Trump v. United States and the Half-Originalist Presidency

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Abstract

The Court's recent decision in Trump v. United States *has been criticized for its ahistorical approach to presidential immunity. This essay offers the first account of the historical mismatch between the* Trump *Court's decision to immunize presidential removal power and Founding-era conceptions of the Presidency. Unlike the presumptive immunity that the Court recognized for most other official presidential acts, the immunity afforded for presidential removal power is absolute. The Court ruled that the President's "unrestricted power of removal" can never be regulated by Congress or considered as evidence of wrongdoing, even when the President threatens removal in order to effectuate blatantly unlawful ends. The Court's approach creates a far more powerful Presidency than was ever recognized by the Founding generation. The text of Article II authorized the President "to execute" the law, not to violate it, and it required Presidents to "take care" that the law be faithfully executed. The Court's decision to immunize removal also conflicts with Founding era understandings and laws in which Congress restricted the President's removal power.*

Introduction

In *Trump v. United States*, the Supreme Court went to new lengths to guarantee a "vigorous" and "energetic" President.[1] Its decision afforded then-Mr. Trump and other former Presidents broad immunity from criminal prosecutions based on the official acts they took while in office. The Court defended its ruling in largely consequentialist terms: it explained that the ruling was designed to avoid the prospect of "an Executive branch that cannibalizes itself, with each successive President free to prosecute . . . predecessors, yet unable to boldly and fearlessly carry out [current] duties for fear that [they] may be next."[2] At the same time, the Court attempted to ground its ruling in Founding era understandings of the Presidency.[3]

This Essay explains that the Court's historical assertions rest on half-truths and a distorted view of how the Founding generation conceptualized the Presidency. The distortion is most evident in the Court's determination that Article II grants the President an "unrestricted

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[1] 144 S.Ct. 2312, 2329 (internal quotations omitted).

[2] Id. at 2347 (internal quotations omitted); Cass Sunstein, *Presidential Immunity and Democratic Disorder*, manuscript at 7 (arguing that this passage presents the Court's primary rationale), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4896559.

[3] Id. at 2329 (grounding understandings of a vigorous and energetic President in Hamilton's Federalist No. 70); *but see* id. at 2360 (Sotomayor, dissenting) ("the majority endorses an expansive vision of Presidential immunity that was never recognized by the Founders"); Willaim Baude, *A Principled Supreme Court, Unnerved by Trump*, THE NEW YORK TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html.

power of removal" which can never be regulated by Congress[4] or considered as evidence of presidential wrongdoing.[5] The unfettered removal power recognized by the Court conflicts with not only longstanding precedent but also the Founding generation's understanding of the Presidency. This Essay offers the first account of the historical mismatch between the *Trump* Court's ruling on removal and Founding era conceptions of the Presidency.[6]

Much of what the Court decided with respect to immunity is unclear,[7] as its opinion made presumptive immunity for most of the President's official acts turn on a balancing test.[8] Unlike the bulk of the President's official acts, the Court excepted removal from balancing and categorized it as a "core" executive power committed to the President's "conclusive and preclusive" authority.[9] The majority opinion silently departed from contrary precedent on removal. It ignored a balancing test that the Court had earlier applied to removal[10] and treated removal as a power that can never be regulated by Congress or the courts.[11] As a result, the Court suggested not only a sea change in governing law on removal, but it did so without briefing on the merits or analysis of historical evidence that would typically inform a judicial decision to set aside longstanding precedent in this area.[12]

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[4] Id. at 2328.

[5] Id. at 2341.

[6] For other work discussing the Court's ruling on removal, see Sunstein, *supra* note, at 7 ("under existing statutory law, the President has unrestricted power to remove the Attorney General; we might even be able to agree that under Article II, Congress cannot limit that power in any way"); Shalev Roisman, Trump v. United States *and the Separation of Powers*, manuscript at 13-14, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4901732 (noting that the Court's removal decision in *Trump* is inconsistent with its mention of exceptions allowing regulation of removal in *Seila Law*); *see also* Claire O. Finkelstein & Richard W. Painter, *You're Fired: Criminal Use of the Presidential Removal Power*, 25 N.Y.U. J. Legis. & Pub. Pol'y 307, 351-52, 356 (2022) (contrasting William Barr's "extremely broad iteration of the unitary executive theory" with analyses that do not directly condone "criminal use of presidential removal power").

[7] 144 S.Ct. at 2376 ("under the majority's new paradigm . . .the answer to the immunity question" for most official acts "will always and inevitably be: it depends") (Jackson, J., dissenting).

[8] Id. at 2331 ("the President must be immune from prosecution for an official act" unless the Government can show that its criminal prosecution "would pose no 'dangers on the authority and functions of the Executive Branch.").

[9] 144 S.Ct. at 2328.

[10] Morrison v. Olson, 487 U.S. 654, 691 (1988) (approving removal restrictions that did not "unduly trammel[]" powers "central to the functioning of the Executive Branch"). The Chief Justice did not cite *Morrison* or *Humphreys' Executor* in his opinion and relied on *Seila Law*'s characterization of these cases as "two exceptions to the President's removal power." 144 S. Ct. 2328 (internal citations omitted).

[11] It reached this conclusion notwithstanding contrary precedent in both *Morrison* (cited above) and *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627–28 (1935) (validating for-cause tenure protections for officers who served on the Federal Trade Commission). The *Trump* Court's suggestion that courts cannot evaluate the reasons for presidential removal, 603 U.S. at 2328 ("courts cannot examine" a President's exercise of core powers like removal), further conflicts with the *Humphrey* Court's rejection of President Roosevelt's policy justifications for removing Humphrey. The Fifth Circuit recently followed *Humphrey's Executor* in Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 91 F.4th 342 (5th Cir. 2024), *cert. denied*, 2024 WL 4529808 (2024).

