

**Written Statement**  
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*Confirmation Hearing For Attorney General Nominee*  
*The Honorable William Pelham Barr*  
United States Senate Committee on the Judiciary  
United States Senate  
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**I. INTRODUCTION**

Thank you Chairman Graham, Ranking Member Feinstein, and members of the Senate Judiciary Committee for the honor of appearing before you today.

It is indeed a great honor to appear before this Committee at such a historic moment: the confirmation hearing of William Pelham Barr to serve as the 85th Attorney General of the United States. I have known General Barr for many years in my work as both an academic and a litigator, including my representation of Barr with other former Attorneys General during the litigation leading up to the Clinton impeachment. As I have stated publicly, I can think of no person better suited to lead the Justice Department at this critical period in history. Bill Barr is a brilliant and honorable lawyer who can ensure stability and integrity in these turbulent times. While we seem to be living in an age of rage, the Barr nomination should be an opportunity for both sides to find a common ground in our commitment to the rule of law and equal justice. Those are the values that define Bill Barr and I have no doubt that those are the values that he would bring every day to the office of the Attorney General of the United States.

For the purposes of introduction, I write, teach, and litigate cases concerning constitutional law and legal theory, with a particular emphasis on the separation of powers.<sup>1</sup> As my writings indicate, I tend to view the

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<sup>1</sup> I have been asked to include some of my prior relevant academic publications. The most relevant include Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L.

constitutional system through a Madisonian lens. As such, I view the legislative branch as the thumping heart of the tripartite system due to its role in converting factional disputes into majoritarian compromise. Accordingly, I admit to favoring the Legislative Branch in many conflicts with the Executive Branch; indeed, I represented the House of Representatives in its successful assertion of both standing and inherent powers in *House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016). Bill Barr represents the other major school of thought. Whereas my natural default position in separation-of-powers fights is to Article I, Barr's default is to Article II. He is the product of a lifetime of Executive Branch service and holds a robust view of executive power. His views on such inherent powers are in accord with the positions taken in court by all of the modern Administrations, including the Obama Administration. Despite our respective default positions, I have always found Barr to be one of the most knowledgeable and circumspect leaders on constitutional history and theory. He has a deep love and respect for our constitutional traditions that has been evident in his many years of service at the highest levels of our government.

I appreciate the careful attention that senators on both sides of this Committee have given to this nomination. As I discussed in my testimony in the confirmation of former Attorney General Loretta Lynch<sup>2</sup> and

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REV. 965 (2013); Jonathan Turley, United States House of Representatives, Committee on the Judiciary, "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution," May 30, 2006; Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege*, 60 MD. L. REV. 205 (2000) (Symposium); Jonathan Turley, "From Pillar to Post": *The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *A Crisis of Faith: Congress and The Federal Tobacco Litigation*, 37 HARV. J. ON LEGIS. 433 (2000); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000) (Symposium); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence* 44 HASTINGS L.J. 145 (1992).

<sup>2</sup> United States Senate, *Confirmation Hearing For Attorney General Nominee Loretta Lynch*, United States Senate Committee on the Judiciary, January 29, 2015 (testimony of Professor Jonathan Turley).

Supreme Court Justice Neil Gorsuch<sup>3</sup>, confirmation hearings play a critical dialogic role in our system. They allow us not only to explore the credentials and views of nominees, but also to honor their service and more fully appreciate the high offices that they will assume in our government. The Attorney General of the United States holds a unique position in that system, carrying the responsibility of enforcing our laws equally and fairly, while defining the limits and powers of a federal authority that extends broadly across agencies and departments. For that reason, the Attorney General must be a person with unquestioned integrity and proven intellect. Bill Barr is precisely that type of nominee.

There is much that I could say about Barr's character and intellect. However, there are ample witnesses who have already written or will testify on those issues. Instead, I will focus on Barr's legal views and why, even when we reach different conclusions, I consider him one of the finest legal minds in our profession. I will also address two areas that have drawn significant attention since the announcement of Barr's nomination: his public statements about the Russian investigation and his memorandum to Deputy Attorney General Rod Rosenstein. Far from being any liability, I view Barr's stated opinions to be an insight into his concerns for the Department and the professionalism that he would bring again to the office of United States Attorney General.

First, however, I would like to discuss a rather esoteric subject: the curious matter of the Attorney General's seal. While most of the Justice Department's history is extensively documented in statutes and publications, there remains a rather interesting anomaly—one that has been on prominent display for decades with little attention. The seal of the Justice Department remains one of the most recognized symbols of federal authority. On a shield is a commanding eagle rising with an olive branch in its *dexter* talon (right side from the shield bearer's perspective) and thirteen leaves and berries and thirteen arrows in its *sinister* talon (left from the perspective of the shield bearer). The meaning of the symbolism is obvious and well known. However, there is also a legend that appears on the seal and flag reading: "*Qui Pro Domina Justitia Sequitur.*" The origin of this phrase on the seal remains a matter of debate.<sup>4</sup> It is not clear who selected

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<sup>3</sup> United States Senate, *Confirmation Hearing For Judge Neil M. Gorsuch To Be Associate Justice of the United States*, United States Senate Committee on the Judiciary, March 21, 2017 (testimony of Professor Jonathan Turley).

<sup>4</sup> See Justice Department Is Puzzled by Motto, Nearly Century Old, Sunday Star (Wash., D.C.), Feb. 7, 1937, at B5 ("even Attorney General Cummings can't say exactly what it means ... [and] won't even attempt to translate it.").

the phrase or when it was first adopted. It is believed that the phrase is a derivation of how the British Attorney General was introduced to Queen Elizabeth with the words, “madam, here is your Attorney General.” The words, which are difficult to translate, were “*qui pro domina regina sequitur*” or, loosely, here is “one who prosecutes for our Lady the Queen” or “He Who Does Justice in the Name of the Queen.” Variations existed but the British Attorney General was customarily announced as “Now comes [blank], Attorney-General, who prosecutes on behalf of our Lord, the King.” That phraseology would not do for the United States, however. Despite beginning as an adviser to the President, the authority of the Attorney General is based in the law, not the President. More importantly, the Attorney General does not litigate in the name of the President. Thus, *Domina Justitia*, or “our Lady Justice,” was substituted to identify the Attorney General and his or her subordinates as those who work for justice.

Time and again, this Committee has had to struggle to determine whether a nominee understood the difference between representing justice and representing a President. Every Attorney General who stands under that seal must first and foremost understand that difference and swear to uphold their allegiance of *Domina Justitia*. I believe that William Barr not only understands the distinction but defines himself and the Justice Department by it.

## **II. WILLIAM BARR AND THE SEAL OF THE ATTORNEY GENERAL**

When the Congress created the Office of the Attorney General in the Judiciary Act of 1789, the Attorney General was defined primarily as an adviser and litigator: “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments.” The position however gradually changed after the first Attorney General Edmund Randolph took office. With the establishment of the Department of Justice in 1870 and the expansion of federal jurisdiction, the Department soon became the bulwark of due process and the symbol of fair and blind justice in America.

It is often challenging for a Committee to predict how a nominee will perform in a high office, even with an otherwise stellar career. But here, for

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only the second time in history, the Senate will consider a nominee who has previously held this office. (The first being John Crittenden who had the added distinction of serving three presidents—William Henry Harrison, John Tyler, and Millard Fillmore.) That gives the Senate a record not merely of leadership, but of specific leadership of this very department. Any review of Barr’s service in both public office and private practice will reveal a person of the greatest integrity and intellect. Bill Barr is a lawyer’s lawyer—someone who honestly enjoys the details and practice of law. He was extremely popular with the rank-and-file of the FBI and Justice Department because he was a strong and direct and honest leader.

Bill Barr has always had the insatiable intellectual appetite befitting what my colleagues and I affectionately refer to as a “Fac Brat.” He is the son of two Columbia professors, Mary Margaret Ahern Barr and Donald Barr. Barr would earn a B.A. in government as well as a Master’s degree in government and Chinese studies from Columbia. He then attended George Washington University Law School where he received his J.D. degree in 1977. His father (who was a well-known writer and English professor) had served in the Office of Strategic Services (OSS) in World War II. Barr followed in that tradition and worked at the Central Intelligence Agency from 1973 to 1977. After graduating from GW, Barr clerked for the widely respected Judge Malcolm Wilkey of the United States Court of Appeals for the District of Columbia. He then joined the Reagan Administration as Deputy Assistant Director for Legal Policy and followed with almost a decade of private practice with the leading firm of Shaw, Pittman, Potts & Trowbridge. He then returned to the Executive Branch as the Assistant Attorney General for the Office of Legal Counsel under President George H.W. Bush. In 1990, he was appointed Deputy Attorney General and then, with the resignation of Attorney General Richard Thornburgh, he was nominated as Attorney General.

Barr was only 41 when he was made Attorney General by President George Bush, one of the youngest individuals to hold that office in history. In his testimony in 1991, Barr took special efforts to articulate his duty to resist political influence, stating “Nothing could be more destructive of our system of government, of the rule of law, or the Department of Justice as an institution, than any toleration of political interference with the enforcement of the law.” Barr was approved on a voice vote and received the support of then-Sens. Joseph R. Biden and Edward M. Kennedy. It was the third time that Barr was confirmed unanimously by this body. He would proceed to serve with great distinction and was highly regarded both within the Justice Department and on Capitol Hill. During his tenure, Barr appointed and

supervised three special counsels and specifically authorized an independent counsel under the Ethics in Government Act. As Attorney General, Barr was a staunch defender of executive authority and tough law-and-order policies.

Barr followed his government career with almost 15 years as a corporate executive, including serving as Executive Vice President and General Counsel for GTE Corporation (later Verizon). In that capacity, he continued to argue cases, including litigation before the United States Supreme Court.

Each nominee brings his or her own style and priorities to this position. For example, Attorney General Eric Holder proudly called himself “an activist attorney general” and maintained that “any attorney general who is not an activist is not doing his or her job.”<sup>5</sup> Loretta Lynch was widely viewed as less of an activist and more of a traditional Attorney General in style and substance.<sup>6</sup> I admired that about Lynch. Barr has followed the same traditional view of an attorney general as someone who, like Lynch, is more of an institutionalist. Barr is unquestionably conservative and an ardent defender of executive power. However, he identifies deeply with the Justice Department as an institution and will presumably work to restore the morale to the Department. He has the background and reputation to do exactly that.

To put it simply, there are few nominees in history with Barr’s range of prior leadership in top legal and business positions—and only one who can claim prior experience in this position. Most importantly, it is the experience and leadership that the Justice Department desperately needs at this time. The Justice Department under the current Administration has been battered with controversies, with both sides causing damage to its morale and standing. It began with Acting Attorney General Sally Yates ordering the Justice Department not to assist a president in the defense of a major policy—an act that I have previously denounced as without historical, ethical, or professional support. At the same time, the President continually attacked his own Attorney General, Jeff Sessions, as well as FBI leadership in an unprecedented rift within the Executive Branch. This is all damage below the waterline for a Department that has worked to maintain its reputation for integrity and independence. Barr has worked outside of the Department to try to reinforce those traditions and independence, as

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<sup>5</sup> Juan Williams, *Holder Exclusive: Proud To Be An Activist*, The Hill, August 4, 2014.

<sup>6</sup> Matt Apuzzo, *Nominee for Attorney General Less Of An Activist Than Holder*, New York Magazine, Jan. 12, 2017.

evidenced by his defense of Attorney General Jeff Sessions and his offering of advice to Deputy Attorney General Rod Rosenstein during recent controversies. In November 2018, Barr joined former attorneys general Edwin Meese III and Michael B. Mukasey in publishing a Washington Post editorial entitled “We are former attorneys general. We salute Jeff Sessions.” The editorial stated that Sessions “has acted always out of concern not for his personal legacy but rather for the legacy of the Justice Department and the rule of law.” That is precisely what this position demands at this time.

### **III. THE SIGNIFICANCE OF PRIOR COMMENTS AND CONNECTIONS RELATED TO THE SPECIAL COUNSEL**

One of the issues raised before these hearings concerns public comments made by General Barr as a private citizen that relate to the Special Counsel’s investigation. As I have said publicly, I fail to see the barrier that any of these comments would present to either Barr’s confirmation or function as Attorney General. Like most leaders in the bar, a former Attorney General is often called upon to give speeches and interviews on matters related to the justice system. Barr is someone who has continued to offer advice and insights on controversies related to the Department. None of those comments have been out of the mainstream. None raise ethical disqualifications to assuming full responsibility over all aspects of his office. None show bias that would undermine Barr’s ability to make decisions related to the Russian investigation or any report issued by the Special Counsel. Finally, there have been suggestions that Barr’s friendship and connections to the Mueller family or his discussion of representing President Trump would create conflicts of interest. In my view, they do not but it is entirely appropriate for this Committee to explore such issues. I would like to address them and the controlling legal and ethical standards.

As a threshold matter, it is important for the Attorney General to remain above not only conflicts of interest but also the appearance of such conflicts as the chief legal enforcement officer in the United States. At the same time, it is equally important not to manufacture conflicts that penalize those leaders who continue to contribute their views and time to help resolve controversies. Past Attorneys General have come from politics or prior campaign roles where they have made partisan statements in those capacities. The point is that they are in a different capacity when speaking as an Attorney General and most have taken that distinction seriously in carrying out their sworn constitutional functions.

In reference to the Uranium One controversy, Barr previously told The New York Times that there was “nothing inherently wrong about a president calling for an investigation.” In making this statement, Barr stressed that an investigation “shouldn’t be launched just because a president wants it.” That is a correct statement of the law and the lines of authority between the White House and the Justice Department. Like many, I have been highly critical of President Trump’s public comments on investigations as well as his criticism of judges, journalists, and witnesses. While ill-advised and unsettling, those statements are protected under the First Amendment and do not constitute criminal interference or obstruction in my view. Other presidents have weighed in on pending criminal matters or investigations. However, Barr was correct to draw the critical legal distinction that the Justice Department should not launch an investigation due to such statements. While critics have focused on Barr’s first comment, they ignore the import of his second comment: that there must be separation of a President from the Justice Department on the basis or need for any investigation. Indeed, one of Barr’s public writings is an opinion editorial praising Attorney General Jeff Sessions for his integrity and independence. That opinion editorial with two other former attorneys general was a badly needed defense of not just Sessions but his office after almost two years of unrelenting and unjustified criticism by President Trump.

Many critics have focused on Barr’s observation that there was sufficient reason for an investigation into the Uranium One deal and that “to the extent it is not pursuing these matters, the department is abdicating its responsibility.” Barr’s view is shared by many lawyers, though I would view the evidence as less compelling for a formal investigation. There is ample evidence of foreign contributions to the Clinton Foundation as well as speaking fees worth millions of dollars. As the Washington Post has acknowledged, “There can be little doubt that Russians who donated to the Clinton Foundation were trying to curry favor with the secretary of state.” However, the proper focus should be not on the merits of, but rather the propriety in making, such an observation. Barr was not stating that the Clintons are implicated in criminal conduct, but only that these facts raise a sufficient basis for investigation. The statement does not prejudge any evidence or predetermine any outcome in a potential investigation.

Barr has also publicly discussed the actions of former FBI Director James Comey in informing Congress that he had reopened the Clinton investigation (which Barr viewed as appropriate) as well as his press conference on the Clinton probe in 2016 (which Barr criticized). Barr also publicly commented that he was troubled by political donations to



Democrats made by members of the Special Counsel team and said that he “would have liked to see him have more balance” in the group. Barr criticized leaks in the investigation and said that “leaks by any investigation are deplorable and raise questions as to whether there is an agenda.” He also co-authored an op-ed praising Attorney Jeff Sessions as an “outstanding attorney general” despite the attacks by President Trump on Sessions. These comments were virtually identical to those voiced by other experts and former Justice officials on both sides of the debate. Indeed, in terms of the criticism of Comey, Deputy Attorney General Rod Rosenstein detailed how he had spoken with a variety of former Attorneys General and justice officials who viewed Comey’s actions as far outside the range of acceptable conduct and worthy of termination. Such comments reflect the continuing interest of former justice officials in maintaining standards of professional conduct and decorum.

Finally, there have been questions raised over the fact that Bill Barr and Robert Mueller and their wives are friends, including spouses who reportedly go to Bible study together.<sup>7</sup> Mueller reportedly went to Barr’s daughter’s wedding. Such connections are not disqualifying. There is nothing strange that these two men with such shared history in the same Department would be friends.

We should want leaders like Barr to speak on contemporary issues, not penalize them for sharing such knowledge and expertise. Many former attorneys general are called to Congress or the media to help gain insights into decisions being made. Barr’s comments were thoughtful and honest and direct—all characteristics that have made him a respected leader in the legal field. If such comments are disqualifying, we would be left with a list of senior candidates who have spent decades without uttering a single interesting or provocative thought. In his first confirmation, Barr was praised for his refreshing honesty and openness. Senate Judiciary Committee Chair Joe Biden did not agree with Barr’s views but valued his “candid” answers and said that the Barr confirmation was “a throwback to the days when we actually had attorneys general that would talk to you.”

#### **IV. THE 1989 BARR MEMORANDUM AND THE SCOPE OF EXECUTIVE POWER**

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<sup>7</sup> Steven Nelson, *Recusal Redux: Attorney General Might Have To Cede Oversight Of Mueller Investigation If Confirmed*, Washington Times, Jan. 11, 2019.

For decades, General Barr has been a passionate defender of the powers of Article II. That view was captured in his 1989 memo as head of the Office of Legal Counsel. The 10-page memo offered a detailed account of intrusions into executive authority and encouraged a more organized and vigilant opposition to such legislative and judicial encroachments. Barr methodically identified ten types of legislative provisions commonly included in legislation that he viewed as draining authority from the Presidency.

The memorandum presents a familiar theme for those of us who favor legislative authority and have spent years calling on Congress to more vigorously defend legislative authority from executive over-reach.<sup>8</sup> Barr was a highly influential voice in defending the unitary executive theory and the prerogatives and powers of Article II. The position that he laid out twenty years ago is commonly held by many scholars and jurists. It includes a defense of the power over executive appointments and terminations as well as control of classified and privileged information. Barr is correct in raising concerns over “hybrid” commissions, independent agencies, and positions that seem to mix executive and legislative elements, including commissions with congressional members. Many of these issues have vexed academics for years in how certain bodies fit into the tripartite constitutional scheme. It is precisely the type of concern that led the Supreme Court to strike down the one-house legislative veto in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Barr saw the rise of bodies exercising executive powers without executive appointments. To the extent that such bodies or functions involve the exercise of executive powers, Barr argues that “[a]ny proposal to establish a new Commission should be reviewed carefully to determine if its duties include executive functions. If they do, the members of the Commission must be appointed pursuant to the Appointments Clause.”

Separation of powers does require such clarity in separation. In *Federalist No. 51*, James Madison explained the essence of the separation of powers—and the expected defense of each branch of its constitutional prerogatives and privileges:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary

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<sup>8</sup> See generally Jonathan Turley, *A Fox In The Hedges: Vermeule’s Optimizing Constitutionalism For A Suboptimal World*, 82 University of Chicago Law Review 517 (2015)

constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.<sup>9</sup>

Barr has called for the Executive Branch to assert such institutional ambitions in pushing back on both the legislative and judicial branches when Article II powers are implicated. As I have testified previously,<sup>10</sup> the consistent element running throughout the constitutional debates and the language of the Constitution is a single and defining danger for the Framers: the aggrandizement or aggregation of power in any one branch or any one's hands. The Framers actively sought to deny the respective branches enough power to govern alone. Our government requires consent and compromise to function.

Barr prefers clarity and so do many of us on the Article I side. We simply believe that this struggle has been one-sided with the Executive Branch encroaching more and more into legislative areas and Congress relenting to such encroachments. Barr has questioned provisions like “qui tam” actions that undermine the position of the Justice Department as the proper institution to litigate fraud actions against the United States. Notably, Barr does not argue that such laws are unconstitutional per se, but should be opposed as inimical to executive authority. Barr also opposed what he saw as “an unabashed willingness by Congress to micromanage foreign affairs and executive branch internal deliberations.” This is another issue that has continued to divide courts and commentators alike. For the most part, courts have supported the view in the memorandum on the inherent powers governing foreign affairs. Moreover, the Obama Administration asserted the same basic position in taking unilateral action in places like Syria and Libya.

The memorandum is a comprehensive and prophetic account of areas

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<sup>9</sup> THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008).

<sup>10</sup> See, e.g., Jonathan Turley, United States House of Representatives, “Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States” Before the H. Comm. On Rules, 113th Cong., July 16, 2014; Jonathan Turley, United States House of Representatives, “Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws” Before the H. Comm. on the Judiciary, 113th Cong., Feb. 26, 2014; Jonathan Turley, United States House of Representatives, *The President’s Constitutional Duty to Faithfully Execute the Laws Before the H. Comm. on the Judiciary*, 113th Cong., Dec. 2, 2013; Jonathan Turley, United States House of Representatives, Committee on the Judiciary, “Executive Overreach: The President’s Unprecedented “Recess” Appointments,” Feb. 15, 2012.

of potential encroachment and controversies over executive authority. The OLC has long been the intellectual hub of the Justice Department—an office that is supposed to look beyond insular cases to a broader legal horizon. Barr was advocating for a unified and single position of the Executive Branch in resisting proposals and legislation counter to Article II authority. That is what the OLC is supposed to do and Barr was reminding all general counsels (who composed the General Counsels’ Consultative Group) of the position of the Bush Administration on the maintenance of the unitary executive principles.

The memorandum may have proven too successful. For the last twenty years, Democratic and Republican Administrations have jealously guarded executive powers while Congress has yielded time and time again in these separation of powers fights. My only complaint is not that Barr wrote this memorandum, but that Congress lacks a similar memorandum and commitment in defense of its own authority under Article I.

## **V. THE 2018 BARR MEMORANDUM AND THE SCOPE OF FEDERAL OBSTRUCTION LAWS**

On June 8, 2018, Bill Barr sent Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel a memorandum entitled “Mueller’s ‘Obstruction’ Theory.” As Rosenstein said publicly later, there was nothing unusual in former Justice officials, particularly a former Attorney General, sharing thoughts with the Department on legal issues. Indeed, Barr also raises his concerns over the basis for the prosecution of Sen. Bob Menendez with high-ranking Justice officials. He had no interest in that prosecution but was concerned about the implications of the theory of the prosecution and how it would be applied in other cases. The memorandum did not address the core allegations of Russian collusion that were the original purpose of the Special Counsel investigation. Barr was concerned about the widespread reports of the obstruction allegation based on the firing of former FBI director James Comey. The memo is a comprehensive and thoughtful analysis of the federal obstruction provision. It is vintage Bill Barr—detailed and dispassionate account of the history and scope of the obstruction criminal provision. As I have mentioned in columns, I do not agree with all of Barr’s conclusions, but his analysis raises legitimate concerns over the use of obstruction theories in the context of the Russian investigation.

The memorandum argues that the use of obstruction to address issues like the firing of James Comey would distort the federal law in a dangerous

way. That concern is shared by some of us in the civil liberties community. For almost two years, I have raised objections about the expansion of the definition of obstruction (and other criminal laws) that have been widely cited by experts in the media to implicate President Trump in criminal conduct. While Barr's concerns are primarily rooted in Article II, my own concerns have been with broadening the reach of these obstruction statutes to cover a wide range of pre-grand jury conduct, including even the use of public comments likely protected under the First Amendment. Obstruction cases have historically involved acts committed during the pendency of grand jury investigation in the hiding or destruction or altering of evidence. It is less common to have such claims raised before the submission of an investigation to a grand jury and courts have rejected some claims as premature or ill-founded. The expansion of obstruction claims to the earliest stages of investigations raises serious questions of the over-criminalization of conduct. While it remains a crime to lie to federal investigators at any stage, most obstruction cases involve direct and clear efforts to corruptly influence or impede an "official proceeding." The loose interpretations of the obstruction provisions would place a wide swath of conduct under the criminal code. It would also expand the ability of prosecutors to allege criminal acts and force plea agreements.

There are a variety of obstruction crimes, but most have no applicability to this controversy. 18 U.S.C. § 1503, for example, broadly defines the crime of "corruptly" endeavoring "to influence, obstruct or impede the due administration of justice." This "omnibus" provision, however, is most properly used for judicial proceedings such as grand jury investigations, and the Supreme Court has narrowly construed its reach. There is also 18 U.S.C. § 1512(c), which makes it a crime for any person who corruptly or "otherwise obstructs, influences or impedes any official proceeding, or attempts to do so." But this provision too has been narrowly limited to the underlying conduct and the need for some "official proceeding." Mueller should be fully aware of that problem since his principal deputy, Andrew Weissmann, was responsible for overextending that provision in a jury instruction that led the Supreme Court to reverse the conviction in the Arthur Andersen case in 2005.

The obstruction provisions have been widely discussed by experts over the last two years in connection with the firing of Comey. That is the context that raised concerns for Barr, as laid out in his memorandum. Barr focuses on 18 U.S.C. § 1512 since it does not require a pending proceeding at the time of the alleged criminal act. The most obvious provision would be the so-called "residual clause" in subsection (c)(2), which reads:

(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) *otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so [is guilty of the crime of obstruction]. [emphasis added].

As Barr notes, the section specifically defines acts of obstruction, including killing a witness, threatening a witness to prevent or alter testimony, destroying or altering documentary or physical evidence, and harassing a witness to hinder testimony. Subsection (c) (1) then lists acts tied to the altering or concealment or destruction of records, documents, or objects. What follows is a residual reference to someone who “corruptly . . . otherwise obstructs, influences, or impedes any official proceeding.” Barr raises the fair question of why Congress would create the earlier specific references to acts if the “otherwise” reference can literally mean anything. Instead, he suggests that it is meant to be “tied to, and limited by, the character of all the other forms of obstruction listed in the statute.” Accordingly, he suggests that the most natural and plausible reading is that the residual clause “covers acts that have the same kind of obstructive impact as the listed forms of obstruction—i.e., impairing the availability or integrity of evidence—but cause this impairment in a different way than the enumerated actions do.” Barr further argued that the open-ended interpretation of the residual clause would implicate executive powers and privileges. Not only should courts avoid such conflicts in their interpretations with narrower constructions, but criminalizing discretionary powers left to the President would “disempower” his office and run contrary to Article II.

As I have previously stated, I do not agree with some of those conclusions. However, I am baffled by the criticism of some of Barr's statements with regard to the constitutional powers and privileges. For example, Barr states that “[t]he Constitution itself places no limit on the President's authority to act on matters which concern him or his own conduct. On the contrary, the Constitution's grant of law enforcement power to the President is plenary.” That is demonstrably true. The Constitution does not contain any such express limits. That does not mean that presidential actions taken for personal reasons would be lawful. Indeed, Barr has stated that such conduct could involve other crimes and would presumably be both an abuse of power and a violation of the duty to

faithfully execute the laws of the United States.

However, the memo offers an excellent analysis from a perspective shared by many lawyers and judges in both the proper interpretation of the criminal provisions as well as the limitations on the scope of such interpretations in light of countervailing constitutional powers. I have frankly been taken aback by some of the criticism of this memorandum, which either misrepresents Barr's analysis or misconstrues the governing law. There are good-faith arguments on both sides of this issue and no clear answer on the scope of the obstruction provisions in this context. However, we live in times where such good-faith debates are no longer tolerated and where discourse commonly devolves into little more than *ad hominem* attacks. I would like to address a couple of these criticisms and explain why I believe that they are unfairly characterizing both Barr's analysis and his motivations. One of the best-known sayings of Confucius is that "the beginning of wisdom is to call things by their proper name." The same is true about the law. It is important to call – and to prosecute – conduct by their proper name. Barr was not saying that a president cannot commit obstruction or was above the law. He expressly said the opposite. What he was raising is how to properly identify and prosecute conduct in the proper way.

## **1. Barr's "Assumptions" About The Possible Use Of Obstruction Theories By The Special Counsel**

One of the most curious and unfair criticisms of the Barr memo was that the author engaged in some form of wild speculation about the use of the obstruction provisions in the absence of information from the Special Counsel. Critics have characterized the premise of the memo as "bizarre"<sup>11</sup> or "strange" and called the memorandum "a bizarre document" that was "based entirely on made-up facts."<sup>12</sup> The objection is that Barr is suggesting that "he knows Mueller's legal theory, and second, that he understands the fact pattern Mueller is investigating."<sup>13</sup> The problem is that Barr says precisely the opposite. At the outset of his memorandum, Barr says that he is "in the dark about many facts" given the secrecy surrounding

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<sup>11</sup> Daniel Hemel and Eric Posner, *Bill Barr Just Argued Himself Out Of A Job*, *New York Times*, Dec. 21, 2018.

<sup>12</sup> Mijhaia Fogel and Benjamin Wittes, *Bill Barr's Very Strange Memo On Obstruction of Justice*, *Lawfare*, Dec. 20, 2018, <https://www.lawfareblog.com/bill-barrs-very-strange-memo-obstruction-justice>.

<sup>13</sup> Fogel & Wittes, *supra*.

the Special Counsel investigation. However, Barr is addressing what is a commonly known focus of the investigation: the firing of James Comey. We know that because the firing was one of the key factors behind the appointment of a Special Counsel. Indeed, some of us questioned the need for the appointment of a Special Counsel before the firing, but became strong supporters of such an appointment after the firing. Barr is not saying that Mueller will only use obstruction in this fashion but rather than this is the provision that most concerns him from a constitutional and policy perspective. Indeed, his express recognition that the President can be charged under other crimes should plainly show that his intention is not to shield the President but to address a legitimate concern over prosecutorial policy. Indeed, some conduct may not be properly defined as obstruction but properly charged as other crimes. The rule of law is often secured in its details; in the proper classification of conduct. That is what Barr raised in his memorandum.

What is particularly disconcerting is the suggestion that Barr is engaging in wild speculation to even discuss such a theory when experts have been debating this issue for months—and the President’s legal team has been crafting a public defense in response to it. Indeed, all of these critics engaged in precisely the same focus of analysis in discussing whether the firing of Comey was an act of obstruction. There are hundreds of columns and blogs on the obstruction question addressed by Barr, including by these critics.<sup>14</sup> Indeed, one of these critics wrote a lengthy piece on precisely the same issue back in June 2018.<sup>15</sup> He then proceeded within days of his column targeting Barr to write another column exploring the hitherto “strange” focus of an obstruction case against Trump in the Russian

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<sup>14</sup> Compare Marty Lederman, *A First Take On Bill Barr’s Memo on Presidential Authority and The Mueller Investigation*, <https://www.justsecurity.org/61975/legal-arguments-bill-barrs-memo-mueller-investigation/> and Marty Lederman and David Pozen, *Why Trump’s Disclosure To Russia (and Urging Comey To Drop The Flynn Investigation, and Various Other Actions) Could Be Unlawful*, <https://www.justsecurity.org/41024/why-trumps-disclosure-and-more-might-be-unlawful/>. See also, Marty Lederman, *Why Ron Rosenstein Won’t Have To Recuse Himself*, Newsweek, June 19, 2017 (discussing the same obstruction standard as applied to the Comey firing).

<sup>15</sup> Benjamin Wittes, *The Flaw In Trump’s Obstruction-of-Justice Defense*, The Atlantic, June 4, 2018, <https://www.theatlantic.com/ideas/archive/2018/06/even-the-president-can-obstruct-justice/561935/>; see also *Jim Comey Friend Speaks Out On Possible Trump Obstruction*, CNN June 16, 2017, <https://www.youtube.com/watch?v=MJirvkFnbFY>



investigation.<sup>16</sup> Another of these authors wrote a New York Times column blasting Barr for his bizarre speculation on the bringing of an obstruction claim but last year wrote another New York Times column exploring precisely that issue and the specific language addressed by Barr.<sup>17</sup> I have found all of these columns—like Barr’s analysis—to be insightful and helpful, even though I disagreed with them. There was nothing “bizarre” or “strange” in addressing one of the core crimes alleged at the time of the appointment of the Special Counsel.

The firing of James Comey has been openly discussed in Congress as a core allegation of obstruction and witnesses have confirmed that they have been questioned about the controversy. Barr actually wrote about that controversy much later than many of these critics and after more information was available confirming the obstruction inquiry. Indeed, my assumption is that the Special Counsel’s office completed the same analysis long before Barr decided to share his thoughts with Rosenstein. One can raise fair arguments against Barr’s conclusions (as I have) without unfairly characterizing his focus on the obstruction theory as wild or bizarre speculation.

## **2. Barr’s Statutory Construction of the Obstruction Provision**

Barr’s analysis begins with a long and detailed analysis on how to interpret Section 1512. His analysis tracks much of the analysis by critics in the operative language and the unresolved issues related to an obstruction charge. The memo raises the common statutory issue of construction: how to interpret a generally worded residual clause that follows a more specific list of enumerated acts. For example, courts have long applied the doctrine of *eiusdem generis* (“of the same kind”) that states a general term following a list of specific terms will be limited to the more specific term. Moreover, the broad reading of the residual clause raises legitimate questions of why Congress would enumerate specific acts only to permit any act to qualify for the purposes of obstruction. As discussed earlier, Barr argues that an unlimited definition of the meaning of predicate acts that “otherwise”

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<sup>16</sup> Benjamin Wittes, *What if The Obstruction Was The Collusion?* Lawfare, January 11, 2019, <https://www.lawfareblog.com/what-if-obstruction-was-collusion-new-york-times-latest-bombshell>.

<sup>17</sup> Daniel Hemel & Eric Posner, *The Case For Obstruction Charges*, *The New York Times*, June 15, 2017, <https://www.nytimes.com/2017/06/15/opinion/the-case-for-obstruction-charges.html>; see also Eric Posner, *The Motive Question and Obstruction of Justice*, <http://ericposner.com/the-motive-question-and-obstruction-of-justice/>

obstruct would make virtually the rest of the provision superfluous and meaningless. It is a fair point and one that a federal court would seriously consider. There is not only a “rule of lenity” where courts resolve ambiguities in favor of a criminal defendant, but courts tend to narrowly construe criminal laws to guarantee that citizens are given notice and clear standards of what constitutes criminal conduct. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011) (“It leads us to favor a more lenient interpretation of a criminal statute ‘when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.’”) (quoting *United States v. Shabani*, 513 U. S. 10, 17 (1994)). This is a principle that some of us in the civil liberties community regularly raise as a protection from the wide and ambiguous criminalization of conduct.

What is most striking about the criticism of Barr’s memo is that his detractors dismiss his effort for a limiting principle without addressing the obvious danger of their open-ended definition to civil liberties. Their analysis dangerously argues against the notion that generalized language could or should be narrowed through judicial interpretation. In their New York Times column, Daniel Hemel and Eric Posner simply repeat the language of the provision as self-evident proof that it should not be construed to have a more limited meaning in the context of the statute as a whole:

The relevant statute, Section 1512(c) of the federal criminal code, applies, as Mr. Barr says, to cases of evidence impairment, but it also applies to anyone who “otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so” — provided that they act “corruptly.” If destroying evidence to protect oneself from an investigation is obstruction, then so is pressuring a subordinate to ignore such evidence or drop the investigation altogether.

First, I share their view that such acts can be obstruction, but not the determinative weight given this adverb. However, they do not offer (as does Barr) a clear interpretation of the provision other than “anything goes” so long as it can be alleged to be done corruptly. That would entail any act that a prosecutor alleges obstructed or influenced or impeded (or was intended to do so) in any way. They also do not address Barr’s interpretative arguments that the provision must be read in the context of the section overall.

Moreover, it is not clear that their alternative hypotheticals disprove Barr’s point. While Barr was addressing the firing of Comey, the authors

note that it would be obstruction if Trump told Comey to ignore evidence or drop the investigation. However, Barr expressly states that

the President and any other official can commit obstruction in this classic sense of sabotaging a proceeding's truth-finding function. Thus, for example, if a President knowingly destroys or alters evidence, suborns perjury, or induces a witness to change testimony, or commits any act deliberately impairing the integrity or availability of evidence, then he, like anyone else, commits the crime of obstruction. Indeed, the acts of obstruction alleged against Presidents Nixon and Clinton in their respective impeachments were all such "bad acts" involving the impairment of evidence.

It is not clear how some hypotheticals might fit in Barr's analysis. Barr specifically includes acts that impair the integrity or availability of evidence. Indeed, Barr specifically embraces the Nixon impeachment, which dealt with acts intended to impair the integrity or availability of evidence. What Barr argues is that there must be some limiting principle so that any act by a president cannot be interpreted as obstruction merely because it has an influence on the investigation. He does not question that an obstruction investigation and charges against a president would be appropriate when there is a cognizable crime (like those alleged with regard to collusion) that have been identified. Moreover, he does not question that other crimes may be raised by such conduct even if it does not meet the definition of obstruction. Finally, he maintains that efforts to interfere with an investigation would be an "abuse of power" and a violation of a President's duty to faithfully execute the laws.

In other writings, the view of Hemel and Posner becomes even broader and more amorphous.<sup>18</sup> The authors do not even require a specific stand-alone act of obstruction: "The actus reus requirement does not require that an obstruction conviction be predicated on a single act. A 'continuing course of conduct' that obstructs an investigation can be the basis for guilt. And as the use of the verbs 'endeavor' and 'attempt' in the obstruction statutes suggests, a defendant can be convicted of obstruction even if his effort to stymie an investigation does not succeed."<sup>19</sup> Thus, a president could be charged with obstruction based on a mosaic of acts deemed to be

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<sup>18</sup> Daniel Hemel & Eric Posner, Presidential Obstruction of Justice, July 18, 2017, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3004876](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876)

<sup>19</sup> *Id.*

part of an endeavor to “influence” an investigation. In the end, the authors seem to dispense with any limitation on the *actus reus* of obstruction by simply making it redundant with the *mens rea* requirement:

Moreover, a defendant who is innocent of the underlying charge can be convicted of obstructing the investigation into that charge. Obstruction of justice is an independent crime. But of course, it cannot be the case that any action or course of conduct that might interfere with an investigation of any charge constitutes criminal obstruction. The criminal defense lawyer who moves to quash a subpoena thereby impedes an investigation, but that does not mean that he should go to jail. What “separates the wheat from the chaff” in obstruction cases is the *mens rea* requirement: to be guilty of obstruction, a defendant must act with a “corrupt purpose.”

So, under this interpretation, prosecutors must prove both a criminal act and criminal intent, but the criminal act can be defined entirely by alleged criminal intent. Barr’s best defense might be found in such criticism in showing how dangerously undefined the obstruction crime becomes without limiting principles.

As a criminal defense attorney, I find their interpretation unnerving since most any act that is viewed as inimical to a pre-grand jury investigation could be deemed as satisfying this standard. What is notable is that the reliance on the *mens rea* element puts enormous stress at the weakest point of the statute. The ambiguous and undefined meaning of “corruptly” led earlier to the D.C. Circuit finding the term unconstitutionally vague. *United States v. Poindexter*, 951, F.2d 369, 386 (D.C. Cir. 1991) (“neither the legislative history nor the prior judicial interpretation of § 1505 supplies the constitutionally required notice that the statute on its face lacks. Accordingly, we find no reason to disturb our earlier conclusion that the statute is unconstitutionally vague as applied”). As Barr points out, Congress proceeded to magnify the problem with an equally ambiguous “fix” by defining “corruptly” as “acting with an improper motive . . . including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” 18 U.S.C. §1515(b). This is the motivational definition that critics want to use without any limitation on the types of actions that fall under the statute. Notably, when unable to actually define the term, Congress listed the specific acts traditionally associated with obstruction and raised by Barr: “a false or misleading

statement, or withholding, concealing, altering, or destroying a document or other information.”

As a civil libertarian, I would be more comfortable with Barr’s narrow interpretation than I would the virtually limitless interpretation of Hemel and Posner. However, in the end, I disagree with both. Barr is correct that the meaning of the residual clause must be read in the context of the section as a whole. The “otherwise” acts should, as Barr suggests, be confined to “acts that have the same kind of obstructive impact as the listed forms of obstruction . . . but cause this impairment in a different way than the enumerated actions do.” Obstruction does “not criminalize just any act that can influence a ‘proceeding’. Rather they are concerned with acts intended to have a particular kind of impact.” After all, the thrust of the provision is to protect “proceedings” from interference or obstruction. That ties the crime to the process of fact gathering and truth finding. Yet, in the end, I think Barr cogently identifies the problem but not the solution. Confining the definition to “impairing the availability or integrity of evidence” might exclude actions limiting investigators and thus the investigation. The solution might be found in Barr’s evidence-based test with a broader definition of acts that interfere with evidence gathering. Thus, a direct effort to inhibit or prevent investigators from carrying out an investigation is indeed an obstruction of the fact-finding work of a federal proceeding.

Whatever workable definition may be developed, it would arise after decades of struggle with the ambiguity of these terms. More importantly, Barr is raising good-faith and compelling arguments for the type of clarity that courts in cases like *Poindexter* have demanded in the definition of crimes.

### **3. Barr’s Constitutional Limitations On Charging Presidential Obstruction**

While it should not come as much of a surprise, my primary disagreement with the Barr memorandum is its discussion of the inherent presidential powers and privilege. I have long been a critic of the expansion of presidential authority (and corresponding decline of legislative authority) in our tripartite system. However, Barr’s views on executive power are not unlike those argued under the Obama Administration and other administrations. More importantly, Barr is not voicing some extreme view in the memorandum, as suggested by his critics. To the contrary, he leads with a statement that not only rejects such extreme interpretations of the

executive immunity but actually contradicts the stated view of President Trump's legal team. It is worth repeating here:

Obviously, the President and any other official can commit obstruction in this classic sense of sabotaging a proceeding's truth-finding function. Thus, for example, if a President knowingly destroys or alters evidence, suborns perjury, or induces a witness to change testimony, or commits any act deliberately impairing the integrity or availability of evidence, then he, like anyone else, commits the crime of obstruction. Indeed, the acts of obstruction alleged against Presidents Nixon and Clinton in their respective impeachments were all such "bad acts" involving the impairment of evidence. Enforcing these laws against the President in no way infringes on the President's plenary power over law enforcement because exercising this discretion—such as his complete authority to start or stop a law enforcement proceeding—does not involve commission of any of these inherently wrongful, subversive acts.

That is a direct repudiation of the extreme view presented by many that a sitting president cannot by definition commit obstruction or be impeached for such acts. Indeed, in a letter to Chairman Lindsay Graham, Barr reaffirmed what he clearly stated earlier: "If a President, acting with the requisite intent, engages in the kind of evidence impairment the statute prohibits—regardless whether it involves the exercise of his or her constitutional powers or not—then a President commits obstruction of justice under the statute. It is as simple as that." Despite stating (and restating) this important threshold position, critics have attempted to paint Barr's analysis as outside of the mainstream of legal thought. It is not. Moreover, Barr's view that statutory interpretations are often informed and limited by countervailing constitutional rights or powers is widely accepted. The federal courts have long followed a doctrine of avoidance when ambiguous statutes collide with constitutional functions or powers. In *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909), the Court held that "Under that doctrine, when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *See also* Op. Off. Legal Counsel 253, 278 (1996) ("It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional

doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it.”). Such conflicts arise regularly in the interpretation of the scope of federal laws. Thus, when the Supreme Court considered the scope of the Federal Advisory Committee Act (“FACA”) it avoided a conflict with Article II powers through a narrower interpretation. In *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), the Court had a broad law governing procedures and disclosures committees, boards, and commissions. However, when applied to consultations with the American Bar Association regarding judicial nominations, the Administration objected to the conflict with executive privileges and powers. The Court adopted a narrow interpretation: “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Id.*; see also *Ass’n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (“Article II not only gives the President the ability to consult with his advisers confidentially, but also, as a corollary, it gives him the flexibility to organize his advisers and seek advice from them as he wishes.”). These decisions explored the same tensions raised by Barr in the context of the obstruction statute in determining the scope of provisions in the context of countervailing executive functions.

There has been widespread caricaturing of Barr’s views on this issue in the memorandum. For example, while raising many legitimate points, Hemel and Posner stated that:

Mr. Barr also says that the obstruction statutes do not apply to ‘facially lawful’ acts by the president such as the firing of an F.B.I. director, because presidents are constitutionally authorized to fire their subordinates. But the obstruction statutes do apply to actions that would be “facially lawful” under other circumstances. For example, there is no law against tearing up pieces of paper; there is a law against tearing up documents so that they cannot be subpoenaed by federal prosecutors. Firing the F.B.I. director is not a crime; firing the F.B.I. director in order to block an investigation into the president’s own actions very well might be.

The problem is that Barr was not making such a simplistic argument. Obviously all of the acts that Barr agreed would be obstruction would also be, in isolation, facially lawful acts. Thus, Barr acknowledges that destruction of evidence would be obstruction. Destroying a piece of paper is

a lawful act unless the paper happens to be evidence sought in a federal investigation. What Barr is saying is that the act cannot be the exercise of a power that is *faithfully* executed. He is speaking of a president who must carry out functions of his office that could have a collateral or perceived impact on an investigation. Barr states

under this theory, simply by exercising his Constitutional discretion in a facially-lawful way—for example, by removing or appointing an official; using his prosecutorial discretion to give direction on a case; or using his pardoning power—a President can be accused of committing a crime based solely on his subjective state of mind. As a result, any discretionary act by a President that influences a proceeding can become the subject of a criminal grand jury investigation, probing whether the President acted with an improper motive.

His concern again is that an obstruction allegation could turn solely on a prosecutor's belief in a president's subjective mind—the very merging of *actus reus* and *mens rea* that Hemel and Posner advocate. If any act that “influences” an investigation can be obstruction, the only way to really know if there is obstruction would be to investigate a president and demand that he or she answer for the actions.

The example that Barr discusses is the firing of an FBI Director, which puts this difficulty in the sharpest relief. Trump had ample reason to fire Comey, even if the decision was ill-timed and ill-considered. Nevertheless, those reasons were well laid out in the memorandum of Deputy Attorney General Rosenstein, excoriating Comey for his “serious mistakes” and citing former federal judges, attorneys general, and leading prosecutors who believed that Comey “violated longstanding Justice Department policies and tradition” along with “his obligation to ‘preserve, protect and defend’ the traditions of the department and the FBI.” Rosenstein further added that Comey “refused to admit his errors.” Barr is saying that the firing of Comey did not have a direct impact on evidence or even the investigation. Barr is suggesting that this exercise of lawful authority is not an act covered by the obstruction provision. He is not saying that Trump could not or should not be investigated for obstruction if he took acts directly related to interfering with evidence or evidence gathering.

As with the civil liberties implications, critics ignore the countervailing dangers of an ill-defined crime of obstruction to the functioning of the presidency. Consider the application of such an interpretation to other past controversies. President Bill Clinton (who also faced federal investigations of this Administration and his own conduct)



fired FBI Director William Sessions. It was a facially lawful exercise of presidential authority even if some could argue that it could influence possible investigations. The year was 1993—before the 1994 appointment of an independent counsel in the Whitewater investigation. A Resolution Trust Corporation investigation had already made a criminal referral of both Clintons to the Justice Department in 1993. Sessions was dismissed on July 19, 1993. It was the same month of all of the conspiracy theories that would follow the Vince Foster suicide and the speculation about the need for an independent counsel. