D-TZHZ] ("Imaad Zuberi was said by federal prosecutors in New York to have deleted emails and backdated a check to hide the sources of money he donated.").

113. Press Release, Dep't of Just., Russian Attorney Natalya Veselnitskaya Charged With Obstruction Of Justice In Connection With Civil Money Laundering And Forfeiture Action (Jan. 8, 2019), <https://www.justice.gov/usao-sdny/pr/russian-attorney-natalya-veselnitskaya-charged-obstruction-justice-connection-civil> [https://perma.cc/LC65-GXC9].

114. Grace Panetta, *Michael Cohen Says There Is an Investigation Regarding Trump That Has Not Been Publicly Disclosed*, BUS. INSIDER (Feb. 27, 2019, 2:15 PM), <https://www.businessinsider.com/michael-cohen-testimony-prosecutors-sdny-trump-investigation-2019-2> [https://perma.cc/YF23-RPS3]. While SDNY was also investigating other alleged illegal acts by Trump, *infra* note 116, this reference is with respect to his role in the Stormy Daniels payoffs made through Cohen.

violating the Logan Act prohibiting carrying on unauthorized diplomatic relations with foreign nations.<sup>115</sup> Berman alleges that after his office had indicted Trump's lawyer Michael Cohen over the Stormy Daniels payoffs, and Chris Collins, a Republican congressman, for insider trading, DOJ lawyers told him that "it's time for you guys to even things out and indict a Democrat before the midterm election."<sup>116</sup> DOJ officials also pressured Berman to remove references to Individual-1 (Donald Trump) in the case against Michael Cohen. Berman flatly refused to do any of these things and was subsequently fired.<sup>117</sup> The United States Attorney's office never did indict Individual-1 for concealing the Stormy Daniels payoffs in violation of federal election law, although on March 30, 2023 Trump was indicted by a New York state grand jury for falsifying business records in order to conceal the payoffs.<sup>118</sup>

Whether or not Berman's firing was criminal obstruction of justice by President Trump, Attorney General Barr or others in the DOJ, particular sensitivity is called for when firing U.S. Attorneys, district attorneys, or those who have regular enforcement duties with regard to criminal laws generally. Removing an ordinary federal official, such as an investigator, a law enforcement official, a DOJ attorney, an inspector general, and so forth, does more than just politicize removal and exploit the concept of presidential privileges. It also profoundly distorts law enforcement and erodes trust in the criminal justice system. As the authors of this Article have each argued, distortions of law interpretation and law enforcement in the DOJ have profound and

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115. GEOFF BERMAN, *HOLDING THE LINE: INSIDE THE NATION'S PREEMINENT U.S. ATTORNEY'S OFFICE AND ITS BATTLE WITH THE TRUMP JUSTICE DEPARTMENT* (Penguin Press, 2022).

116. George Stephanopoulos & Aaron Katersky, *Justice Department Pressured Former US Attorney to Bring Cases Against Trump Enemies, Geoffrey Berman Says*, ABC NEWS (Sept. 12, 2022 10:20 AM), <https://abcnews.go.com/Politics/justice-department-pressured-us-attorney-bring-cases-trump/story?id=89745338> [<https://perma.cc/6HRL-4LCS>]; see also Press Release, Dep't of Just., Congressman Christopher Collins And Others Charged In Manhattan Federal Court With Insider Trading And Lying To Federal Law Enforcement Agents (Aug. 8, 2018), <https://www.justice.gov/usao-sdny/pr/congressman-christopher-collins-and-others-charged-manhattan-federal-court-insider> [<https://perma.cc/2ASK-DNYF>]; Press Release, Dep't of Just., Michael Cohen Pleads Guilty In Manhattan Federal Court To Eight Counts, Including Criminal Tax Evasion And Campaign Finance Violation (Aug. 21, 2018), <https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax> [<https://perma.cc/U9FM-3KQ3>].

117. *Id.*

118. Ben Protess, et al., *Trump is Indicted, Becoming First Ex-President to Face Criminal Charges*, N.Y. TIMES (Mar. 30, 2023), <https://www.nytimes.com/2023/03/30/nyregion/trump-indictment-hush-money-charges.html> [<https://perma.cc/83RA-VD5Y>].

long-term effects on government<sup>119</sup> and put Department lawyers directly at odds with their own professional obligations to the country they are supposed to serve.<sup>120</sup>

#### IV.

##### REMOVAL TO OBSTRUCT JUSTICE

The reasoning that treats implicit Article II authority as supplanting ordinary legislation could arise under a number of other circumstances, but very often the exercise of an Article II privilege will serve the criminal purpose of obstruction of justice or obstruction of an official process. Consider the hypothetical President who orders executive branch officials to obstruct Congressional investigations; who grants himself immunity through a self-pardon to cover up a crime and avoid accountability; who coerces the DOJ to declare an election he lost to be invalid; who orders the military to seize ballot boxes and redo an election; who orders the Secret Service to drive him to the Capitol to lead a criminal insurrection, and so forth. Each of these examples would place the assertion of presidential power and privilege into conflict with some form of prohibited obstruction of the law.

In the cases addressed in the previous Part, the Supreme Court considered the scope of presidential removal power across a variety of contexts. None, however, squarely addressed our question, namely the relationship between Article II powers and criminal statutes. That question, however, was squarely raised by another case, *Morrison v. Olson*.

##### A. *Morrison v. Olson*

*Morrison v. Olson*<sup>121</sup> is the one case in which the Supreme Court addressed removal power in the context of a criminal investigation. *Morrison* was not a criminal case for obstruction of justice, but a challenge to the post-Watergate independent counsel law. In *Morrison*, the Court upheld the independent counsel statute which provided that the Independent Counsel would be supervised by a panel of judges from

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119. These arguments were made in connection with efforts on the part of the OLC under President George W. Bush to justify the use of torture in violation of federal and international law. See Finkelstein & Xenakis, *supra* note 35, at 493.

120. See RICHARD W. PAINTER, *When Lawyers Work for the Government*, in GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE 121, 129-132, 138 (Oxford Univ. Press 2009) (discussing the OLC torture memos as a dereliction of duty on the part of OLC lawyers).

121. *Morrison v. Olson*, 487 U.S. 654 (1988).

the federal appeals court and could only be removed for cause by the Attorney General.<sup>122</sup> This provision insulated the independent counsel from removal by the President even though the Office of the Independent Counsel performed purely executive functions within the DOJ.

An important factor in the Court's decision was that under the statute, the Independent Counsel had a very narrow and case specific role and was not charged with regulatory powers, and it did not have the broad enforcement power of other DOJ officials.<sup>123</sup> The specific holding is now moot because Congress allowed the Independent Counsel statute to lapse in 1998, but *Morrison v. Olson* does bestow considerable flexibility upon Congress were it to enact another independent counsel statute.

Furthermore, *Morrison v. Olson* is arguably also relevant to the power of the President to remove law enforcement officers in the middle of an investigation if doing so violates *any* act of Congress, not just an Independent Counsel statute. If Congress can constitutionally prohibit the President from removing an independent counsel, Congress can presumably also pass generally applicable laws, such as obstruction of justice or bribery statutes, that constrain the President from removing a federal officer if doing so would constitute a crime. In sum, a reasonable reading of the holding in *Olson* is that a prosecutor who is investigating the President or persons close to the President cannot be removed by the President if there is an act of Congress prohibiting removal of that prosecutor or investigator. That rule should apply whether the law is the now expired independent counsel statute that was at issue in *Olson*, or another more generally applicable law such as the obstruction of justice statute. This leaves only the question of whether Congress did impose such a prohibition on firings in the obstruction of justice statute. As discussed below in the discussion of the obstruction of justice statute, it appears that Congress has done just that.

### B. Three Presidents in Fifty Years

President Nixon's October 1973 firing of special counsel Archibald Cox in the infamous "Saturday Night Massacre" is likely the most notorious use of presidential removal power to obstruct justice.<sup>124</sup> In the aftermath, several members of Congress filed a lawsuit

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122. *Id.* at 659–663, 696–697.

123. *Id.* at 680–81, 691–692.

124. The reaction in Congress was swift. Republicans as well as democrats in both the House and Senate made public statements condemning Nixon's actions. Jules Witcover, *Pressure for Impeachment Mounting*, WASH. POST (Oct. 21, 1973), <https://>

with the District Court of the District of Columbia, seeking a declaratory judgment challenging both Cox's removal and the temporary abolition of the Office of Watergate Special Prosecutor. Judge Gerhard Gesell ruled that the Cox firing was illegal insofar as it violated DOJ regulations and the terms of Mr. Cox's appointment, as was the abolition of the Special Prosecutor's office. However, Gesell declined to reinstate Cox given the latter's unwillingness to participate in the lawsuit to request his reinstatement.<sup>125</sup>

President Nixon was never charged with a crime, though one can readily imagine that had he been removed from office pursuant to the impeachment process, he might at least have been charged with obstruction. If he had been prosecuted, Nixon likely would have countered with a defense built upon some version of the unitary executive theory. One can only surmise how prosecutors, defense attorneys, and federal courts in the 1970's would have approached unitary executive theory defenses in a prosecution of Nixon for obstruction. It is conceivable that prosecutors would have focused on other ways Nixon obstructed justice—marshaling the White House tapes in which he openly discussed obstructing justice—rather than build a criminal case around his removal of two of his own attorneys general in order to fire Cox. But still, much of Nixon's campaign to obstruct the Watergate investigation involved use of his Article II powers, not just private capacity conduct of Nixon and his campaign workers. Absent a plea bargain, the federal courts might have addressed the tension between presidential privilege and federal obstruction law, which would have given some guidance for future Presidents and future departments of justice.

While no one knows how a court would have responded to such arguments, it is hard to imagine that a federal court in the 1970's would have subscribed to the proposition that a President can do anything he wants to obstruct a DOJ investigation, simply because as President he appoints the federal officer who controls the DOJ. One cost of the Nixon pardon by President Ford—a cost underappreciated

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[www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-1.htm](http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-1.htm) [<https://perma.cc/7JXP-WVRR>].

125. Nader v. Bork, 366 F. Supp. 104, 105-106, 110 (D.D.C. 1973). See also Warren Weaver, Jr., *Cox's Ouster Ruled Illegal, No Reinstatement Ordered*, N.Y. TIMES (Nov. 15, 1973), <https://www.nytimes.com/1973/11/15/archives/coxs-ouster-ruled-illegal-no-reinstatement-ordered-dismissal-of-cox.html> [<https://perma.cc/9QSA-XYHJ>] ("Judge Gerhard A. Gesell of Federal District Court said that Robert H. Bork, the Acting Attorney General, who dismissed Mr. Cox upon orders from President Nixon, had violated a Justice Department regulation prohibiting such a move 'except for extraordinary improprieties.' No one accused Mr. Cox of such acts.").

in 1974—was that federal courts never ruled on whether a President has the legal right to obstruct a federal investigation while in office. President Ford genuinely wanted to put an end to the “long national nightmare”<sup>126</sup> of Watergate, but the Nixon pardon<sup>127</sup> made it more likely that the country would face another obstruction of justice nightmare in the future.

In less than fifty years since Watergate and the Saturday Night Massacre, the country has experienced potential presidential obstruction of justice two more times, yet as of the time of this writing, no President has yet been convicted of obstruction. Donald Trump may well be the first to bear that honor, as four of the charges brought by Special Counsel Jack Smith are forms of obstruction relating to Trump’s efforts to conceal his theft of government documents and refusal to return them to the National Archive. Yet the June 2023 federal indictment of Trump only pertains to conduct he engaged in after he left office; it does not address the circumstances under which he actually removed the documents from the White House or any other conduct actually engaged in while Trump was still president. Thus even if Trump is convicted under the June, 2023 Mar-A-Lago indictment, the crucial barrier of the prosecution of a President for obstruction for official conduct while in office still will not have been breached.

The opportunity to address that challenge arguably arose with President Clinton, who likely obstructed justice as well as committed perjury when he lied in his testimony to Special Prosecutor Ken Starr. That episode resulted in Clinton’s subsequent impeachment by the House and acquittal by the Senate<sup>128</sup> for both of these crimes, as well as in the payment of a fine and the loss of his Arkansas license to

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126. See Miller Center, *Ford: “Our Long National Nightmare is Over”*, YouTube (Aug. 6, 2014), <https://www.youtube.com/watch?v=LySpUpI9k1s> [<https://perma.cc/DAJ8-YKBN>] (including a clip from President Ford’s speech on the day he was sworn in as President, August 9, 1974).

127. See Major Kong, *Ford Pardons Nixon — September 8, 1974*, YouTube (Oct. 23, 2008), <https://www.youtube.com/watch?v=eM9dGr8ArR0> [<https://perma.cc/24D9-6XF3>] (documenting the speech by Ford, dated September 8, 1974, granting Nixon a full and unconditional pardon).

128. The first article of impeachment against Clinton was for perjury in grand jury proceedings in which he lied about his relationship with White House intern Monica Lewinsky. The House approved the impeachment by a vote of 228–206. 144 CONG. REC. 28110 (1998). The second article of impeachment was for Clinton obstructing justice both in the grand jury proceeding and in the civil suit, *Jones v. Clinton*, in which he first testified falsely. The House approved that article by a vote of 221–212. 144 Cong. Rec. 28111 (1998). The Senate acquitted Clinton. 145 Cong. Rec. 274 (documenting the 1999 trial of Clinton in front of the Senate).



practice law for five years.<sup>129</sup> Had Clinton been prosecuted for obstruction of justice as well as for perjury, Article II would have been less central to his defense than for Nixon, given that much of Clinton's conduct was personal capacity behavior, and he did not fire a prosecutor or investigator. On the other hand, the underlying conduct causing the investigation was sexual improprieties in the White House with a White House intern, and Clinton might have argued that he lied about their affair to protect the presidency. The obstruction of justice impeachment article against Clinton also referred to his having used his powers as President to obtain a federal job for a witness in an effort to influence her testimony,<sup>130</sup> suggesting that Clinton could have been charged with witness tampering in addition to obstruction of justice.

In a Clinton criminal prosecution, at least some aspects of the interface between Article II and obstruction of justice statutes might have been addressed by courts and prosecutors. The conduct was likely criminal obstruction of justice even if it did not necessarily rise to the level of a crime justifying his removal from office. There was, however, disagreement over the seriousness and relevance of the sexual conduct that Clinton had lied about and tried to cover up, and some legal commentators even went so far as to justify Clinton's lying under oath.<sup>131</sup>

Twenty years later came the far more persistent and serious efforts by President Trump to obstruct the Russia investigation for almost his entire presidency. Federal obstruction of justice under Section 1512(c) of Title 18 contains two elements: (1) the defendant must have acted "corruptly;" (2) with the intent to "impair [an] object's integrity or availability for use in an official proceeding. Or the defendant must have done something to "obstruct, influence or impede" an official proceeding.<sup>132</sup> Part II of the Mueller Report points to

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129. Associated Press, *Clinton Disbarred from Practice Before Supreme Court*, N.Y. TIMES (Oct. 1, 2001), <https://www.nytimes.com/2001/10/01/national/clinton-disbarred-from-practice-before-supreme-court.html> [https://perma.cc/VT8C-TGWX].

130. Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998) (alleging that Clinton "intensified and succeeded in an effort to secure job assistance to a witness in a Federal civil rights action brought against him in order to corruptly prevent the truthful testimony of that witness in that proceeding at a time when the truthful testimony of that witness would have been harmful to him.").

131. See Leo Katz, *All Deceptions Are Not Equal*, N.Y. TIMES (Aug. 19, 1998), <https://www.nytimes.com/1998/08/19/opinion/all-deceptions-are-not-equal.html> [https://perma.cc/JE7R-PTLD] ("What people don't realize is that even among the many forms of direct deception, some are much better than others.").

132. 18 U.S.C. § 1512(c) ("Whoever corruptly (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2)

several specific instances in which Trump's conduct satisfies the elements of the crime of obstruction of justice: Trump's conduct to obstruct the investigation into Michael Flynn; Trump's firing of Comey; Trump's efforts to fire Mueller and to curtail Mueller's investigation; Trump's efforts to have Sessions "un-recuse" and take control the investigation; Trump's order to White House Counsel Don McGahn to lie about Trump's earlier attempt to fire Mueller and Trump's order to McGahn to create a false record "for our files."<sup>133</sup>

This Article will not delve further here into the factual issues – whether Donald Trump did the things that Mueller concluded he did, whether the intent element of an obstruction of justice crime was met, or whether other elements of the crime were satisfied. Our focus here is on the possible defenses Trump or any similarly situated future President could mount based on his Article II powers. For two very different insights on that topic, it will suffice to compare the response of Mueller and his prosecution team, with that of the man who supervised Mueller toward the end of the investigation and shaped its outcome—Attorney General William Barr.

### C. *Mueller's "Obstruction Theory"*

A specific instance of the debate over when a President can commit a crime in his official capacity was reflected in the very different approaches of Mueller's prosecution team and Attorney General Barr to the facts alleged in the Mueller Report. It is clear from Part II of the Mueller Report that the lawyers in the Independent Counsel's Office did not accept the extreme application of the unitary executive theory: that a President may not use his other powers to obstruct a DOJ investigation into his own conduct. This is pointed out not once, but repeatedly in the Report:

The Department of Justice and the President's personal counsel have recognized that the President is subject to statutes that prohibit obstruction of justice by bribing a witness or suborning perjury because that conduct does not implicate his constitutional authority. With respect to whether the President can be found to have obstructed justice by exercising his powers under Article II of the Constitution, we concluded that Congress has authority to prohibit a President's corrupt use of his authority in order to protect the

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otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.”).

133. See 2 ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, 12, 109, 113, 115 (2019) [hereinafter MUELLER REPORT].

integrity of the administration of justice. Under applicable Supreme Court precedent, the Constitution does not categorically and permanently immunize a President for obstructing justice through the use of his Article II powers. The separation-of-powers doctrine authorizes Congress to protect official proceedings, including those of courts and grand juries, from corrupt, obstructive acts regardless of their source.<sup>134</sup>

The Report went on to argue that prohibiting the use of presidential powers to commit corrupt acts was not an infringement on the legitimate exercise of those powers, despite the fact that it may make "inroads" on presidential authority. Placing legitimate boundaries on presidential authority is a key function of Congress, and it is supported by a framework of checks and balances, in which the Congress is constrained by the core powers described in Article II of the U.S. Constitution:

We also concluded that any inroad on presidential authority that would occur from prohibiting corrupt acts does not undermine the President's ability to fulfill his constitutional mission. . . . For example, the proper supervision of criminal law does not demand freedom for the President to act with a corrupt intention of shielding himself from criminal punishment, avoiding financial liability, or preventing personal embarrassment. To the contrary, a statute that prohibits official action undertaken for such corrupt purposes furthers, rather than hinders, the impartial and evenhanded administration of the law. . . . [I]n the rare case in which a criminal investigation of the President's conduct is justified, inquiries to determine whether the President acted for a corrupt motive should not impermissibly chill his performance of his constitutionally assigned duties. The conclusion that Congress may apply the obstruction laws to the President's corrupt exercise of the powers of office accords with our constitutional system of checks and balances and the principle that no person is above the law.<sup>135</sup>

The Report then went on to address the position of the unitary executive theory, namely the claim that if the President is exercising his Article II privileges, he cannot be violating the law. The President's argument here is a version of the Nixonian quip that if the President does it, it's not illegal:

The President's counsel has argued that "the President's exercise of his constitutional authority . . . to terminate an FBI Director and to close investigations . . . cannot constitutionally constitute obstruction of justice." As noted above, no Department of Justice position

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134. *Id.* at 8.

135. *Id.*

or Supreme Court precedent directly resolved this issue. We did not find counsel's contention, however, to accord with our reading of the Supreme Court authority addressing separation-of-powers issues. *Applying the Court's framework for analysis, we concluded that Congress can validly regulate the President's exercise of official duties to prohibit actions motivated by a corrupt intent to obstruct justice. The limited effect on presidential power that results from that restriction would not impermissibly undermine the President's ability to perform his Article II functions.*<sup>136</sup>

The Report concludes its discussion of obstruction of justice thus:

In our view, the application of the obstruction statutes would not impermissibly burden the President's performance of his Article II function to supervise prosecutorial conduct or to remove inferior law-enforcement officers. And the protection of the criminal justice system from corrupt acts by any person—including the President—accords with the fundamental principle of our government that “[n]o [person] in this country is so high that he is above the law.”<sup>137</sup>

Did Donald Trump commit the crime of obstruction? The Mueller Report does not quite say. It does not reach a definitive conclusion on this because the Special Counsel believed a decision about whether someone committed a crime should not be made by a special counsel appointed to investigate during a sitting President's tenure, but rather by a prosecutor duly authorized to conduct an investigation leading to potential indictment and prosecution. Under longstanding DOJ policy against indicting a sitting President, Mueller regarded himself as forbidden from indicting a sitting President. However, the Mueller Report's lengthy recitation of facts showing multiple instances of obstruction of justice within the meaning of the criminal statute, coupled with the Report's rejection of the constitutional unitary executive theory defenses to an obstruction charge, suggest that Mueller would have concluded obstruction if DOJ policy regarding prosecuting a sitting President had been different. It also strongly indicates that Donald Trump can be prosecuted now that he has left office for the federal crime of obstruction. The Mueller Report expressed this thought delicately—though perhaps too subtly—in the following famous passage:

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136. *Id.* at 169 (emphasis added).

137. *Id.* at 180-81 (citing *United States v. Lee*, 106 U.S. 196, 220 (1882)); *see also* *Clinton v. Jones*, 520 U.S. 681, 697 (1997) (holding that civil suit against a sitting President for personal conduct does not impermissibly interfere with Article II duties); *United States v. Nixon*, 418 U.S. 683, 715 (1974) (holding that DOJ special counsel investigation of the President may subpoena presidential records, including White House tapes, without unconstitutionally encroaching on presidential privilege).

[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him."<sup>138</sup>

Given that Mueller, as a seasoned prosecutor, would have applied a "presumption of innocence" standard to any assessment of presidential criminal liability in a report of this sort, his refusal to rule out criminal obstruction of justice on the part of President Trump speaks volumes.

#### D. Barr's Rebuttal

William Barr had a different view, which he had already expressed as a private sector attorney, when he wrote a nineteen-page June 8, 2018 memorandum to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steven Engel with the heading "Mueller's 'obstruction theory.'"<sup>139</sup> Presumably this memo was written in coordination with lawyers representing defendants in the Mueller investigation, including possibly President Trump himself. At the very beginning of the memo, Barr observed that Mueller should not be permitted to question Trump because "Mueller's obstruction theory is fatally misconceived."<sup>140</sup>

Barr's arguments constitute an extremely broad iteration of the unitary executive theory, going well beyond anything the Supreme Court has ever said in any of its opinions upholding the President's right to remove superior federal officers. Barr first said that Mueller's "sweeping interpretation" of the obstruction statute § 1512 "would directly contravene the Department's longstanding and consistent position that generally worded statutes like § 1512 cannot be applied to the President's exercise of his constitutional powers in the absence of a 'clear statement' in the statute that such an application was intended."<sup>141</sup> In other words, if criminal statutes do not specifically

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138. MUELLER REPORT, *supra* note 133, at 2.

139. Memorandum from William P. Barr to Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., & Steve Engel, Assistant Att'y Gen., U.S. Dep't of Just. 1 (June 8, 2018), <https://s3.documentcloud.org/documents/5638848/June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction.pdf> [<https://perma.cc/YC27-7NXQ>].

140. *Id.*

141. *Id.* at 3.

mention Presidents, Presidents are presumptively exempt. Most criminal statutes, including laws criminalizing bribery, espionage, and sedition, do not specifically reference the President. Does Barr's presumption against application to the President pertain to these statutes as well?

Second, Barr challenged Mueller's premise that it is "corrupt" under § 1512 for the President to influence a DOJ investigation into his own conduct. To the contrary, "[i]n granting plenary law enforcement powers to the President, the Constitution places no such limit on the President's supervisory authority"<sup>142</sup> and "'conflict of interest' laws do not, and cannot, apply to the President, since to apply them would impermissibly 'disempower' the President from supervising a class of cases that the Constitution grants him the authority to supervise."<sup>143</sup> Thus, if the President wants to supervise a criminal investigation of himself, he has the constitutional right to do just that. In a similar vein, Barr argued that "defining facially lawful exercises of executive discretion as potential crimes, based solely on subjective motive, would violate Article II of the Constitution by impermissibly burdening the exercise of core discretionary powers within the Executive branch."<sup>144</sup>

Finally, Barr's memo took the position that obstruction requires a showing of the underlying crime, which in this case would be a conspiracy between the Trump campaign and Russia to subvert the 2016 election.<sup>145</sup> Never mind that the obstruction statute nowhere says that a violation only occurs if the obstructed investigation leads to a finding that the obstructing party committed a separate underlying crime.

What is disturbing is not just the very broad vision of unitary executive theory, even when it conflicts with criminal law, that is embodied in Barr's arguments, but that these arguments were imposed on the DOJ when Trump appointed Barr to be Attorney General. Barr believed that the President had the power to do just about anything he wanted with DOJ's investigation of Russian inference in the election. Trump had the power to terminate the Russia investigation, confine it, refuse to fund it, fire Mueller and staff it with other people, or any-

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* ("[E]ven if one were to indulge Mueller's obstruction theory, in the circumstances here, the President's motive in removing Comey and commenting on Flynn could not have been "corrupt" unless the President and his campaign were actually guilty of illegal collusion. Because the obstruction claim is entirely dependent on first finding collusion, Mueller should not be permitted to interrogate the President about obstruction until [he] has enough evidence to establish collusion.").

thing else he wanted—including obstruct it. Barr believed that the obstruction of justice statute does not apply to such acts by the President, because during his presidency, Trump was the chief law enforcement officer of the United States and in obstructing the investigation Trump was only obstructing himself.

In his March 24, 2019, four-page summary of the Mueller Report sent to Congress, newly appointed Attorney General Barr thus concluded that “the evidence developed during the Special Counsel’s investigation is not sufficient to establish that the President committed an obstruction-of-justice offense.”<sup>146</sup> Mueller was disturbed by this “summary” of his conclusions, and wrote Barr a March 27, 2019, letter citing “public confusion about critical aspects of the results of our investigation.” Mueller continued, “[t]his threatens to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome of the investigations.”<sup>147</sup>

Despite the fact that his views on the reach of the obstruction statute differed from Barr’s, Mueller did not recommend that DOJ criminally charge Trump. And Barr would likely not have approved an indictment of Trump. Not only did Barr not believe Trump had committed a crime, but he also relied upon the longstanding DOJ policy that a sitting President cannot be prosecuted.<sup>148</sup> Attorney General Barr would not have approved the DOJ indicting the President for any reason whatsoever.

On March 24, 2019, the head of the OLC, Steve Engel, a Trump political appointee, wrote a memorandum to Barr evaluating whether evidence in Mueller’s investigation could support prosecution of Trump for obstruction of justice at a time when Trump could be indicted. The DOJ refused to release the memorandum, claiming attorney “deliberative” privilege, despite the fact that on August 19, 2022, the U.S. Court of Appeals for the D.C. Circuit rejected this privilege

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146. Letter from William P. Barr, Att’y Gen., U.S. Dep’t of Just., to Lindsey Graham, Chairman, Comm. on the Judiciary; Dianne Feinstein, Ranking Member, Comm. on the Judiciary; Jerrold Nadler, Chairman, Comm. on the Judiciary & Doug Collins, Ranking Member, Comm. on the Judiciary 3 (Mar. 24, 2019) (on file with the New York Times).

147. Letter from Robert Mueller, Special Couns., Dep’t of Just., to William P. Barr, Att’y Gen., Dep’t of Just. (Mar. 27, 2019) (on file with the New York Times).

148. *See* Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office, 24 Op. O.L.C. (Sept. 24, 1973); A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. (Oct. 16, 2000); *see also* Finkelstein & Painter, *supra* note 36 at 133-34 (discussing and disagreeing with the OLC memos of 1973 and 2000).

claim and ordered the memo released.<sup>149</sup> On August 24, 2022 the memo was released to the public.<sup>150</sup>

The memo explained at length why OLC did not believe conduct attributed to Trump in Mueller's report was sufficient to prove an obstruction of justice charge beyond a reasonable doubt. Curiously, however, the OLC memo did not pick up on Barr's earlier arguments about unitary executive theory and about whether Trump's Article II powers as President in any way narrowed the reach of the obstruction of justice statutes. The DOJ memo did assume that because Mueller had not concluded in Part I of his report that there was criminal collusion between the Trump campaign and Russia, charging Trump with obstructing the Russia investigation would be inappropriate: "It would be rare for federal prosecutors to bring an obstruction prosecution that did not itself arise out of a proceeding related to a separate crime."<sup>151</sup> Next, the memo danced around the issue of whether Trump had tried to control the F.B.I. investigation under James Comey: "The President's expression of 'hope' that Comey would 'let this go' did not clearly direct a particular action in the Flynn investigation, and Comey did not react at the time as though he had received a direct order from the President."<sup>152</sup> The memo thus avoids the question of whether it would have been criminal obstruction of justice for the President to give a direct order to an F.B.I. director to end the Russia investigation and then fire him if he refused.

With respect to abuse of removal power, the OLC memo also went out of its way to say that Trump did not take any action to try to fire Robert Mueller: "The President vehemently denied telling McGahn that he wanted to fire the Special Counsel, and McGahn recalled the President's direction to be more ambiguous."<sup>153</sup> The memo did not opine on whether Trump would have obstructed justice if he had taken active steps to fire Mueller. Noticeably absent in the memo were any of the Article II arguments in the 2018 memo Attorney General Barr had advanced as a private lawyer, or the suggestion that Trump could

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149. *See* *Citizens for Resp. and Ethics in Wash. v. U.S. Dep't of Just.*, 45 F.4th 963, 966–67 (D.C. Cir. 2022).

150. *See* Memorandum from Steven A. Engel, Assistant Att'y Gen., Off. of Legal Counsel, & Edward C. O'Callaghan, Principal Assoc. Deputy Att'y Gen. (Mar. 24, 2019), <https://www.documentcloud.org/documents/22187584-barr-unredacted-memo> [<https://perma.cc/3JEJ-F3CK>].

151. *Id.* at 3 (summarizing that Mueller indicted 34 people, including 12 Russian operatives, and concluding, that was not sufficient to justify prosecuting Trump if he obstructed the investigation).

152. *Id.* at 6.

153. *Id.* at 7.



have fired Mueller if he had wanted to. Perhaps the OLC lawyers did not want to reiterate in a memo addressed to Barr the same constitutional arguments Barr had made as a private lawyer (Barr's conflict of interest then would have been even more obvious) or perhaps the OLC lawyers simply were not willing to say that Article II gave a President the power to brazenly obstruct a DOJ investigation and fire DOJ prosecutors. Rather than confront these constitutional issues, the OLC lawyers preferred to assume that Trump simply did not go that far.

Putting aside the OLC lawyers' memo and the reasons Trump was not indicted for obstruction, who was right about the interface of the federal obstruction of justice statute and presidential power under Article II? Mueller or Barr?

This Article has argued that Article II of the Constitution does not preclude a President from being charged for obstruction of justice in his official acts. The obstruction of justice statute is not obviated or constrained by Article II, any more than are bribery statutes, insurrection and sedition statutes or other criminal laws. The clear message to President Trump from Attorney General Barr's "exoneration" of him for obstruction of justice is that he could do more. The President's Article II powers were used—through Attorney General Barr himself—to interfere in the DOJ's prosecution of cases against Michael Flynn and Roger Stone.<sup>154</sup> The President—once again through Barr—also removed the United States Attorney for the Southern District of New York in June 2020 in the middle of several S.D.N.Y. investigations that were politically sensitive to Donald Trump.<sup>155</sup> This Article will not delve into the specifics of these actions—and not all of the facts are public—but they too raised serious questions under the obstruction of justice statutes and their interface with Article II.

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154. When the Justice Department moved to dismiss charges against Michael Flynn after his guilty pleas, U.S. District Judge Emmet Sullivan appointed retired Judge John Gleeson to brief the court on the propriety of the Justice Department's actions. Gleeson submitted an amicus brief stating that the Justice Department in this and other cases succumbed to political pressure from President Trump. *See* Reply Brief for John Gleeson as Court-Appointed Amicus Curiae at 23, *United States v. Flynn*, No. 1:17-cr-00232 (D.D.C. Sept. 11, 2020); *see also Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence Before the H. Comm. on the Judiciary*, 116th Congress (2020) (testimony of Donald Ayer, former Sr. Att'y, Dep't of Just., Aaron Zelinsky, Att'y, Dep't of Just., John Elias, Att'y, Dep't of Just.).

155. *See supra* notes 108-115 and accompanying text.

E. *Could Trump have Fired Mueller?*

Michael McConnell is right that strictly speaking one can believe in a unitary executive as a formal matter without commenting on the extent of executive authority itself.<sup>156</sup> Nevertheless, at some point one cannot avoid the question of criminality.

Virtually all commentators who write and speak about presidential power invoking phrases such as the concept of the “unitary executive” have skipped criminal use of presidential removal power, including removal to obstruct justice, as a separate subject of interest. Those who favor broad presidential removal power, including the two justices of the Court, who in *Seila Law* implied they would overturn *Humphrey’s Executor*, believe Article II prohibits Congress from interfering with removal power in all cases, even removal of members of a multi-member commission, but they are still silent on the question of whether a President could remove a federal officer if doing so would violate the express language of federal criminal statutes. Even cases involving removal of prosecutors sidestep the question of criminal removal. Justice Scalia, the lone dissenter in *Morrison v. Olson*, famously argued that the independent counsel statute was unconstitutional—an opinion that has been much discussed and debated—but even he stopped short of saying that that the obstruction of justice statute also was unconstitutional if applied to a President who removed a special prosecutor with the particular intent to obstruct justice or to commit another crime. He avoided that question and simply said the independent counsel statute was unconstitutional.

During the Trump presidency, a few academics, including Alan Dershowitz and Akhil Amar, claimed that Trump had the constitutional right to fire Mueller. Dershowitz—who also defended Donald Trump in his first impeachment trial—argued that it would not be an impeachable offense for Trump to order the DOJ to fire Mueller.<sup>157</sup> Amar, who unlike Dershowitz did not represent Trump as a client, testified before the Senate in 2017 that it would be unconstitutional for Congress to pass a bill constraining the President’s power to remove Mueller.<sup>158</sup> Amar premised his opinion on his own disagreement with

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156. See McCONNELL, *supra* note 43, at 341-42.

157. Joe Concha, *Dershowitz: Firing Mueller ‘Would Not Be an Impeachable Offense’*, The Hill (Nov. 29, 2018, 9:59 AM), <https://thehill.com/homenews/media/418870-dershowitz-firing-mueller-would-not-be-an-impeachable-offense/> [perma.cc/6HRL-4LCS].

158. See Amar Testimony, *supra* note 25 (stating that a proposed bill protecting Mueller from being fired by Trump would be unconstitutional).

the Supreme Court majority and agreement with Justice Scalia's lone dissent in *Morrison v. Olson*.<sup>159</sup>

But even Amar did not squarely confront the question of whether Trump could have fired Mueller if doing so would have put Trump in violation of federal law for obstructing justice. Other than mentioning the fact that Mueller was investigating Trump for obstruction of justice for firing James Comey as Director of the F.B.I.,<sup>160</sup> Amar's Senate testimony does not opine on whether Trump would have committed obstruction of justice had he fired Robert Mueller. How Amar arrived at his strong view of presidential power is unclear. Insofar as his claims about presidential privilege draw inspiration from one case he repeatedly discussed however, namely *Nixon v. Fitzgerald*,<sup>161</sup> his testimony would not have supported an argument for broad presidential removal power. *Nixon v. Fitzgerald* did not pertain to criminal law at all. Instead, it addressed the very different issue of whether a private plaintiff could sue a former President for money damages on account of his official acts while in office.

Painting with very broad strokes to defend the theory of the unitary executive, and removal power along with it, is a dangerous endeavor. Some commentators, including Amar, appear to take an interest in the subject of presidential removal at least in part because they are concerned to shore up presidential authority elsewhere. How far they are willing to go is unclear, and some, whether academic commentators, judges or DOJ lawyers, will get off the "unitary executive theory" bandwagon sooner than others. Most commentators simply do not consider the question we have raised. They assume that when a President removes a federal officer—even a special prosecutor—the obstruction of justice statute does not apply. However, after three Presidents in fifty years have come into direct conflict with the obstruction of justice statute, such avoidance is no longer a defensible posture in the analysis of constitutional or criminal law. It is for this reason that this Article takes the position that a President may not remove a federal officer to obstruct justice or to commit any other crime.

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159. *Morrison v. Olson*, 487 U.S. 654, 697 (1988).

160. Amar Testimony *supra* note 25, at 7.

161. *Nixon v. Fitzgerald*, 457 U.S. 731 (1981).

## V.

## REMOVAL TO COERCE PARTISAN POLITICAL ACTIVITY

Subject to restrictions set forth in the Hatch Act, federal employees may engage in partisan political activity in their personal time and in their personal capacity. Use of a federal employee's official position to influence a partisan election, use of federal funds for political activity, and some political fundraising activities by federal employees, are prohibited.<sup>162</sup> Many of these Hatch Act restrictions do not apply to the President and Vice President, both of whom are candidates themselves, but the Hatch Act does apply to every other federal employee in the executive branch.

The line between official capacity functions and personal capacity political activity is sometimes vague, and over several administrations, the White House Office of Political Affairs has been staffed by presidential appointees who provide politically oriented official capacity advice. These same White House staffers also coordinate with each other and others in the executive branch who "volunteer" for partisan political activity in their personal capacity. Separation of partisan politics from the affairs of state can be confusing,<sup>163</sup> but most administrations have kept White House partisan politics on the right side of the law, most of the time.<sup>164</sup>

There are limits to coordination of "personal capacity" political activity in the White House or anywhere else in the federal government. Under Section 610 of Title 18 it is a crime "for any person to intimidate, threaten, command, or coerce, any employee of the Federal Government . . . to engage in, any political activity."<sup>165</sup> Violations are punishable by up to three years in prison. This provision applies whether or not federal employees are permitted to engage in such political activity of their own volition. The political coercion statute, un-

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162. See 5 U.S.C. § 7324.

163. Richard W. Painter, Opinion, *The Separation of Politics and State*, N.Y. TIMES (June 13, 2010), <https://www.nytimes.com/2010/06/14/opinion/14painter.html> [<https://perma.cc/CB4D-YFDX>].

164. *But see* U.S. OFF. SPECIAL COUNS. REP., INVESTIGATION OF POLITICAL ACTIVITIES BY WHITE HOUSE AND FEDERAL AGENCY OFFICIALS DURING THE 2006 MIDTERM ELECTIONS, [https://legacy-assets.eenews.net/open\\_files/assets/2020/06/22/document\\_gw\\_09.pdf](https://legacy-assets.eenews.net/open_files/assets/2020/06/22/document_gw_09.pdf) [<https://perma.cc/8QYU-ZDQE>]; see also *The Hatch Act: The Challenges of Separating Politics from Policy Before the U.S. House Comm. on Oversight and Gov't Reform* (June 21, 2011) (testimony of Richard W. Painter), [https://republicans-oversight.house.gov/wp-content/uploads/2012/01/Prof.\\_Painter\\_Testimony.pdf](https://republicans-oversight.house.gov/wp-content/uploads/2012/01/Prof._Painter_Testimony.pdf) [<https://perma.cc/FN4F-8P8Y>] (discussing problematic conduct in the White House that while not technically violating the Hatch Act may be inconsistent with the purpose of the Hatch Act).

165. 18 U.S.C. § 610.

like the other provisions of the Hatch Act, makes no exception for the President and Vice President. Presidents and Vice Presidents can ask federal employees to work for their political campaign, so long as it is understood to be voluntary, but they cannot "order" or "coerce" federal employees to engage in partisan politics.

What happens if a President tells a senior official that he should engage in partisan political activity to support the President's re-election, or the official will be fired? The President has broad removal power under the Supreme Court holdings discussed earlier in this article, but does this power go so far as to allow removal of a federal officer who refuses to obey an order to engage in partisan politics, an order which clearly violates the political coercion statute?

Conceptually this resembles the problem discussed in the previous section of this article: whether Article II removal powers "trump" the obstruction of justice statute. Attorney General Barr's argument that a President can never obstruct justice by exercising his power to remove a federal officer can be applied also to argue that a President can never violate the political coercion statute by removing or threatening to remove a federal officer for not doing enough for his political campaign. The rationale is similar: that the President's Article II removal power is absolute.

The criminal removal problem is complex in this context. Under the removal power case law discussed earlier in this article, a President legally can threaten to remove or actually remove a presidential appointee who is not sufficiently loyal to the President in an official capacity. The President can do this even though it would violate the political coercion statute to remove or threaten to remove an appointee for refusing to engage in partisan political activity. In many cases, this question never comes up because personal capacity partisan political activity is the way federal officials often signal that they are loyal to the President. Federal officials who fail to send this signal cannot be coerced or ordered to do so without violating the political coercion statute, but they can be fired if the President believes they do not support his policies or him in his official capacity.

Putting aside these more ambiguous cases, what happens where there is overwhelming evidence that the President removed a presidential appointee because that appointee refused to help the President engage in partisan political activity to win re-election? Is Article II removal power so absolute that presidential removal used as an instrument of political coercion is legally permissible and hence noncriminal?

If this question is answered in the affirmative, the political coercion statute would simply fail to apply to the President. The President perhaps cannot directly “order” or “coerce” a federal official to engage in partisan politics, but he can “ask” them to do so and then threaten to remove them, and remove them, if they don’t. Nowhere in its language does the statute exempt the President, but this does not matter if the President may use his removal power to as an instrument of political coercion. When applied to the political coercion statute, an extreme iteration of unitary executive theory would once again nullify the statute and conclude that the President is above the law.

The consequences of a President using removal power to coerce political activity are problematic for a representative democracy. A President could remove or threaten to remove any appointee who did not do enough to support his re-election campaign. He might solicit legally permissible political activity, such as prominent federal officials giving personal capacity speeches at fundraisers, or impermissible political activity that violates the civil provisions of the Hatch Act. In the months, perhaps years, leading up to the election, the President could order officials in charge of every major federal agency, upon pain of removal from office, to devote substantial time and energy to his re-election campaign, even though Congress has expressly provided that such orders are illegal. The advantages of incumbency, already great, could be insurmountable for a challenger, meaning a President is *de facto* elected to an eight-year term—or more if he manages to dispense with elections. He might even use his removal power to coerce the full weight of the executive branch to recognize the authority of his chosen successor, such as a member of his own family or another who will do his bidding.

When a President engages in political coercion to enlist federal officers to reject the validity of an election entirely, the consequences of prioritizing removal power over federal law may be even more concerning, as such pressure could *de facto* eliminate federal elections entirely.

In the runup to the 2020 presidential election, there was significant partisan political activity designed to manipulate the outcome of the election. The authors of this Article filed a Hatch Act complaint with the Office of Special Counsel against Secretary of State Mike Pompeo for, among other things, using a diplomatic mission to Jerusalem to broadcast a speech to the Republican National Convention in

which he advocated for the reelection of President Donald Trump.<sup>166</sup> A bipartisan working group that the authors of this Article chaired issued a report in October 2020 concluding that the DOJ had become thoroughly politicized under Attorney General William Barr. In several specific matters, including criminal cases, the Department was narrowly focused on the re-election of President Trump rather than on its mission to enforce the law.<sup>167</sup> There was sufficient evidence that Trump himself was coercing this and other political activity by senior officials to cause the authors of this article to also file a complaint with DOJ against President Trump for violation of the criminal coercion statute.<sup>168</sup> For example, Trump said in an interview:

Unless Bill Barr indicts these people for crimes, the greatest political crime in the history of our country, then we're going to get little satisfaction unless I win. And we'll just have to go. Because I won't forget it. But these people should be indicted. This was the greatest political crime in the history of our country. And that includes Obama. And it includes Biden. These are people that spied on my campaign. And we have everything. Now they say they have much more. Ok? And I say, "Bill we got plenty. You don't need anymore."<sup>169</sup>

President Trump again said in another interview:

To be honest, Bill Barr is going to go down as either the greatest attorney general in the history of the country or he's going to go down as, you know, a very sad situation . . . I'll be honest with you.

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166. Letter from Claire O. Finkelstein, Algernon Biddle Prof. L. and Prof. Phil., U. Pa. Carey L. Sch. & Richard W. Painter, S. Walter Richey Prof. of Corp. L., U. Minn. L. Sch., to the Off. of Special Couns. (Aug. 26, 2020) (on file with the University of Pennsylvania Carey Law Library), <https://www.law.upenn.edu/live/files/10769-pompeo-hatch-act> [<https://perma.cc/366H-M8NX>]; see also Laura Jakes, *Bush's Ethics Lawyer Calls for an Investigation of Pompeo's R.N.C. Speech*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/27/us/elections/bushs-ethics-lawyer-calls-for-an-investigation-of-pompeos-rnc-speech.html?smid=TW-share> [<https://perma.cc/96G3-HWEU>].

167. See CTR. FOR ETHICS AND RULE OF L. AT U. PA. AND CITIZENS FOR RESP. AND ETHICS IN WASH., REPORT ON THE DEPARTMENT OF JUSTICE AND THE RULE OF LAW: UNDER THE TENURE OF ATTORNEY GENERAL WILLIAM BARR (Oct. 12, 2020), <https://www.law.upenn.edu/live/files/10900-report-on-the-doj-and-the-rule-of-law>, [<https://perma.cc/AQ8X-8ES8>].

168. Letter from Claire O. Finkelstein, Algernon Biddle Prof. L. and Prof. Phil., U. Pa. Carey L. Sch. & Richard W. Painter, S. Walter Richey Prof. of Corp. L., U. Minn. L. Sch., to Corey R. Amundson, Chief of the Pub. Integrity Section, Dep't of Just. (Oct. 26, 2020) [hereinafter Oct. 26, 2020 Finkelstein & Painter Letter] (on file with the University of Pennsylvania Carey Law Library), <https://www.law.upenn.edu/live/files/10951-trump-criminal-hatch-act-complaint> [<https://perma.cc/P22E-U4NM>].

169. *Interview: Maria Bartiromo Interviews Donald Trump on Fox Business - October 8, 2020*, VIMEO (Oct. 8, 2020), <https://vimeo.com/466413086> [<https://perma.cc/JP4F-6NX2>].

He's got all the information he needs. They want to get more, more, more. They keep getting more. I said, you don't need any more.<sup>170</sup>

The previous year, President Trump held a meeting in the Oval Office where he put pressure on U.S. Ambassador to the European Union Gordon Sondland, Special Envoy Kurt Volker, and Secretary of Energy Rick Perry to engage in political activity in their official interactions with Ukraine. According to Sondland, Trump “express[ly] direct[ed]” them to coordinate with Rudy Giuliani to induce Ukraine to open investigations into Joe Biden and Hunter Biden’s connection with Ukrainian gas company Burisma as well as allegations of Ukrainian interference in the 2016 election. Sondland testified that he, Volker, and Perry were “follow[ing] the President’s orders.”<sup>171</sup> Ambassador Sondland then testified in the first impeachment trial of President Trump. After Trump was acquitted in the Senate, in retribution, Trump fired Sondland in February 2020.<sup>172</sup> This use of removal power was in furtherance of Trump’s obstruction of his own impeachment trial. Obstruction of an official proceeding is itself a crime,<sup>173</sup> but the underlying cause of Trump’s impeachment had been, among other things, his coercion of State Department officials to aid his reelection campaign by helping him pressure Ukraine to investigate Joe Biden and his son Hunter. These are but a few examples of alleged political coercion of federal officials by President Trump. The officials he pressured in each of these instances knew that if they did not comply, Trump would use his Article II powers to remove them.

After the 2020 election, Trump’s use of political coercion accelerated as he tried to enlist senior officials in the White House and in the DOJ in his effort to overturn the election. The pressure Trump put on members of his administration and others to support the “big lie” led to even greater potential violations of the federal statute prohibit-

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170. *Id.*; see also Ian Schwartz, *Trump: Bill Barr’s Going to Go Down as Either the Greatest Attorney General of a Very Sad Situation*, REAL CLEAR POLITICS (Oct. 8, 2020), [https://www.realclearpolitics.com/video/2020/10/08/trump\\_bill\\_barrs\\_going\\_to\\_go\\_down\\_as\\_either\\_the\\_greatest\\_attorney\\_general\\_or\\_a\\_very\\_sad\\_situation.html](https://www.realclearpolitics.com/video/2020/10/08/trump_bill_barrs_going_to_go_down_as_either_the_greatest_attorney_general_or_a_very_sad_situation.html) [<https://perma.cc/7SXM-FMDF>].

171. Gary Stein, *Hatch Act*, in *Federal Criminal Offenses and the Impeachment of Donald J. Trump*, JUST. SEC. (Dec. 16, 2019), <https://www.justsecurity.org/67738/federal-criminal-offenses-and-the-impeachment-of-donald-j-trump/> [<https://perma.cc/CRX4-FHT7>].

172. Peter Baker, Maggie Haberman, Danny Hakim & Michael S. Schmidt, *Trump Fires Impeachment Witnesses Gordon Sondland and Alexander Vindman in Post-Acquittal Purge*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/us/politics/alexander-vindman-gordon-sondland-fired.html> [<https://perma.cc/NRH6-838X>].

173. 18 U.S.C. § 1505.



ing “Coercion of Political Activity,” or Section 610 of Title 18. Thus, Trump plotted with DOJ Attorney Jeffrey Clark to devise ways to place pressure on state and federal officials, including individuals in the DOJ who would help him challenge the election. They also planned for Trump to fire acting Attorney General Jeffrey Rosen, who had refused to issue a legal opinion that the November 2020 election was invalid, and replace him with Clark.<sup>174</sup> This latter episode appears to be a clear-cut violation of the political coercion statute. But it was also a part of a broader plan of seditious conspiracy—an attempt to overturn the 2020 election—a crime discussed in greater detail in the next section of this Article.

The subject here, however, is not sedition, but use of the President’s removal power for purposes of political coercion of federal employees. Whether and when President Trump in fact removed appointees because they expressly refused to engage in partisan politics is not clear. As discussed in these authors’ October 2020 Hatch Act complaint against Trump, most of his appointees went along with his requests to support his campaign, at least before the election.<sup>175</sup> In addition, as discussed in a 2021 Office of Special Counsel report, thirteen senior Trump appointees—including Secretary Pompeo in his Jerusalem speech to the Republican National Convention during an official State Department trip to Israel—engaged in political activity to such an extent that they themselves violated the civil provisions of the Hatch Act.<sup>176</sup>

One thing is clear: President Trump did not believe there were any limits on his removal power, including removal to coerce political activity by federal officials. His Attorney General William Barr appeared to support that view on Article II removal power until he himself resigned in December 2020 when pressured to support Trump’s efforts to overturn the 2020 election.<sup>177</sup> The Attorney General who

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174. Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html> [https://perma.cc/H3DP-R7BF].

175. Oct. 26, 2020 Finkelstein & Painter Letter, *supra* note 168.

176. U.S. OFF. SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION (Nov. 9, 2021), <https://osc.gov/Documents/Hatch.pdf> [https://perma.cc/VEH6-ESZN].

177. Donald Trump himself suggested that Bill Barr stepped down because of a report written by the present authors and other individuals relating to Bill Barr’s tenure in office during the Trump Administration and the question of whether the DOJ respected the rule of law under his leadership. *See, e.g.,* Kaelan Deese, *Trump: Barr was ‘Unable’ to Hold Kavanaugh Accusers and Steele Dossier Sources ‘Accountable’*, WASH. EXAMINER (July 11, 2021, 11:43 AM), <https://www.washingtonexaminer.com>.

had opined that under Article II the President could commit any crime he wished in the exercise of his removal power, was now himself a target of presidential coercion of political activity which became so intense that he himself likely faced removal. Instead he chose to resign.

## VI.

### SEDITIONOUS REMOVAL

#### *A. Removal in Furtherance of a Conspiracy to Overturn an Election*

Two crimes clearly disqualify a President or any other official from ever again holding public office—the crime of insurrection, or rebellion against the United States and the crime of seditious conspiracy. The Fourteenth Amendment, Section 3 provides: “No person shall [hold public office] who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.” And although this provision has lain dormant since the Civil War, the recent disqualification from office of Cowboys for Trump Founder Couy Griffin based on his participation in the January 6 insurrection suggests that it still has teeth.<sup>178</sup> Disqualifying a former President who is running for federal office again would be more challenging.

Although the Fourteenth Amendment, Section 3 does not require a criminal conviction for insurrection or rebellion to disqualify a person from public office, a criminal conviction for such crimes should be dispositive. Insurrection and rebellion against the United States could occur in a range of circumstances, although the Fourteenth Amendment was an outgrowth of a specific instance—a four-year-long Civil War fought over the southern states’ refusal to accept the result of the 1860 presidential election. For the next one hundred and sixty years, refusal to accept the results of a U.S. presidential election

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com/news/barr-was-unable-to-hold-kavanaugh-accusers-steele-dossier-sources-accountable [https://perma.cc/HNS8-367D] (“Trump said Barr ‘became a different man’ after two ethics groups in October called for his impeachment, with the University of Pennsylvania’s Center for Ethics and the Rule of Law and Citizens for Responsibility and Ethics in Washington arguing he used his position as attorney general for political purposes to aid the former president.”).

178. Griffin had been serving as County Commissioner and a court ruled that based on his participation in the January 6 “insurrection,” he was no longer able to hold office under the “Disqualification Clause.” *New Mexico ex. rel. White v. Griffin*, 604 F. Supp. 3d 1143 (D.N.M. 2022) (removing Griffin from office after finding he engaged in the January 6 insurrection).

did not again result in violence and attempt to overthrow the United States government, until the election of 2020.

The most pertinent criminal statute is Section 2382 of Title 18, which imposes criminal penalties on "[w]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto."<sup>179</sup> In addition to prison terms of up to ten years, the statute provides that the convicted person shall be incapable of holding any office under the United States, consistent with the disqualification provision of the Fourteenth Amendment, Section 3. The statute makes it a crime to engage in "rebellion or insurrection against the authority of the United States or the laws thereof." This includes rebellion against the authority of the federal courts, for example, a ruling of the courts on the results of a presidential election.

Yet another applicable statute is Section 2384 of Title 18 which criminalizes "seditious conspiracy" in which two or more persons "conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof . . . ." The statute provides for penalties up to twenty years in prison. Disqualification under Fourteenth Amendment, Section 3 would surely follow as well.

Other crimes can be committed during the commission of seditious conspiracy. For example, it is a crime for members of the armed forces to interfere with a lawful election.<sup>180</sup> A President who orders the military to interfere with an election, for example to seize ballot

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179. The acts described in the statute are in the alternative. To be convicted a person must incite, set on foot, assist, *or* engage in rebellion *or* insurrection against the authority of the United States *or* the laws thereof, *or* give aid *or* comfort thereto. A person who commits any one of these acts violates the statute. A person who commits any one of these acts more than once, or who commits several of these acts, could be convicted of multiple counts of violating the statute. A single count is enough to impose the mandatory penalty referred to in the statute itself and in the Fourteenth Amendment, Section 3: disqualification from public office. 18 U.S.C. § 2383.

180. 18 U.S.C § 593 ("Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any States [or] prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election . . . may be imprisoned for a maximum of five years."). There is also a disqualification provision in this statute, namely that anyone who commits a crime under this section shall be "disqualified from holding any office of honor, profit or trust under the United States." *Id.*

boxes or try to reverse the results of an election he lost, would have issued an illegal order. Under long-standing law and precedent, subordinate officers or other enlisted personnel are entitled—indeed obligated—to refuse to carry out the order and to report the illegal order up the chain of command.

Obstruction of an official proceeding is also a crime under Section 1505 of Title 18,<sup>181</sup> for example, obstruction of the proceeding in which Congress certifies the election of the next President. Sedition or any of these other crimes can also be the object of a conspiracy, and hence may be punishable under Section 371 of Title 18.<sup>182</sup> And under the federal complicity statute, Section 2 of Title 18,<sup>183</sup> a person who “solicits” another person to commit a crime will be treated as though he had himself committed that crime.

Many criminal statutes may be applicable in the course of the commission of seditious conspiracy—it is beyond the scope of the present Article to analyze them all. Rather, the question this Article addresses is whether a President’s Article II removal power preempts these statutes, such that a President can summarily remove from office any presidential appointee who refuses to commit these or other crimes. Can a President, in furtherance of a seditious conspiracy, seek to compel federal officers to become his accomplices in crime and threaten to fire them if they don’t comply? If Presidents can use their removal power to obstruct justice and to coerce political activity, the subject of the two previous sections of this Article, why not go one step further and allow Presidents to use removal power to compel appointees to engage in insurrection and rebellion against the United States?

Unlimited presidential removal power makes it that much more likely that a President can accomplish this result. The potential consequences are frightening. First, consider what almost happened in November 2020 through January 2021 when the United States came very close to a coup orchestrated by a President intent on staying in power. Removal was a critical part of that effort and might have played an even greater role in the attempt to seize control of the election narrative.

For example, in November 16, 2020, Trump fired Christopher Krebs, the election cybersecurity security official who earlier that

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181. 18 U.S.C. § 1505.

182. 18 U.S.C. § 371.

183. 18 U.S.C. § 2.

month, denied the existence of fraud in the election.<sup>184</sup> On its face, the firing of Krebs, however politically motivated, was part of the President's legitimate removal power and therefore lay within the purview of the President's legitimate Article II powers. However, what if the firing occurred because the President wanted Krebs to say the election was fraudulent and Krebs refused? What if Trump had indeed said that if he did not declare him, Trump, the winner of the 2020 election, Krebs would be fired? This shows that while presidential removal is normally assessed simply as a power, plain and simple, a correct analysis of removal power must examine the motive from which a removal is conducted. Whether the firing of Krebs was criminal depends on its purpose, and if the purpose was to put in place someone who would declare the election fraudulent as part of a criminal conspiracy to overthrow the U.S. government and to interfere with the official proceeding that was to take place on January 6, then the firing of Krebs might have been criminal after all.

Removal even operates outside the scope of official White House business, for example within the 2020 campaign itself. A book published by former Director of the Office of Trade and Manufacturing Policy under Donald Trump, Peter Navarro, has revealed that Trump even attempted to remove his son-in-law Jared Kushner from control of his 2020 campaign. Although no legal repercussions could attach to removal from non-official positions, and a President would always be within his rights to determine who leads his campaign for reelection, it is interesting to note that even in this context, Trump deputized a third party (in this case Republican donor Bernie Marcus) to do the firing for him and to replace Kushner with Steve Bannon, if Navarro's account is correct.<sup>185</sup>

Meanwhile, the conspiracy to overturn the 2020 election worsened in the days and weeks leading up to January 6. Former Overstock CEO Patrick Byrne, who testified behind closed doors for the January 6 Committee, attended a December 18, 2020 meeting at the White House with Trump, Trump's personal lawyer Sidney Powell, and for-

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184. David E. Sanger & Nicole Perlroth, *Trump Fires Christopher Krebs, Official Who Disputed Election Fraud Claims*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/us/politics/trump-fires-christopher-krebs.html> [<https://perma.cc/93AE-P8CD>].

185. Darragh Roche, *Donald Trump Backed Failed Coup to Remove Jared Kushner: Navarro*, NEWSWEEK (Sept. 10, 2022, 9:07 AM), <https://www.newsweek.com/donald-trump-backed-failed-coup-remove-jared-kushner-navarro-1741751> [<https://perma.cc/A3EB-PN72>].

mer National Security Adviser Michael Flynn.<sup>186</sup> They discussed official actions Trump could take to reverse the 2020 presidential election. They specifically discussed Trump ordering the military to seize voting machines and redo the election, after numerous federal and state courts had already decided that the election was valid.<sup>187</sup> This was clearly a plan to use the military to rebel against the authority of the courts and the laws of the United States. What if Trump had given this order to his most senior military offices and threatened to remove any of them who refused? An understanding that the President's removal power is unlimited, even by criminal law, would make it that much more likely that such an order would be obeyed.

A critical part of the plot to overturn the 2020 election was to put pressure on the DOJ to support Trump's bid to remain in office. Removal played a significant role in that scheme. The January 6 congressional hearings revealed the extent of Trump's designs on the Department, and along with it, his threat to fire Acting Attorney General Rosen if he did not fall into line with those plans. The threat later turned into a plan. Trump planned to use his removal power to coerce DOJ to issue a legal opinion that would be used by the Vice President, by the military or both, to overturn final decisions of the voters and the courts. Under these circumstances, and in view of Trump's intent, the plan to remove the Acting Attorney General was part of the overarching criminal conspiracy to overturn the 2020 election.

Had federal officers at DOJ under threat of removal succumbed to the pressure to declare the election invalid, the United States might have succumbed to a "self-coup," as has occurred in so many other countries, in which a leader who came to power through legal means remains in power by using his executive authority to subvert the coun-

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186. Maggie Haberman, *Tears, Screaming and Insults: Inside an 'Unhinged' Meeting to Keep Trump in Power*, N.Y. TIMES (July 12, 2022), <https://www.nytimes.com/2022/07/12/us/politics/jan-6-trump-meeting-screaming.html> [<https://perma.cc/8NZP-86RH>].

187. See Claire O. Finkelstein & Richard W. Painter, *Invoking Martial Law to Reverse the 2020 Election Could be Criminal Sedition*, JUST SECURITY (Dec. 22, 2020), <https://www.justsecurity.org/73986/invoking-martial-law-to-reverse-the-2020-election-could-be-criminal-sedition/> [<https://perma.cc/Y4MR-UT9N>]; see also Betsy Woodruff Swan, *Read the Never-Issued Trump Order That Would Have Seized Voting Machines*, POLITICO (Jan. 21, 2022), <https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572> [<https://perma.cc/5L3U-UDCS>]; William Cummings, Joey Garrison & Jim Sergeant, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/S9RC-W7QU>] (discussing dozens of lawsuits in federal and state courts challenging the 2020 election all of which failed).

try's laws of succession. Had Trump used this same power of removal to threaten military officers and demand their compliance, or to remove and replace them with Trumpian loyalists who would do his bidding, this result would have been all but guaranteed.

### B. *Removal of a Military Officer*

Thus far this Article has considered cases of removal of a civilian federal officer, where the removal was effectuated for the purpose of committing a domestic crime. In such cases, the President's removal powers are understood to be grounded in his control over the Executive branch, under the theory of the unitary executive. The question of presidential removal to further a crime becomes particularly complicated, however, when the officer removed is a member of the military and the intention in removing him is to eliminate an obstacle to an illegal use of the forces. The President's Commander-in-Chief role provides him with the foundation to conduct removals under Article II, Sec. 2 of the U.S. Constitution in such instances; it is not necessary to justify the removal by invoking the general provisions of the President's Article II authority. Although Senate confirmation is still required for many military officers—including members of the Joint Chiefs of Staff; the Secretary of the Army, Navy, and Air Force; and anyone above the rank of major in the Army, Marine Corps, Air Force or Space Force—the President's power to remove military officers is apparently unlimited under Article II.

There was an attempt to limit the President's removal power over military officers after the end of the Civil War by statute, though the legitimacy of Congressional action in this area has been challenged.<sup>188</sup> 10 U.S.C. § 1161 limits the dismissal of a commissioned officer from the armed forces to (1) sentences of general court-martial; (2) commutation of a sentence of a general court-martial; or (3) by presidential order in time of war. Removal during time of war is a straightforward application of the President's Commander-in-Chief authority, and the principle that the President's removal authority over military officers is absolute during war has never been seriously questioned. However, as 10 U.S.C. § 1161 indicates, there are legal protections for military personnel during peacetime that purport to tie the hands of the President in removing commissioned officers. And while this legislative

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188. See Charlie Dunlap, *Can Presidents 'Fire' Senior Military Officers? Generally, Yes . . . But It's Complicated*, DUKE U. LAWFIRE BLOG (Sept. 15, 2016), <https://sites.duke.edu/lawfire/2016/09/15/can-presidents-fire-senior-military-officers-generally-yesbut-its-complicated/> [<https://perma.cc/TW5W-P4GR>].

approach is subject to doubt,<sup>189</sup> the idea that the President may not remove commissioned officers during peacetime has survived since 1865.

The question, however, arises whether the President may remove a commissioned officer from his position without dismissing him from the military altogether, thus avoiding the §1161 hurdle but still removing him from positions of power. The further question then is whether the President may use such removal to commit a crime or whether criminal removal of a military officer is outside the President's Article II authority. The correct answer ought to be that whatever power of removal of commissioned officers the President has, that power should be limited to cases in which the President exercises his removal power for lawful purposes. Thus, if the commissioned officer commits no crime or wrongful act, but the President wishes to remove him because he is a witness to crimes within the military the President wishes to cover up, the removal is unlawful and the President acts beyond the scope of his Commander-in-Chief authority, as articulated by Congress and the U.S. Constitution.

What, then, of the case in which the President has commanded the armed forces to violate federal law? Imagine that on January 6, Donald Trump had decided to federalize the national guard, not to protect the Capitol but to aid the insurrection in his bid to halt the certification of the vote. Upon his orders, the National Guard was to attack the Capitol Police and to prevent the protection of Congress and its members, who were by now fleeing for their lives. Imagine further that acting Defense Secretary Christopher Miller had refused to carry out the order for the National Guard to support the insurrectionists against the Capitol Police, and that Trump had accordingly sought to remove Miller from his post. What then? Assuming that Miller had refused to resign his post, could the President remove him from his position and install a party loyalist such as the now disgraced General Michael Flynn, who shortly after his pardon suggested that Trump could impose martial law and deploy the military to re-do the election?<sup>190</sup>

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189. JOHN NORTON MOORE & ROBERT F. TURNER, *PRESIDENT'S BLUE RIBBON COMM'N ON DEF. MGMT., THE LEGAL STRUCTURE OF DEFENSE ORGANIZATION*, at 2 n.1 (Jan 15, 1986).

190. Jim Golby & Peter Feaver, *The Military Would Put Down Michael Flynn's Proposed Insurrection*, MIL. TIMES (Jan. 3, 2021), <https://www.militarytimes.com/opinion/commentary/2021/01/03/the-military-would-put-down-michael-flynns-proposed-insurrection/> [<https://perma.cc/N46P-W3GK>] ("Less than two weeks after being pardoned, retired Lt. Gen. Michael Flynn took to the airwaves to suggest President Trump could impose martial law and deploy the military to re-run the election.



As it happens, Miller had retired from the military in 2014. But had it been otherwise, the President could not have removed Miller if that had meant separating him from the military. But he could remove him as acting Defense Secretary, ordinarily a civilian position in the Department of Defense, and replace him with Flynn consistent with the Article II analysis, along with 10 U.S. Code § 1161 goes. The deeper question is the following: if the only reason Trump had removed Miller and replaced him with Flynn in our hypothetical was because Miller refused to make the Guard complicit with the January 6 attack on the Capitol and Flynn, he knew, was aware of the plan and had agreed to participate in the attack, would the President have exceeded his removal powers under Article II?

Here the analysis seems identical to that offered above: since Miller's removal and Flynn's appointment were steps in a criminal conspiracy to attack the Capitol in order to delay and permanently interfere with the certification of Joe Biden as the President-elect, the removal and replacement were themselves illegal, insofar as they were links in the chain of actions that fell within the scope of the conspiracy. To argue under these circumstances that the President was exercising his valid Article II removal powers and hence that his actions were constitutionally protected would not only distort Commander-in-Chief authority, but also would allow presidential removal power to be used for illegal purposes. That is, if a President harbors the criminal intent to overturn the results of a valid, democratic election and he enters into a seditious conspiracy with others to carry out his plan, he ought not have the additional benefit of claiming the superior privileges of his office to further his felonious plans. Article II was meant to help a President claim the benefits of his office to further the lawful and protected functions of the presidency. It was not meant to amplify the ability of the President to commit crimes while in office. Under such circumstances, the President must be understood to have forfeited his implicit Article II powers—at least those that were to be used in the service of his criminal plot—while he continues to attempt to carry out the object of the illegal conspiracy to overturn a valid U.S. election.

What does it mean to say the President has forfeited his Article II powers under these circumstances? At a minimum, it means that removing Miller would itself be illegal as part of a criminal conspiracy, and the President could be charged with the conspiracy immediately,

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Apparently, this proposal intrigued President Trump, who invited Flynn to the White House to hear more.”).

as the authors of this Article have defended elsewhere, or at least after he leaves office (if he leaves office).<sup>191</sup> But now a difficult question emerges: if the President *had* succeeded in replacing Miller with Flynn under the circumstances described, would Flynn now be the rightful acting Secretary of Defense? If, not accepting his demotion, Miller continued to give orders as the Secretary of Defense and insisted that he continued to be the rightful occupant of that office, would the replacement of Miller with Flynn be valid, despite its illegality? Imagine that Miller had instructed all National Guardsmen to ignore any instructions to assist in the overtaking of the Capitol and had instead ordered the military to assist the Capitol Police to protect the Capitol while Flynn was barking orders to the guardsmen to protect the rioters and attack the Capitol Police. Would the rest of the U.S. military be entitled to continue to follow Miller's orders? Or should they follow Flynn instead? And if they regard Flynn as the rightful acting Secretary of Defense, should they refuse to follow orders under such circumstances?

Unlike the question of the illegality of the removal—which arguably can be inferred from the illegality of the underlying conspiracy and the seditious intent of its participants—the question here is about the validity of the succession in the role of acting Secretary of Defense. The question of the validity of the removal is separate from the question of its legality. It seems plausible to think that the validity of a removal and replacement should fail with its illegality—a matter addressed in Part VII below. This Article will turn to the question of validity momentarily, after a discussion of a final aspect of the legality of the removal.

### C. *Removal as Part of a Self-Coup*

Where could criminal use of presidential removal power lead? One need only look beyond our own borders in recent history to see how dangerous it can be. This is not an article on comparative law of executive power, nor an article about the history of its abuse, but we ignore the warning signs of past experience at our peril. What almost happened here in January 2021 is not that different from what has happened in many other representative democracies, in some cases with cataphoric consequences not only for the country involved but for human civilization.

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191. Finkelstein and Painter, *supra* note 36.

Self-coup has been experienced by over a dozen countries, including South Korea in 1972 (President Park Chung-hee),<sup>192</sup> Uruguay in 1973 (President Juan Maria Bordaberry),<sup>193</sup> Peru in 1992 (President Alberto Fujimori),<sup>194</sup> and Venezuela in 2017 (President Nicolás Maduro).<sup>195</sup> In Venezuela, Attorney General Luisa Ortega Díaz was removed from office in 2017 after she objected to President Maduro's seizure of power with the support of the Venezuelan Supreme Court. The reasons for her firing were not expressly stated and she was not fired directly by Maduro but rather by the nation's newly installed Constituent Assembly, after Maduro had packed the Assembly with loyalists and announced that opposition leaders were subject to prosecution.<sup>196</sup>

The most notorious example of self-coup in European history was the seizure of power by German Chancellor Adolf Hitler in 1933 within months of his assuming office after his appointment by President Paul von Hindenburg. Conservatives at first thought they could control Chancellor Hitler, and even the *New York Times* reported that he had "put aside" his aim to be a dictator.<sup>197</sup> But that proved short lived after Hitler used a fire in the Reichstag building as an excuse to declare an emergency under Article 48 of the Weimar Constitution.<sup>198</sup> The Enabling Act<sup>199</sup> of March 1933 gave the Chancellor and Cabinet unilateral power to decree laws without consent of the Reichstag. Removal power then was used en-masse in one of the first such decrees,

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192. See *South Korean Chief Orders Martial Law*, N.Y. TIMES (Oct. 18, 1972), <https://www.nytimes.com/1972/10/18/archives/south-korea-chief-orders-martial-law-assembly-dissolved-and-all.html> [<https://perma.cc/3TXE-FP7M>] ("President Park Chung Hee proclaimed martial law tonight throughout South Korea, suspended part of the Constitution, dissolved the National Assembly and suspended all political activities.").

193. See generally EDY KAUFMAN, *URUGUAY IN TRANSITION: FROM CIVILIAN TO MILITARY RULE* (1979) (discussing the term "Autogolpe" in referenced to events in Uruguay in 1973).

194. See generally CHARLES D. KENNEY, *FUJIMORI'S COUP AND THE BREAKDOWN OF DEMOCRACY IN LATIN AMERICA* (2004).

195. Emma Graham-Harrison & Virginia López, *President Maduro Strips Venezuela's Parliament of Power*, THE GUARDIAN (Aug. 19, 2017), <https://www.theguardian.com/world/2017/aug/19/venezuela-crisis-deepens-maduro-strips-opposition-held-parliament-power> [<https://perma.cc/7VUT-X5TD>].

196. *Venezuela Constitutional Assembly Fires Chief Prosecutor*, DEUTSCHE WELLE (Aug. 5, 2017), <https://www.dw.com/en/venezuela-constitutional-assembly-fires-chief-prosecutor/a-39973289> [<https://perma.cc/3WH8-CT5E>].

197. *Hitler Puts Aside Aim to Be Dictator*, N.Y. TIMES, Jan. 31, 1933, at 3.

198. *Hitler Suspends Reich Guarantees*, N.Y. TIMES, Mar. 1, 1933, at 1.

199. See Gesetz zur Behebung der Not von Volk und Reich [Ermächtigungsgesetz] [Law to Remove the Distress of the People and the State], Mar. 23, 1933, RGBI I at 141 (Ger.). This act is also known as Ermächtigungsgesetz [The Enabling Act of 1933].

the Law for the Restoration of the Professional Civil Service of April 7, 1933, the first section of which provided that “to restore a national professional civil service and to simplify administration, civil servants may be dismissed from office in accordance with the following regulations, even where there would be no grounds for such action under the prevailing Law.”<sup>200</sup> The next section of this removal law provided that non-Aryan (e.g. Jewish) and “politically unreliable” people were banned from the civil service.<sup>201</sup> With dissenters removed from the civil service, including from prosecutors’ offices and the judiciary,<sup>202</sup> Hitler was free to solidify his hold on absolute power. The removal power of the executive was near absolute by April 1933, only three months after Hitler had been appointed Chancellor under the constitution of a representative democracy.

As with other examples of self-coup, the removal power of the executive is a critical part of the story, particularly at the initial stages where the executive consolidates power and dismisses anyone who disagrees with him. In the case of Germany in 1933 and the many other countries that have experienced a successful self-coup, the story winds up in a familiar place. It almost ended that way for the United States in 2021.

## VII.

### ARE CRIMINAL PRESIDENTIAL REMOVALS VOID?

The question of the limits of presidential removal is part of a broader issue this Article has not yet explicitly addressed: do the constitutional powers of the President preempt application of criminal law to the President’s official acts? In other words, does the President retain his inherent Article II powers when these are used to commit a crime? There are three possible positions one might take on this question. The first takes the broadest possible view of presidential privileges and holds that the President never forfeits his Article II powers, regardless of the reasons he seeks to exercise such powers or whether they are explicit powers—such as the pardon power—or implicit, such as removal power. On this model, the President’s power of removal remains intact even if he uses it as part of a criminal conspiracy.

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200. See Gesetz zur Wiederherstellung des Berufsbeamtentums [Law for the Restoration of the Professional Civil Service], Apr. 7, 1933, RGBI I at 175, (Ger.).

201. *Id.*

202. INGO MULLER, *Jurists “Coordinate” Themselves, in HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 36-37 (Deborah Lucas Schneider trans., Harvard Univ. Press 1992) (discussing removal of political opponents of the Nazis from the judiciary and the civil service under the new civil service decree and the acquiesces of the German judiciary to the same).

Moreover, according to this model, because the President is exercising a constitutionally protected power in such instances, his actions cannot be criminal. This is the heart of the Nixonian position on presidential privilege quoted above, namely that if the President does something, it cannot be illegal.

A second position would maintain that the President retains his right to exercise his inherent Article II powers, even when his actions form an integral part of a criminal conspiracy, but that the President enjoys no protection from criminal indictment or conviction by reason of exercising those powers in such cases. Thus, if removing the attorney general is part of an overall scheme to engage in seditious conspiracy, the removal would be valid. However, the President could be indicted for his crimes (whether during the presidency or post-presidency, depending on one's view on indicting a sitting President) for exercising his removal power in this way.

A third answer maintains that a President who exercises his removal power in a way that violates a generally applicable criminal statute forfeits that power—meaning that the exercise of the removal power is itself invalid and the removal is not in fact effective. According to this view, not only does the fact that a presidential act is part of a criminal plan or conspiracy mean that it is not permissible, it also means that the exercise of presidential removal is limited to legal uses of that power. This view makes a priority of the criminal status of certain acts and treats the illegal nature of the conduct as a basis for limiting the reach of the removal power.

This third view entails certain complexities. Would the exercise of the removal power be void from the outset, such that the removed officer would still hold the office and the appointment of a successor is invalid? Or would the removal simply be voidable upon a judicial finding that the removal was criminal, in which case the removed officer would be restored to his office and the successor appointed in his place removed? As discussed further below, this distinction between a void versus a voidable presidential removal could be vitally important in particular situations, and there may be no easy "one size fits all" approach.<sup>203</sup>

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203. A related question, but one that is beyond the scope of this article, is whether the individual who is wrongfully removed would have a civil cause of action. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (examining a suit by the estate of a FTC commissioner removed by President Roosevelt for back salary up until the date of Humphrey's death on the grounds that he was still a commissioner). Another alternative might be a *Bivens* action based on the constitutional violation implicit in the removal. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). If so, and if specific performance is a remedy, then there would be a mechanism for

The most critical question, however, lies at the intersection between unitary executive theory and removal as a tool for the commission of various crimes—from obstruction to seditious conspiracy and everything in between. Should removal as part of the commission of a crime always be prosecutable? In other words, should the fact that the President is exercising implicit Article II powers in removing a federal officer ever protect him from prosecution? It is the position of this Article that indeed, a President cannot hide behind assertions of privilege to shield himself from prosecution where the exercise of the privilege—in this case the removal privilege—violates the law. This would mean that the first of the three positions above could be ruled out in cases involving criminal use of the removal power. This would leave either the second or the third position as correct. And in fact the answer as between these two possibilities might vary depending on the case.

At a minimum, the second of the above positions would be correct with regard to presidential removals where the removal itself violated a criminal statute. In some cases, however, it seems correct to go further and to maintain that the removal itself is void by reason of its illegality, and that therefore the replacement is also invalid in cases in which one federal officer has been removed and replaced with another. For such cases, not only is the President potentially prosecutable for his role in the commission of a crime, but the removal itself is invalid and the removed officer should be restored to his or her former position.

When is the second position correct and when the third? In other words, when does illegality in removal subject the President to potential prosecution and when, in addition, is the removal itself void? While this Article does not provide a complete theory of this question in the current context, the next Section attempts to distinguish between those removals that violate the law and those removals that, in addition to violating the law, also should be considered invalid and the former office holder should have the right to be restored to his former position. Which cases implicate this second consequence—namely that the removal is void, and not just illegal—will require some reflection.

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restoring a wrongfully removed federal officer that did not necessarily require a determination of criminal culpability. However, *Bivens* actions have been sharply curtailed by the Supreme Court. See *Hernandez v. Mesa*, 582 U.S. \_\_\_, 137 S. Ct. 842 (2017); *Hernandez v. Mesa*, 589 U.S. \_\_\_, 140 S. Ct. 735 (2020).

A. *When Might Criminality Void the Removal Power?*

In some situations, criminality is not likely to void the acts of Congress or the President. For example, suppose a bill passed in a Congress where some members were bribed to vote for the bill. If the deciding votes for a bill are the result of bribes, and the corrupt legislators can be prosecuted for bribery, is the law still a valid law? What if a President is bribed to sign a bill? Would that be sufficient to conclude that the bill was not validly signed into law if and when the undue influence came to light?

Probably not. Voiding statutes, some of them passed decades or even centuries ago, because of corruption in their passage undermines the certainty of law. Furthermore, there is no telling with confidence what statutes would have been passed in their place in the same or subsequent sessions of the same legislative body. For example, even if it could be shown that President Lyndon Johnson had crossed the line into bribery of members of Congress to pass the Voting Rights Act of 1965 (there is no evidence that he did), that should not result in the invalidation of the Voting Rights Act. In most instances, there is little value gained by invalidating a law because of evidence of corruption in its passage, other than perhaps creating employment as expert witnesses for historians searching legislative history for evidence of corruption and counterfactual historians opining on what would have happened absent the alleged corruption.

Very different, however, is an official act in a particular party matter such as the awarding of a government contract or license. There it is highly likely that an award obtained by means of corruption, even on falling well short of criminal corruption, would be considered voidable by a court, and indeed courts have done just that.<sup>204</sup> The Federal Acquisition Regulation (FAR) also provides that a government contract can be voided because of corruption, although such a determination is discretionary, and the contract is generally not viewed as void from its inception.<sup>205</sup>

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204. *See* *Mass. Bay Telecasters, Inc. v. Fed. Comm'n's Comm'n*, 261 F.2d 55 (D.C. Cir., 1958), *cert. denied*, 366 U.S. 918 (1961). In this case, the Federal Communications Commission (FCC) had granted a license application in Boston of WHDH, Inc., a wholly owned subsidiary of the Boston Herald-Traveler newspaper. When the Court became aware of improper *ex parte* contacts with the FCC Chairman and principals of WHDH, the court invalidated the award and remanded for further consideration. *Id.* at 65-66.

205. FAR 3.704 (2022) ("In cases in which there is a final conviction for any violation of 18 U.S.C. § 201-224 involving or relating to contracts awarded by an agency, the agency head or designee, shall consider the facts available and, if appropriate, may declare void and rescind contracts.").

Removal of a federal official is also a particular party matter like a contract or license award. It would, however, pose unique problems for the predictability of administrative government and succession in administrative agencies if a criminal removal were always assumed to be void. This is particularly true if the wrongfully removed official is not still seeking to exercise the authority of the office, and it is important to the government that someone performs the duties of that office. On the other hand, assuming that a President's criminal removal of a federal official and replacement of that official is always valid can be dangerous as well if the criminal scheme is furthered thereby. The question of validity versus voidness of a criminal removal by a President is a difficult one, and specific facts rather than a one-size-fits-all legal theory may be determinative of the best outcome.

It seems likely then that whether the removal is not just criminal but void will turn on the role the removal plays relative to the illegal course of conduct. Arguably in cases in which the removal itself not only represents a violation of a criminal statute, but it also plays an integral role in furthering the criminal course of action, the removal should be invalidated and the former federal officer restored. Such was the case, for example, when Nixon finally succeeded in removing Archibald Cox. Not only was firing the Special Prosecutor part of a plan to obstruct justice, but it was also an invalid removal, as the ruling of Judge Gesell confirmed. On the other hand, when Nixon fired Cox, Cox did not seek reinstatement, and the court thought that significant in assessing whether to invalidate the removal and hence the appointment of Cox's successor, Leon Jaworski.<sup>206</sup>

Ironically, the idea that Cox's firing was void as well as illegal—even if he did not seek reinstatement—would have done Nixon a favor since Cox was not himself pushing for reinstatement. For it would have implied that Jaworski had no power to act, including his successful fight for the White House tapes in the Supreme Court. That would have been exactly the result Nixon wanted after Cox returned to teaching after his firing. The federal district court in 1974 in *Nader v. Bork* rejected that view, given Cox's lack of participation in the litigation, and this meant that Jaworski had the power to proceed.<sup>207</sup> If, on the other hand, Nixon had pressured the DOJ to appoint H.R. Haldeman

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206. See *Nader v. Bork*, 366 F. Supp. 104, 105, 106 n.3 (D.D.C. 1973).

207. *Id.* at 109 ("These conclusions do not necessarily indicate that defendant's recent actions in appointing a new Watergate Special Prosecutor are themselves illegal, since Mr. Cox's evident decision not to seek reinstatement necessitated the prompt appointment of a successor to carry on the important work in which Mr. Cox had been engaged. But that fact does not cure past illegalities, for nothing in Mr. Cox's behavior as of October 23 amounted to an extraordinary impropriety, constituted consent to



or another political crony as special counsel, the better approach probably would have been to assume the firing of Cox was void and his replacement had no power to act. The search for an underlying rule distinguishing void removals from voidable removals is fraught with difficulty, but the construction of void vs. voidness that does the least to further the underlying crime is very likely the correct one.

Thus, not only could Nixon have been charged with obstruction of justice for his efforts to cover up his role in the Watergate break-in, but in addition, Cox could have been restored to his position and his removal invalidated. Given that the removal was part and parcel of the plan to obstruct justice, and further, that the firing of the Special Prosecutor was an integral part of the plan to obstruct justice and furthered that criminal aim, the firing of Archibald Cox was not only criminal but invalid, and had he sought to be restored he would have had the right to the same. Thus, if the President removes a federal officer as part of a plan to obstruct justice or commit some other crime, the removal is presumptively invalid if the aspect under which the removal was criminal itself depended on the removal for the accomplishment of the illegal aim. However, whether, and under what circumstances, a court should be willing to void the removal and subsequent reappointment is a critical question, one that cannot be fully resolved in the context of this Article.

After President Roosevelt, for political reasons and with no criminal intent, sought to remove William E. Humphrey as commissioner of the FTC in 1933, Humphrey "never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of \$10,000 per annum."<sup>208</sup> Humphrey's estate then sued in the Court of Claims for his back salary up until the date of this death in early 1934. The Court of Claims certified the statutory and constitutional questions to the Supreme Court, but the underlying premise of the complaint in *Humphrey's Executor* was that the President's actions were void under a federal statute. The illegally fired federal officer had a right to sue for his salary. Had Humphrey survived beyond 1934, and had the Supreme Court ruled his removal illegal (it did not), a court could have entertained a suit for his job back as well. If a federal officer who was illegally removed by a President who acted politically but not criminally could remain in his or her post, it is hard to imagine why a federal officer removed as part of a

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the abolition of his office, or provided defendant with a reasonable basis for such abolition.").

208. *Humphrey's Executor v. United States*, 295 U.S. 602, 603 (1935).

criminal act would not have an equal right to remain in the position he or she occupied.

A related question is whether the newly appointed official has power to act in furtherance of the criminal scheme for which he was appointed, particularly if he is appointed in order to commit an identifiable crime. If acting Attorney General Jeff Rosen had been fired and Jeffrey Clark had been appointed acting Attorney General in his place in early January 2021 for the purpose of issuing a DOJ opinion nullifying the 2020 election, would Rosen's removal be valid and Jeffrey Clark be legally exercising the powers of the office of the Attorney General? Or should a court have entered an injunction prohibiting Clark from doing so, at least insofar as his exercise of those powers was in furtherance of the same criminal scheme that has led him to be appointed to begin with? This is a critical question because Trump very likely intended to obtain the DOJ opinion and then use it to persuade the military to back him in claiming the election was invalid.

In this instance, the only workable answer is to assume that Rosen's firing was void, and that Clark's actions as acting Attorney General would have been void at least insofar as he took actions in furtherance of the criminal conspiracy that would have caused President Trump to fire Rosen and replace him with Clark. Any other answer would mean that Clark's legal opinion that the election was fraudulent would itself have been a legitimate and hence internally binding opinion of the Department, with important repercussions. For example, it would have shaped Department policy on litigation and would have been binding on U.S. attorneys across the country. It could also have been used by President Trump in combination with his other presidential powers—including as Commander-in-Chief of the military—to stage a coup. Waiting for a court to void Rosen's removal and hence Clark's appointment because Rosen's firing was criminal would have been too late to protect the country from potentially disastrous consequences. Other DOJ employees, other Administration officials and Congress would have had to assume from the outset that Rosen's firing was invalid, or Trump's seditious scheme might very well have succeeded.

### *B. Criminal Removal in the Military, Revisited*

When the President removes a military officer, what is the status of the new officer appointed to replace him? In this context the void versus voidable distinction may be critical. If a military officer is removed in order to commit a crime, and then replaced with another military officer who will commit the crime, and other members of the

military wait around for a court to void the criminal removal, it may be too late. Whether other military officers consider the removal and replacement to be void and refuse all orders from the replacement officer, or whether the replacement officer is deemed to have some authority in matter unrelated to the crime, with orders related to the crime presumed to be illegal, is a difficult question, but simply taking all orders, including orders likely to be illegal, from the replacement officer is not an option consistent with maintaining a representative democracy. Endorsing a rule that recognizes such removals as valid would validate the tools of the self-coup.

This situation poses unique issues in interpreting the President's powers as commander in chief. On the one hand, Truman's firing of MacArthur must be a legitimate exercise of presidential removal power, however unpopular it may have been. MacArthur enjoyed enormous support with the public and in Congress, so any ambiguity with regard to the exercise of removal power in that context would have been very dangerous for civilian control of the military. MacArthur very likely would not have gone along with a military coup against Truman, but some other general might have if the removal power had not been clear in this instance. A rule that does not allow a President to remove a dissident general invites a military coup. On the other hand, self-coup (*autogolpe*) almost always involves a President ordering the military to help him stay in power, which Trump came close to doing in 2020-21. A President may seek to remove a general who refuses to participate in a self-coup and replace him with a general who will. This would have been the case if Trump had decided to fire his Chairman of the Joint Chiefs of Staff, General Mark Milley and replace him with someone like General Flynn. Such criminal use of removal power cannot be tolerated in a representative democracy. A rule that recognizes such removals as valid would be inviting a self-coup.

Those are the two extremes. It's a difficult question at the margins in-between, but in order to have a definitive answer in all situations we cannot endorse a single rule—or a theory behind a rule—that would give support to either of the above seditious conspiracies. We cannot endorse a rule or theory that would facilitate either a military coup by a general who thinks he cannot be removed or a self-coup by a President who thinks he can remove and replace generals who will not help him seize power.

CONCLUSION: IMPLICATIONS, IMPLEMENTATION AND  
ACCOUNTABILITY

This Article has drawn attention to both a legal and a conceptual claim, namely that unenumerated presidential removal powers do not create a carve-out from federal or state criminal laws, despite the fact that they have been recognized as part of the President's constitutional Article II powers. But what does this interpretation of the relationship between presidential powers and federal criminal law mean for our criminal justice system? What does it mean for the DOJ, for the President, and potentially for Congress? Most importantly, would the DOJ be prepared to indict a President or ex-President for illegally removing an executive branch official, as part of a scheme to obstruct justice with regard to another investigation or to commit another crime, such as coercion of political activity by federal officials or sedition? It is one thing to say that certain uses of presidential removal power are criminal and therefore beyond the scope of constitutional Article II powers; it is quite another to enforce criminal law to prevent Presidents from removing federal officers under such circumstances. This Conclusion will briefly address the enforcement aspects of the legal framework suggested in this Article, recognizing that procedural aspects of the relationship between law enforcement and presidential power are complex and would be worthy of separate treatment in a follow up article.

The first point to note is that drawing attention to the relationship between criminal prohibitions and presidential removal power likely will itself assist with compliance. Opinion among commentators is presently divided. Some commentators have argued against abuse of presidential removal power,<sup>209</sup> but as this Article emphasized in the previous Part, a number of commentators would be prepared to agree with Richard Nixon that if the President does something it can't be illegal. Accordingly, this view suggests that presidential removals are *eo ipso* legal, since no exercise of removal power could possibly, on this view, violate Article II.<sup>210</sup> This position however, is unsupported by existing precedent and doctrine, including Supreme Court jurisprudence on the question of presidential obstruction of justice and other crimes, namely that an assertion of presidential privilege does not supply a basis for regarding either a sitting or a former President as immune to legal process. But while scholars and other commentators,

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209. See Shugerman, *supra* notes 42, 45, 53.

210. See, e.g., Amar Testimony, *supra* notes 25 (discussing how President Trump had a constitutional right to fire Mueller).

White House officials, OLC lawyers, and constitutional law practitioners may be prepared to accept that a sitting President is constrained by laws prohibiting bribery, the Insurrection Act, or seditious conspiracy laws, there has been insufficient attention given to applying this same logic to the topic of presidential removal.

There is grave danger to the constitutional order from a view that treats removal as though it were an inalienable right of sitting Presidents, regardless of the motive for the removal. Removal is no more sacrosanct than other presidential powers that are exercised in the process of committing crimes like espionage or insurrection: the fact that a President exercises presidential powers in committing a crime does not immunize him from criminal liability. Thus, a President exercises presidential powers when he orders his security detail to drive him to the Capitol Building, but if he issues that order for the purposes of leading an insurrection against his own Vice President and the entire U.S. Congress, his exercise of his presidential powers likely violates the law. If a President exercises presidential powers when he removes classified documents from the Oval Office to his White House residence for the purpose of later removing them from the government altogether, then his exercise of presidential powers is part of a scheme to steal government documents, and it violates the law. Similarly, if a President were to remove the acting Attorney General for the purposes of replacing him with a presidential loyalist who can be counted on to deny the outcome of a presidential election, then the removal is itself illegal, though if done with different motives and under different circumstances, it might be perfectly legal. The point is that there is nothing special about removal. The President can violate the law by putting his powers to illegal use, and those powers include the power to remove other executive branch officers.

Second, as part of our suggested interpretation of the relationship between unenumerated presidential powers and criminal statutes, the DOJ needs to be willing to open criminal investigations and if appropriate, prosecute cases involving criminal use of removal power. As these authors have discussed in a previous article,<sup>211</sup> OLC should reverse its position that a sitting President cannot be indicted. Furthermore, the DOJ needs to appoint an independent special counsel to investigate alleged criminal acts of a President or a former President. Indicting a former President, even of the opposing political party, may be too heavy a lift for DOJ appointees of the President, not only because of partisan considerations, but because political appointees often

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211. Finkelstein & Painter, *supra* note 36, at 93.

defend broad use of presidential power in a wide range of circumstances. These authors have also suggested in a book chapter published by the Brookings Institution<sup>212</sup> that the 1978 independent counsel law should be reenacted in some form, and until Congress passes such a law, the DOJ should use its existing special counsel regulations for criminal investigation and enforcement against a current President, former President, or President's senior appointees where needed.

Third, to enhance transparency in circumstances where it is possible that criminal motives were involved with removal of a federal officer by the President, or at the behest of the President, Congress should pass a law requiring a written explanation for a removal under certain circumstances. This would expand upon the existing notification requirement when a President removes an inspector general. The Inspector General Reform Act of 2008, Section 3(a) thus provides that:

If an Inspector General is removed from office or is transferred to another position or location within an establishment, the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.<sup>213</sup>

Representative Ted Liu introduced legislation that passed the House and would enhance this reporting requirement; the Inspector General Protection Act would require Congress to be notified before an Inspector General is placed on nonduty status, a strategy short of removal that the President or agency head could use to undermine the work of an inspector general.<sup>214</sup>

Similar notification from the President or agency head should be required in the case of removal of prosecutors, senior officers in the FBI, national intelligence officers and other federal officers if the officer was involved in an investigation of the President, a President's appointee, or a President's close associate. This should also be the case if the individual was or will be a witness in such an investigation, or if anyone in the government has alleged that the reasons for removal included the fact that the officer refused to engage in illegal

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212. Claire Finkelstein & Richard Painter, *Restoring the Rule of Law Through Department of Justice Reform*, in BROOKINGS INST., *OVERCOMING TRUMPERY: HOW TO RESTORE ETHICS, THE RULE OF LAW, AND DEMOCRACY* 121–177 (Norman Eisen ed. 2022).

213. 5a U.S.C. § 3(b).

214. H.R. 23, 117th Congress (2021). This bill passed the House. In the Senate it was read twice and then referred to the Committee on Homeland Security and Governmental Affairs.

conduct. In the case of removal by the President or by an agency head upon direct orders from the President, the notification should come from the President. In the case of removal by an agency head acting alone, the notification should come from the agency head. In either case the notification should set forth the reasons for removal or, alternatively, an unequivocal statement that the removal was not in any way connected with or motivated by the official's involvement in such an investigation or prosecution (as described above) or with the official's refusal to engage in conduct that the official believed to be illegal. A notification from an agency head also should be required to disclose whether the agency head discussed the removal with the President or with anyone on the White House staff, and if so, with whom. A false statement in such a notification to Congress of course would itself be a crime under the false statements statute.<sup>215</sup>

As discussed at the beginning of this Article, the President's power to remove executive branch officers was debated at the time of the founding, and it is still debated today. Reasonable persons differ as to whether the President has the power to remove an officer whom Congress by statute has provided shall serve for a fixed term during good behavior and cannot be removed except for cause. Some statutes limiting presidential removal power have been upheld by the Supreme Court and some not.

Congress, however, has never passed a law that would require the President to keep in place a federal officer who committed a crime. Criminality is beyond the outer limits allowed of all civil officers of the United States, including the President, who is subject to impeachment and removal for "high crimes and misdemeanors."<sup>216</sup> Similarly, a President is prohibited from using Article II powers, including removal power, in furtherance of a criminal enterprise. The President also cannot remove a federal officer simply because that officer refuses to commit a crime, as a President who pressures an officer to commit a crime is suborning or soliciting him to commit that crime.

Accepting criminality in removal of a federal officer is a line that a representative democracy cannot cross without the risk of converting itself into a dictatorship. It is only a matter of time before a President who can criminally remove a federal officer might dispense with the

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215. 18 U.S.C. § 1001 (providing for criminal penalties for any knowing false statement in connection with any matter pending in the executive, legislative, or judicial branch of the United States government).

216. U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

formalities of firing and “remove” the officer, and other persons standing in his way, as tyrants have done it for thousands of years. As Henry II is alleged to have said, “[w]ill someone not rid me of this troublesome priest?”<sup>217</sup> Or perhaps a future U.S. President might engage with dissent in his government through the “open window” policy of Russia’s President Vladimir Putin.<sup>218</sup> A March 2023 Truth Social media post by President Trump of a photo of himself holding a baseball bat next the head of Manhattan District Attorney Alvin Bragg, the man who has indicted him, is an ominous sign that we could be closer to that eventuality than we think.<sup>219</sup>

The unitary executive theory is a framework frequently defended by constitutional commentators and occasionally embodied in case law defining presidential power, including removal power. However, one envisions the unitary executive, and the extent of legislative branch control over executive branch officer holders, the executive branch cannot be run as an organized crime syndicate. Even under circumstances in which a President has unfettered discretion to remove a federal officer and appoint a replacement, refusal to commit a crime is not a legitimate reason for the President to say, “you’re fired.”

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217. Jessica Estepa, *Comey Quotes Henry II: ‘Will No One Rid Me of This Meddlesome Priest?’*, USA TODAY (June 8, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/06/08/comey-what-trump-thinks-him-no-one-rid-me-meddle-some-priest/102628176/> [https://perma.cc/DM37-JCM3].

218. See e.g. *Top Russian Oil Official Falls to Death from Hospital Window – Sources*, REUTERS (Sept. 1, 2022, 1:26 PM), <https://www.reuters.com/world/europe/chairman-russian-oil-producer-lukoil-dies-after-falling-hospital-window-source-2022-09-01/> [https://perma.cc/H3WS-CQGT].

219. @realDonaldTrump, Truth Social (Mar. 23, 2023), <https://truthsocial.com/@realDonaldTrump/posts/110073654029130107>.