[12] In *SEC v. Jarkesy*, the Court declined to address the removal issue despite historical briefing on this question. *Compare* Brief Amici Curiae of Constitutional Originalists Edwin Meese III, Steven G. Calabresi, and Garry S. Lawson at 19, SEC v. Jarkesy (2023) (No. 22-859) (the President's Article II control "over *all* exercises of executive power" requires removal) *and* Brief Amicus Curiae of Professor Ilan Wurman at 13, SEC v. Jarkesy (2023) (No. 22-859) (the "constitutional solution most consonant with text, structure, and history is to permit for-cause pro

The Court treated removal the same as the pardon and veto powers without recognizing important differences between them.[13] Removal is an implicit Article II power whereas the pardon and veto powers are granted by the express text of the Constitution.[14] The pardon and veto powers allow Presidents to check other branches[15] in ways that could be undermined by congressional regulation. Removal does not operate as a check on other branches and can be regulated as part of the presidential power to execute laws passed by Congress as well as a duty of faithful execution.[16] Although the majority asserted that an implicit, Article II removal power should nevertheless enjoy the same core status as at least the pardon power,[17] its approach overlooked the fact that this approach to removal power would depend heavily on pragmatic enrichment and the historical record.[18] The problem is that the *Trump* Court's assertions of an unlimited removal power conflict with a substantial body of Founding era history.

Originalist debates over presidential removal power have typically focused on the unitary executive theory of Article II. While there is general agreement that the President has power to remove subordinates who violate the law,[19] unitary scholars have argued that original understandings of Article II also require a presidential power to remove subordinates at will, based on disagreement over lawful policy choices.[20] The weight of recent scholarship presents a

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tection for inferior officers but to hold that principal officers must be removable at will"); *with* Brief Amicus Curiae of Jed H. Shugerman at 2, SEC v. Jarkesy (2023) (No. 22-859) (recent "historical research shows that the Founding generation never understood Article II to grant the President an indefeasible removal power"). The briefs in *Trump v. United States* omitted the historical accounts of the President's removal power or discussed the removal issue only in passing. *See*, *e.g*., Brief of Former Attorneys General Edwin Meese III and Michael B. Mukasey and Professors Steven G. Calabresi and Gary Lawson et al. as Amici Curiae, at 1, 9 n.4, *Trump v. United States* (2024) (No. 23-939) (focusing on the "preliminary question" of "whether Jack Smith actually has authority to prosecute this case all" and arguing in passing that "inferior officers must both have a boss who directs what they can do and can remove them at will"); Brief Amici Curiae of Scholars of the Founding Era in Support of Respondent, *Trump v. United States* (No. 23-939) (omitting removal issue from historical arguments about immunity); *but cf.* Brief of Coolidge Reagan Foundation and Shaun McCutcheon as Amici Curiae in Support of Petitioner, at 10, *Trump v. United States* (2024) (No. 23-939) (raising ahistorical argument that power to "remove" subordinates performing executive functions is a "core" executive power under Article II).

[13] *Trump v. United States*, 144 S.Ct. at 2328.

[14] U.S. Const. Art. II, § 2, cl. 1.

[15] The pardon power checks the legislative and judicial branches in their application of criminal law, HAROLD KRENT, PRESIDENTIAL POWERS 214 (2005), and the veto power checks Congress's exercise of legislative power. *Id*.at 17-18.

[16] See *infra* Part I.

[17] *Trump v. United States*, 144 S.Ct. at 2328 (asserting that the pardon, removal, and recognition powers are core executive powers under Article II).

[18] Christine Kexel Chabot, *Rejecting the Unitary Executive*, manuscript at pp. 11-19 (summarizing textual and historical evidence on the President's removal power), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4968775. For a general critique of originalist assumptions on the extent to which constitutional powers and rights have been captured in writing, see JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM 124 (2024).

[19] *Seila Law*, 40 S.Ct. at 2233 (Kagan, J., dissenting in part) ("we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President's performance of his own constitutional duties") (internal citations omitted).

[20] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 597 (1994) (the President "must be able to remove federal officers" whom "he feels are not executing federal law in a manner consistent with his administrative agenda.")

formidable historical challenge to unitary claims to this sort of indefeasible presidential removal power.[21] Within this unitary executive debate, moreover, unitary scholars have focused on Presidents' need to control policies *within the limits of substantive laws*, as well as the way that statutory tenure protections interfere with presidential control of a subset of lawful policy decisions.[22] Unitary arguments have not directly addressed whether the President may also use removal at will to promote unlawful, private ends in violation of substantive laws.[23] Nor have they addressed the *Trump* Court's further idea that courts cannot even consider evidence of improperly motivated removals in order to demonstrate wrongdoing.[24] By pushing removal in this absolute direction, the *Trump* Court's decision exacerbates tension with the historical record and runs up against longstanding concerns about the President's abuse of the removal power.[25]

The Court's decision in *Trump v. United States* appears to recognize an unlimited unitary executive theory which places the entirety of the President's removal power above the law. By suggesting that it has excepted the whole of the President's removal power from the reach of criminal laws, the Court has raised questions about whether Article II empowers the President to remove officers using unlawful means, such as murder.[26] It also raises questions about whether the President may remove or threaten to remove officers in order to promote unlawful ends, such as punishment for refusing to help the President break the law.[27] While the Court may have had in mind other, difficult cases in which removal effectuates aggressive and contested

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[21] Chabot, *Rejecting the Unitary Executive*, supra note 18, at 14-19.

[22] See supra note 20.

[23] Finkelstein & Painter, supra note 6, at 356 ("virtually all commentators" on unitary theory have "skipped" specific discussions of "criminal use of presidential removal power").

[24] While most of the historical evidence addresses restrictions on the President's removal power, the idea that Presidents should held accountable for abuse of the removal power finds historical support in Madison's view that such abuses would be grounds for impeachment. See infra note 25. The Trump Court's assertion that future courts must exclude official acts as evidence of wrongdoing (602 U.S. at 2341) conflicts with Madison's view. If an improperly motivated removal can provide grounds for impeachment, then it would seem that an improperly motivated removal could also provide proof of wrongdoing after the President has left office.

[25] See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2189-90 (2019) (the President's duty of faithful execution may restrict his power to remove officers "for primarily self-protective purposes against the public interest"). James Madison also noted that the President's abuse of removal power could provide ground for impeachment. See 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791: DEBATES IN THE HOUSE OF REPRESENTATIVES: FIRST SESSION: JUNE–SEPTEMBER 1789, at 897 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter DHFFC] (the president "himself will be impeachable for the wonton removal of a meritorious officer, and will himself be removed from high trust . . .") (Madison). In addition, the amici brief which leading unitary scholar, Steven Calabresi, co-filed in *Trump v. United States* did not directly address the historical removal issue in addition to its arguments that Special Counsel Jack Smith was not properly appointed. See Amici Br. of Brief of Former Attorneys General Edwin Meese III and Michael B. Mukasey and Professors Steven G. Calabresi and Gary Lawson et al. as Amici Curiae supra note 12.

[26] Trump v. United States, 144 S.Ct. 2312, 2337, n.5 (Jackson, J. dissenting) ("While the President may have the authority to decide to remove the Attorney General, for example, the question here is whether the President has the option to remove the Attorney General by, say, poisoning him to death.").

[27] Id. at 2324 (noting allegations that Trump or his co-conspirators "attemped to use the Justice Department 'to conduct sham election crime investigations" and raise "false[] claim[s]" about concerns with the election outcome); *id*. at 2335 (discussing Trump's "threatened removal of the Acting Attorney General" in connection with these actions); *see also* Finkelstein & Painter, supra note 6, at 368, 383 (discussing Trump's "threat to fire Acting Attorney General Rosen" as part of a "plot to overturn the 2020 election" and identifying "grave danger to the constitutional order from a view that treats removal as though it were an inalienable right of sitting Presidents").

interpretations of the law, its absolute approach also excuses Presidents who abuse the removal power in furtherance of clearly unlawful or private ends.[28] Under the Court's approach, an official exercise of removal power can never violate the law. This approach elevates removal power above other executive powers, such as the protective power, [29] even though Presidents may use threats of removal to facilitate abuse of their protective powers.[30] It is unclear why the balancing approach applicable to official acts like the protective power should not also apply to removal. [31]

None of the precedents cited by Chief Justice Roberts support a presidential power to remove subordinates using unlawful means or to promote unlawful ends.[32] The Court's assumed interest in protecting "choices in the public interest"[33] does not seem present in removals calculated to bring about unlawful action. While members of the Court have sometimes suggested that overruling *Humphrey's Executor* is a foregone conclusion and will not work a great change,[34] these arguments fail to account for important aspects of decisional

[28] 144 S.Ct. at 2361 ("any use of official power for any purpose, even the most corrupt purpose indicted by objective evidence of the most corrupt motives and intent, remains official and immune") (Sotomayor, dissenting).
[29] Cunningham v. Neagle, 135 U.S. 1, 67 (1890) ("[w]e cannot doubt the power of the president to take measures for the protection of a [federal] judge" who "is threatened with a personal attack"); *see also* HAROLD KRENT, PRESIDENTIAL POWERS 149-50 (2005) (citing *Neagle* as an example of the an emergency measures to protect governmental personnel and property).
[30] Excusing the President from a generally applicable criminal law risks undermining public purposes in ways that excusing a President from generally applicable tenure protections might not.
[31] Former President Trump's alleged threats of removal in order to encourage DOJ officials to conduct sham investigations (144 S. Ct. at 2324) would seem unprotected under the Court's general balancing test. It is unlikely that criminal enforcement against Trump's threatened removals would be found to endanger the "authority and functions of the Executive branch" (*Trump v U.S.*, 144 S. Ct. at 2331) in the same manner as prosecution for run of the mill removal decisions based on colorable policy disagreement. A President's use of removal to require compliance with aggressive or questionable interpretations of the law would likely fall within the safe harbor of executive judgment entitled to immunity from criminal prosecution.
[32] The Court's citations to *Youngstown*, *Myers*, and *Seila Law* do not support the unbounded presidential removal power recognized in *Trump v. United States*. The holding of *Youngstown* did not turn on removal power, and Justice Robert Jackson's reference to an illimitable removal power in his *Youngstown* concurrence turned on *Myers*. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 n.4 (1952). In *Myers* the Court held that the President's power to remove a post-officer first class could not be subjected to senatorial approval. *Myers v. United States*, 272 U.S. 52, 177 (1926) ; Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief: Myers and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2178 (2023) (recounting how Myers was removed after he "caused problems" in a patronage appointment). And in *Seila Law v. CFPB*, the Court invalidated tenure protections applicable to an agency head attempting to enforce an otherwise lawful civil investigative demand against a private firm. 40 S.Ct. 2183, 2194, 2211 (2020). Nor do the Court's immunity decisions support a contrary understanding of the President's removal power. *Nixon v. Fitzgerald*, 457 U.S. 731,738-39 (1982) (while finding a former president immune from civil damages related to the discharge of a civil servant, the Court noted that the servant received backpay and reinstatement under statutory regulations limiting the lawful reasons for removal); *id.* at 787 (it is "frivolous" to contend that "Presidential control of executive employment decisions is a constitutionally assigned Presidential function with which Congress may not significantly interfere") (White, J., dissenting).

[33] 144 S.Ct. at 2331.
[34] *Seila Law*, 40 S.Ct. at 2218 (2020) ("it is not clear what is left of *Humphrey's Executor*'s rationale") (Thomas, J. concurring in part).

independence[35] or the consequences of extending unitary executive theory in *Trump v. United States*. In the discussion below, this Essay will show that the *Trump* Court's approach conflicts with Founding era understandings reflected in the Constitution's text, framing history, and early historical practice. Its approach suggests an erosion of significant limitations that were central to the Founding generation's understanding of the Presidency.

I. The Court's removal decision conflicts with Founding era understandings of the Constitution's text

A presidential removal power appears nowhere in the express language of the Constitution. While many have argued that this power is nevertheless implied by Article II's Vesting Clause,[36] the historical record weighs strongly against arguments that Congress cannot regulate the President's removal power.[37] Exercises of the presidential removal power to promote unlawful, private ends are especially difficult to square with Article II's language vesting "the executive power in a President of the United States."[38] As Professor Julian Davis Mortenson's historical research has made clear, the "signal characteristic of executive power . . . was that it was substantively an empty vessel. The only thing [the Vesting Clause] authorized the President to do was to carry out legal instructions created pursuant to some other authority."[39] From a Founding era perspective, therefore, power to "execute" the law is merely the "power to execute plans, instructions, and above all else the laws."[40] The power to execute was not understood to include the ability to suspend or violate the law.[41] Removing an officer who refuses to help the President violate the law would therefore seem to fall outside the scope of law execution. Unlawful action is ultra vires and outside the scope of public law execution power conferred by the Vesting Clause.

The Take Care Clause in Article II, section 3 further requires the President to "take care that the Laws be faithfully executed."[42] Professors Andrew Kent, Ethan Leib, and Jed Shugerman

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[35] See, e.g., Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 6 n.17 (2020) (noting how removal protections "insulated the Federal Reserve from political pressure to cut interest rates"); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("[T]he Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.").

[36] *See, e.g.*, Calabresi & Prakash, supra note 20, at 597 (under Article II, "a host of historical and textual arguments persuade us that the President must also have a removal power so that he will be able to maintain control over the personnel of the executive branch").

[37] Chabot, *Rejecting the Unitary Executive*, supra note 17, at 14-19.

[38] U.S. Const. Art. II, section 1.

[39] Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1278 (2020) (comprehensive historical immersion research uncovered a thin understanding of the Vesting Clause and did not directly address removal power); *see also* Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEX. L. REV. 55, 67 (2021) ("I am unaware of anyone from the Founding Era contenting that the Vesting Clause . . . grants" the President "immunity from prosecution").

[40] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1269 (2019).

[41] Id. at 1237 ("Justinian's *Institutes* taught that if you went beyond your instructions, you were no longer engaged in execution").

[42] U.S. Const. Art. II, section 3.

have marshaled considerable preratification evidence of the duties imposed by Article II's Take Care Clause and requirement that the President take an oath to "faithfully execute the Office of President."[43] According to their research, this constitutional language shows "how important it was to constitutional designers that the President stay within his authorizations and not act ultra vires."[44] They also note that these requirements "may . . . restrict the President's power to dismiss officials for primarily self-protective purposes against the public interest."[45]

It could be that the executive power implies a further ability to appoint (and perhaps remove) officers who would help presidents carry out their powers.[46] But again the point of any implicit appointments power would be to facilitate the President's *execution*, not evasion, of the law. The President's power to appoint subordinate officers is also subject to requirements that Congress create an office for the President to fill under the Necessary and Proper Clause. And in Article I, section 8, clause 12, the Framers deliberately assigned Congress, and not the President, the power to assemble and fund an army for a two-year period. As explained by Professor Josh Chafetz, this clause was designed to guard against a "tyrannical president" who might otherwise assemble a "standing army" that could be used "to oppress the people."[47] The President's power to staff the executive branch thus operates within the confines of the law and other provisions of the Constitution.

Article II's Appointments Clause imposes further limitations on the President's power to appoint officers and fill any vacancies created by removal. Under Article II, section 2, clause 2, the President "shall nominate, by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose appointments are not herein otherwise provided for." While Article II, section 2's Appointments Clause does not directly address removal, it creates a default requirement that the Senate confirm nominees to fill vacancies created by removal. The only exceptions allowed by the Constitution are recess appointments or in cases where Congress "by law" vests "the Appointment of [] inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."[48]

Chief Justice Roberts' characterization of presidential removal as "conclusive and preclusive" and therefore "exclusive" to the President[49] also runs up against the Impeachment

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[43] Id. at section 1.
[44] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2178 (2019).
[45] Id. at 2189-90. Professor McConnell has asserted that the "logic of Article II and . . . the Take Care Clause" empowers the President to remove subordinates. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 167 (2020). But his argument fails to explain how the Take Care Clause could support a broad removal power that Presidents could use to encourage subordinates to violate the law.
[46] Ilan Wurman, *The Original Presidency: Conception of Administrative Control*, J. LEGAL ANALYSIS 11 (2024) (raising a removal-follows-appointments argument).
[47] JOSH CHAFETZ, CONGRESS'S CONSTITUTION 57 (2017).
[48] U.S. Const. Art. II, section 2, cl. 2-3.
[49] Trump v. United States, 144 S.Ct. at 2328.

Clause in Article II, section 4.[50] Section 4 is the only part of the Constitution that grants an express removal power, and it grants this power to Congress, not the President. It provides that the "President, Vice President, and all other Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[51] The Impeachment Clause undermines claims of exclusivity because it assigns Congress a potentially overlapping power to remove officers. As James Madison recognized, it leaves open the possibility that Congress would use its impeachment power to remove a treasonous officer even though the President would prefer to keep that person in office.[52] By subjecting the President to impeachment, moreover, this Clause makes clear that the President can be held accountable for his misuse of official powers including removal.[53] The Impeachment Judgment Clause further contemplates that impeachment will effectuate removal from office and leave the ousted officer open to criminal prosecution.[54] These clauses are difficult to reconcile with the *Trump* Court's ruling that courts cannot consider presidential abuse of the removal power as evidence of wrongdoing.[55]

Finally, the President's removal power may be subject to the Due Process Clause's requirements that "no person" be "deprived of life, liberty, or property, without due process of law." Removing officers by putting them to death[56] or by cutting short service in term-of-years offices has historically required due process beyond executive fiat.[57] This is an additional way in which the Constitution could restrict any implicit removal power that the President holds under Article II.

II. The Court's understanding conflicts with the Constitution's history

A. Framing, ratification, and early debates

[50] U.S. Const. Art. II, section 4; see also Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1485 (2022) ("[T]he word 'vest'" in Article II, section 1 "generally meant a simple grant of powers without the constitutional significance of exclusivity or indefeasibility that the unitary theorists have imputed to it.")
[51] U.S. Const. Art. II, section 4.
[52] 10 DHFFC at 727 ("It is very possible that an officer who may not incur the displeasure of the president, may be guilty of actions that ought to forfeit his place, the power of this house may reach him by means of impeachment, and he may be removed even against the will of the president . . .") (Madison).
[53] *See infra* note 27 (noting Madison's understanding that a President's abuse of the removal power would provide grounds for impeachment).
[54] U.S. Const. Art. 1, section 3, cl. 7; Brief Amici Curiae of Scholars of the Founding Era in Support of Respondent, *Trump v. United States*, at p. 22 (No. 23-939).
[55] *See supra* note 5.
[56] Act of Feb. 20, 1792, ch. 7, §§ 16, 1 Stat. 232 (authorizing removal by death for postal employees convicted of stealing postage containing bank notes); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1316 (2006) ("A deputy postmaster who destroyed or misappropriated mail containing a monetary payment faced the death penalty"); *see also* DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829, 210-11 (the "machinery Congress provided for enforcing" the postal acts and other "criminal laws was detailed in the Judiciary Act of 1789—judges, a district attorney for each district, and a marshal").
[57] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 20 n.17 (2021) (noting judicial understanding that term of years offices were treated as a "'privilege entitled to the protection of the law,' including due process and judicial review") (internal citation omitted).

The Framers designed the executive branch to be led by a President who "would not be King."[58] A recent historical summary of early state constitutions crafted in the wake of independence from England shows that the states established a limited executive role. The states subjected executive governors to mere law execution, limited terms in office, and accountability under criminal laws.[59] While delegates to the 1787 Philadelphia Convention urged a strong national President with energy and vigor, they did not lose sight of these basic limits on presidential power. When proposing the new executive, for example, James Wilson urged "a single magistrate" in order to give "most energy dispatch and responsibility to the office."[60] At the same time, Wilson recognized that the President's powers would not be unlimited and noted that the "only powers" he "conceived" as "strictly Executive were those of executing the laws[] and appointing Officers."[61] After Edmund Randolph objected that a single executive would create "the foetus of monarchy,"[62] Wilson reiterated that the executive "was not governed by the British Model."[63] The Framers also worried about corrupt Presidents. As James Madison warned at the Philadelphia Convention, a single executive presented a "probable" risk of "corruption" that "might be fatal to the Republic."[64] His concerns were echoed by other delegates who voted to subject the President to impeachment.[65]

Concerns about a corrupt President extended to the potentially tyrannical use of the removal power. The First Congress initially debated whether the President even had an Article II removal power in 1787, when it was attempting to pass legislation establishing the three initial departments of the United States government (Foreign Affairs, War, and Treasury).[66] Some members of the House recognized that a presidential removal power might help promote lawful executive action, by allowing the President to remove a corrupt subordinate immediately and without awaiting impeachment.[67] At the same time, representatives including a proponent of presidential removal power, James Madison, understood that this power could be a double-edged sword. Corrupt Presidents might remove law-abiding officers with the hope of appointing

[58] McConnell, supra note 45.
[59] Amici Br., supra note 54, at 8-9; Prakash, supra note 39, at 68-69 ("some state constitutions made crystal clear that their chief executives . . .could be prosecuted and punished," whereas others "granted express criminal immunities").
[60] 1 The Records of the Federal Convention of 1787, at 65 (Max Farrand ed., 1911).
[61] Id.
[62] Id. at 66.
[63] Id. at 66.
[64] 2 The Records of the Federal Convention of 1787, at 65-66 (Max Farrand ed., 1911); see generally Amici Br. supra note 54, at 10-11.
[65] 2 The Records of the Federal Convention of 1787, at 69 (Max Farrand ed., 1911) ("The Executive ought therefore to be impeachable for treachery [and c]orrupting his electors") (Morris); *id.* at 65 ("When great crimes were committed he was for punishing the principal [or President] as well as" his aids.) (Mason); *id*. at 67 ("Guilt wherever found ought to be punished. The Executive will have great opportunit[ies] of abusing his power") (Randolph).
[66] *See generally* Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 759-65 (2023).
[67] 10 DHFFC 728 (arguing that presidential removal was necessary to provide immediate protection against the "machinations of a bad man in office," as impeachment presented too slow a process for removal) (Vining); Id. at 851 (the President "might for example, discover in the officers of the treasury a project of embezzling the public money" in which case "some decisive and sudden remedy would in such a case be indispensable") (Ames).

dishonest successors.[68] Members of the House recognized that this type of wrongful removal might provide grounds for impeaching the President,[69] a position inconsistent with the *Trump* Court's suggestion that improper removals could not be considered as grounds for finding presidential wrongdoing.[70] Initial members of the House also recognized that appointments would present a further obstacle to any President who hoped to replace a law-abiding officer with the President's partner in crime.[71]

A final, significant concern was that a tyrannical President might use the removal power to unlawfully gain control of both the sword and the purse. In arguing against a presidential removal power, Representative Jackson outlined this concern. First, Jackson noted that "the [C]onstitution gives the president the command of the military. If you give him complete power over the man with the strong box, he will have the liberties of America under his thumb."[72] Thus, if the President wants "to establish an arbitrary authority, and finds the secretary of finance not inclined to second his endeavors, he has nothing more to do than to remove him, and get one appointed with principles more congenial with his own."[73] And then, in the final stage, Jackson noted that the President might declare "I have got the army, let me have but the money, and I will establish my throne upon the ruins of your visionary republic. . . . Behold the baleful influence of the royal prerogative!"[74] Similar concerns were noted by other members,[75] including Rep. Boudinot, who generally favored a presidential removal power.[76] As recounted by Professor

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[68] 1 ANNALS OF CONG. 498 (1789) (Joseph Gales ed., 1834) ("But what can be his motives for displacing a worthy man? It must be that he may fill the place with an unworthy creature of his own")(Madison); see also id. at 458 (the President might "misbehave" and apply removal power to "dangerous purposes" and "from caprice remove the most worthy men from office") (Smith). The first two volumes of the Annals of Congress were also published in two
separate editions with different pagination. Marion Tinling, Thomas Lloyd's Reports of the First Federal Congress, 18 WM. & MARY Q. 519, 520 n.2 (1961). References in this Article refer to the edition with the running head "History of Congress."

[69] 11 DHFFC 897 (the president "himself will be impeachable for the wonton removal of a meritorious officer, and will himself be removed from high trust . . .") (Madison); 10 DHFFC 727 ("indeed it may perhaps on some occasion be found necessary to impeach the president himself" in addition to a poorly behaved officer) (Madison); Aaron L. Neilson & Christopher J. Walker, *The Early Years of Congress's Anti-Removal Power*, 62 Am. J. of Legal Hist. 219, 224 (2023) (citing 1 ANNALS OF CONG. 517-18 and recounting Madison's suggestion that improper removal would be grounds for impeaching the President).

[70] See supra note 5

[71] 11 DHFFC 897 (if the President expects to then fill "the vacancy with some unworthy favorite he "cannot accomplish this himself" and must instead "consult the Senate") (Madison); id. (the Senate "will judge [the President and the new nominee] by the merits and character of the person removed"); id. at 891 (with respect to appointments, "the senate was only a check on the President, to prevent his filling offices with unworthy men.") (Clymer).

[72] 1 ANNALS OF CONG. 488.

[73] Id.

[74] Id.

[75] 11 DHFFC 929 ("Among the rest, I presume [the President] is to have an unlimited control over the officers of the treasury. I think if this is the case, then you may as well give him at once the appropriation of the revenue") (Gerry).

[76] Id. at 948 (if "the officers were virtuous, and opposed [the President's] bad measures, he might away with them," and he would then "no body in [Treasury] who would dare to oppose him. Then, having the treasury and army at his command, he might bid farewell to liberty forever.") (Boudinot). Boudinot was a presidentialist who favored an Article II removal power. Shugerman, *Indecisions*, supra note 66, at 802-03.

Shugerman, these statements reflected significant concerns about the "dangers of presidential corruption and abuse of the removal power."[77]

B. Early practice

i. Independent structures to promote faithful execution

The notion of an unconstrained presidential removal power is inconsistent with early practice. When passing laws in the shadow of the newly minted Constitution, early congresses repeatedly assigned executive functions to officers whom the President could not remove. A leading example that I have explained at length in earlier work is the Sinking Fund Commission.[78] The First Congress created the Sinking Fund Commission to manage domestic debt. The Commission was authorized to conduct open market purchases of U.S. securities, so long as the purchases served the dual purposes of "repay[ing]" the debt underlying these securities while "stabilizing [their] value."[79] As I have noted, the "Act did not allow the President to appoint Commissioners of his choosing" and instead "placed the following officers on the Commission ex officio: the Secretary of the Treasury (Alexander Hamilton), Secretary of State (Thomas Jefferson), President of the Senate/Vice President (John Adams), the Attorney General (Edmund Randolph), and the Chief Justice of the Supreme Court (John Jay)."[80] As a result, the Act empowered two officers whom the President could not remove (the Vice President and the Chief Justice of the Supreme Court) to vote on Commission purchases alongside other Commissioners and the President.[81] The Commission's independent structure also rendered the President "powerless" to require purchases that three or more of the Commissioners refused to approve.[82]

When Secretary of the Treasury Hamilton proposed the Commission, one of his key concerns was that the large sums of money allocated to the Commission (over $400 billion in current terms[83]) would tempt politically accountable actors to unlawfully divert funds to causes more popular than repaying the debt.[84] The Commission's independent structure and non-removable officers operated as a check to ensure that the President and other officers would all

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[77] Shugerman, *Indecisions*, supra note 66, at 826-27.
[78] Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 172-76, 184 (2022) [hereinafter *Interring*]; Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 32-52 (2020).
[79] Chabot, *Interring* at 172.
[80] Chabot, *Interring* at 172-72 (citing Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186).
[81] *Id.* at 172-72 (citing Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186).
[82] Chabot, *Interring*, at 173. The statute's ex officio provisions blocked the President from using removal to replace the independent Chief Justice and Vice President, and removal of one of the three remaining Commissioners who were also cabinet members would merely shift the deciding majority vote back to the independent Commissioners. Chabot, *Interring*, at 173-74.
[83] Christine Kexel Chabot, *The Founders' Purse*, 110 Va. L. Rev. 1027, 1081 & n.329 (2024).
[84] Chabot, *Is the Federal Reserve Constitutional*, supra note 78, at 37-38 (noting Hamilton's desire to avoid problematic history of political actors "raiding" sinking funds).

disburse funds in compliance with the law. This arrangement is inconsistent with a system where Congress is powerless to limit presidential removal power.

The First Congress delegated executive power to officers and even private parties whom the President could not remove in several other statutes. With respect to deputy marshals, for example, the 1789 Judiciary Act assigned Article III judges and not the President power to remove deputy marshals within the judges' districts.[85] The First Congress also passed two provisions allowing tenure-protected Article III judges to make initial factual findings that would support executive determinations under early revenue laws.[86] In addition, it passed multiple laws granting prosecutorial power to non-removable private parties. The First Congress enabled private parties to bring enforcement actions against public officials as well as private parties.[87] Many of the statutes blurred the lines between civil and criminal enforcement: they authorized private parties to sue for monetary fines or forfeitures that public prosecutors could also recover through criminal indictments.[88] All of these laws show that Congress could delegate executive power to officers and private parties whom the President could not remove.

While some unitary scholars may not accept the full import of this historical evidence, their claim that Article II must grant the President an unrestricted removal power turns primarily on a subset of historical examples in which Congress declined to regulate removal.[89] Strong unitary claims cannot account for the complete historical record including counter evidence showing that Congress sometimes assigned executive power to officers or actors whom the President could not remove.[90] The *Trump* Court's ruling went even farther astray when it immunized presidential removals designed to effectuate unlawful private ends and held that such removals could not even be considered as evidence of wrongdoing. In addition, as noted below, a completely illimitable removal power is difficult to square with other restrictions manifest in early practice, such as appointments requirements and judicial removals.

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[85] Judiciary Act, Ch. 20, § 27, 1 Stat. 73, 87; Chabot, *Interring* at 185-86 (noting deputy marshal removal provisions); Shugerman, *Indecisions*, supra note 66, at 52-53 (same).

[86] Chabot, *Interring*, at 188-89. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122 (upon petition, judges could inquire and into "circumstances" showing lack of willful negligence or fraud and transmit findings that would allow the Secretary of the Treasury to "to mitigate or remit" the "fine, penalty or forfeiture" on these grounds); Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 199, 209 (allowing same procedure for penalties or forfeitures under the Spirits Act).

[87] Chabot, *Interring* at tbl. 2 (entries 26, 44, 45, 48, 49, 51, 53) & tbl. 3 (entries 69-71); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1291–304 (2018) (discussing use of private qui tam actions to monitor conduct of revenue, census, treasury, and postal officers); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469, 480 (2023) (describing 1794 act that allowed private enforcement of public law against participation in the slave trade).

[88] Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 208–09 (the person "who shall first discover the matter or thing" leading to a penalty and forfeiture under the Act may seek recovery of these amounts "by action of debt"); Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (allowing recovery of $800 forfeiture through private action "action in debt" or public "indictment"); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 297 (1989).

[89] Chabot, *Rejecting the Unitary Executive*, supra note 18, at 23 (recent unitary work "conflates evidence of the President's power to remove some officers with proof that Congress lacked power to regulate removal of all officers").

[90] *Id*. at 49-52 (discussing counterevidence that disproves unitary claim to absolute removal power over all officers).

ii. Removal in the shadow of appointments

The President's removal power operates in the shadow of the Appointments Clause. Professors Neilson and Walker have emphasized Congress's ability to use appointments and other "anti-removal" powers to raise the President's cost of removing an officer.[91] These anti-removal powers take on additional dimensions when one considers the President's use of removal to facilitate unlawful conduct. The threat of presidential removal typically hangs over a subordinate officer like the Sword of Damocles. It incentivizes the officer to comply with the President's lawful or even lawless commands in order to remain in office.[92] If the President removed an officer for refusing to follow an unlawful command, however, then the President's ability to effectuate an unlawful scheme would depend on succession: whether the President could replace an uncooperative officer with one "more congenial" to his views.[93]

Founding era laws afforded the President very little latitude to unilaterally fill vacancies created by removal. They did not include provisions like today's Vacancies Act.[94] The Appointments Clause was instead recognized as an important limit on the excessive power that removal might bestow upon the President. As James Madison recognized in the First Congress's debates over removal power, the President would be required to "consult the Senate" and obtain confirmation in order to displace an officer.[95]

Early statutes reflected an understanding that the Appointments Clause provided the default mechanism for filling vacancies. Some offices, such as the office of the Attorney General, had no successorship provisions other than the implicit requirement that any replacement for the Attorney General be filled according to the Appointments Clause.[96] In other instances, the First Congress coupled an Appointments Clause default with successorship provisions that allowed the outgoing department heads to name assistants or clerks who would assume limited interim duties in case of a removal or other vacancy. When creating Department of the Treasury, for example, the House rejected a proposal to have the President appoint the assistant who would

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[91] Neilson & Walker, *supra* note 69, at 222 (the "Constitution provides Congress with potent tools to *increase* the President's removal costs"); *see generally* Aaron L Nielson & Christopher J Walker, *Congress's Anti-Removal Power*, 76 Vand L Rev 1. (2023).

[92] Christine Kexel Chabot, *The President's Approval Power*, 92 FORDHAM L. REV. 373, 381 (2023)

[93] 1 ANNALS OF CONG. 488.

[94] *See generally* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 625 ("Presidents' extensive use of acting officials" has the practical effect of reducing "the number of Senate confirmed lower-level positions across the federal bureaucracy"). Early Congresses did not authorize acting appointments for heads of major departments until 1792. They did not extend these acting provisions to "any vacancy" until 1795.

[95] 11 DHFFC 897.

[96] Act of Sept. 24, 1789, ch. 20, §35, 1 Stat. 73, 92-93; Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 580 (Judiciary Act creating the office of Attorney General was unlike other statutes where "Congress had defined an 'inferior officer' to be the person to take charge of the department in the event the principal officer was removed").

assume interim control of the Treasury Department's records if the Treasury Secretary were to be removed by the President.[97]

Thus, if the President removed the Secretary of the Treasury, the Assistant (and inferior officer) who had been appointed by and was presumably loyal to the outgoing Secretary[98] would automatically retain "charge and custody of all records, books, and papers pertaining" to the Department "during the vacancy."[99] The Assistant's oath of office also required that he "well and faithfully execute the trust committed to him"[100] and would seem to position the Assistant as an additional obstacle to a President's attempt to oust a law-abiding Secretary and then obtain senatorial confirmation of a corrupt successor. As I have previously noted, "[h]aving the Secretary's hand-picked assistant retain Department records would seem to limit a Machiavellian scheme to oust a law-abiding Secretary and cover up existing Department records, as removal would automatically transfer Department records to a second officer who was understood to be loyal to the Secretary."[101] The War and Foreign Affairs Acts contained similar successorship provisions for clerks, who were inferior officers appointed by secretaries of these departments.[102]

Even acting appointments authorized by subsequent Congresses were limited in scope. The Second Congress abolished the "assistant to the Secretary of the Treasury" and created "Commissioner of Revenue" in the assistant's stead.[103] With the elimination of the assistant, Congress also updated its vacancy provisions and allowed the President to name an acting Secretary of the Treasury in cases of "death, absence from the seat of government, or sickness . . ."[104] The acting officer would serve "until a successor be appointed, or until such absence or inability by sickness shall cease."[105] Notably, this provision did not grant the President power to name an acting officer in cases of removal. Such vacancies would remain subject to the

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[97] 1 ANNALS OF CONG. 676 (the House "doth agree . . .to strike out" words providing that "The assistant to the Secretary of the Treasury shall be appointed by the President").

[98] An Act to Establish the Treasury Department, Ch. 12, 1 Stat. 65, 65 § 1 (Sept. 2, 1789) ("Assistant to the Secretary of Treasury shall be appointed by the . . . Secretary").

[99] 1 Stat. 65, 67 § 7.

[100] Act of March 3, 1791, Ch. 18, 1 Stat. 215, 215 § 2.

[101] Chabot, *Interring* at 162; Neilson & Walker, supra note 69, at 226-227 (noting that these succession provisions "could make removal somewhat more difficult").

[102] An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, Ch. 4, 1 Stat. 28, 29 § 2 (July 27, 1789); An Act to Establish an Executive Department, to be denominated the Department of War, Ch. 7, 1 Stat. 49, 50 § 2 (Aug. 7, 1789). Early laws also allowed customs collectors and marshals to appoint temporary successors to act in their stead until a replacement could be appointed. Act of July 31, 1789, ch. 5, §§ 6-7, 1 Stat. 29, 37 (deputies were to "execute and perform" on the collector's behalf "all . . . the powers, functions, and duties of the collector" in "case of his necessary absence, sickness, or inability to execute the duties of his office" and "until a successor be appointed"); Judiciary Act of 1789, Ch. 20, § 28, 1 Stat. 73, 87 (if a marshal died, deputies who had been earlier appointed by the marshal would automatically "execute the same" duties in the marshal's name "until another marshal be appointed and sworn").

There was only one instance in which the First Congress afforded the President unilateral power to replace an officer he removed. That was in legislation establishing Washington, D.C. as the permanent seat of U.S. government, and allowed the President "to appoint, and by supplying vacancies happening from refusals to act or other causes, to keep in appointment" three or commissioners who would act under the President's direction. Act of July 16, 1790, ch. 28, 1 Stat. 130, 130 §2.

[103] Act of May 8, 1792, ch. 37, 1 Stat. 279, 280 §6.

[104] 1 Stat. at 281 §8. The President could also name acting officers for Departments of War and State.

[105] *Id.*

Appointments Clause default and require successors to obtain senatorial confirmation. It was not until 1795 that the Third Congress extended the President's unilateral power to name temporary acting Secretaries or officers in the Departments of War, Treasury, or State to cases of "any vacancy."[106]

Taken as a whole, these provisions show that the Appointments Clause limited the President's power to effectuate unlawful conduct through removal. Removal might be an effective way for a President to halt unlawful conduct (say by firing an embezzling officer), without the need to await impeachment proceedings. But whatever the scope of the President's original removal power may have been, it did not grant the President a similar power to effectuate an unlawful scheme by firing a law-abiding officer and then unilaterally naming a new officer as the President's partner in crime. The limits provided by the Appointments Clause reinforce the Vesting and Take Care Clauses and the understanding that Presidents must operate within the confines of the law.

iii. Non-exclusive removal

Contrary to the *Trump* Court's assertion of an "exclusive"[107] presidential removal power, presidential removal was only one of three ways in which an officer could be removed in the Founding era. The second way an officer could be removed was through impeachment. The third way an officer could be removed was through judicial removal. Early laws reflected an understanding that removal could be regulated by Congress and the courts. A number of these laws contained provisions requiring removal of corrupt officers after they were convicted in judicial proceedings. Under the initial Treasury Act, Treasury officers who took "emolument or gain for negotiating or transacting any business" in the Department could be found "guilty of a high Misdemeanor" and "upon conviction" be "removed from office . . ."[108] In subsequent amendments in 1791 and 1792, Congress extended these removal provisions to "all . . . of the clerks employed in the treasury department"[109] and "to all officers of the United States concerned in the collection or disbursement of the revenues thereof."[110]

The Spirits Act likewise contained provisions subjecting revenue officers to requirements that they "forfeit [their] office[s]" if "convicted of oppression or extortion in the execution" of the office.[111] In addition, an officer convicted of committing or colluding to commit various types of fraud or "embezzl[ing] the public money" would "forfeit the sum of one thousand dollars," "forfeit his office," and "be disqualified for holding any other office under the United States."[112] Finally, the 1792 Post-Office Act provided that "any person[] employed in the departments of the general post-office" would "suffer death" "on conviction" for secretly appropriating, "embezzling, or destroying" any mail containing a "bank note" or similar instrument.[113] These provisions are, again, the opposite of a system in which the power to

[106] Act of Feb. 13, 1795, 1 Stat. 415.
[107] 144 S.Ct. at 2328.
[108] Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.
[109] Act of Mar. 3, 1791, ch. 18, § 1, 1 Stat. 215, 215.
[110] Act of May 8, 1792, ch. 37, § 12, 1 Stat. 279, 281.
[111] Act of Mar. 3, 1971, ch. 15, § 39, 1 Stat. 199, 208.
[112] Id. at § 49, 1 Stat. 199, 210.
[113] Act of Feb. 20, 1792, ch. 7, § 16, 1 Stat. 232, 236.

remove officers cannot be regulated by Congress. Congress instead specified certain types of misconduct that could form the basis of a conviction and result in the judicially imposed punishment of removal from office. These judicial determinations of removal further highlight the inconsistency with the *Trump* Court's ruling that courts cannot consider a President's arguably improper removal as evidence of executive wrongdoing.[114]

III. Conclusion

Trump v. United States is the latest in a series of Roberts Court decisions[115] that have forgotten much of our Nation's history on executive removal power.[116] The Court has forgotten what happened at the Founding.[117] It has forgotten that the express language of Article II never included a presidential removal power,[118] and it has forgotten that the First Congress debated the very existence of an Article II, presidential removal power for months before adopting ambiguous laws that at best declined to regulate the President's removal power in three instances.[119] It has forgotten that other Founding era laws incorporated a panoply of legal restrictions on the power to remove officers charged with executing the law.[120] It has forgotten that the constitutional balance struck by the political branches on removal was never checked by the Supreme Court until Chief Justice Taft's 1926 decision in *Myers v. United States*.[121] It has forgotten that an earlier Court approved for-cause removal restrictions in *Humphrey's Executor*, and it has forgotten that only one Justice dissented from the balancing test that the Court applied to for-cause removal restrictions in *Morrison v. Olson*.[122]

Recent scholarship has reminded us of a different past: a history that contradicts originalist arguments for an indefeasible presidential removal power.[123] The Court seems bent on avoiding rather than confronting this inconvenient historical evidence. Despite lengthy amici briefs on originalist arguments for and against an indefeasible presidential removal power in *SEC*

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[114] See infra note 5.
[115] See Seila Law, *supra* note 40 S.Ct. 2183, 2194, 2211 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., S. Ct. 3138, 3151-52 (2010).
[116] *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).
[117] Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., dissenting in part and concurring in part) (the majority's recognition of removal power "repudiates the lessons of American experience, from the 18th century to the present day.").
[118] *See* Mortenson, *supra* notes 39 - 40.
[119] *See* Shugerman, *Indecisions*, supra note 66, at 860 (Madison opted for "strategic ambiguity in the Foreign Affairs bill because he and the presidentialists were outnumbered by their opponents in the House and Senate" and "[l]ess than a third endorsed even a thin version of presidential removal power as implied by Article II").
[120] *See infra* part II.A.
[121] Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2077 (2022) (before *Myers*, "the Court had never struck down a statute on the ground that it unconstitutionally regulated the President or executive branch").
[122] See supra notes 10 and 11 and surrounding text.
[123] Chabot, *Rejecting the Unitary Executive*, *supra* note 18, at 14-19 (summarizing recent scholarship).

v. Jarkesy,[124] the Court eschewed the benefits of additional historical briefing and declined to decide the removal issue in that case.[125] The Court instead injected the removal issue into *Trump v. United States*, a case in which the parties and amici presented no historical briefing on this point. The removal power recognized by the *Trump* Court seems to exceed the President's fundamental power to execute the law as well as the President's fundamental duty of faithful execution. The Court's decision demonstrated no awareness of one of the Founding generation's most important lessons: that the President was never meant to be a king. For the first time ever, the Court has opened the door to a presidential removal power that knows no legal boundaries. It has placed the President above the law.

[124] *See supra* note 12.

[125] Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117, 2127-28 (2024) ("Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.").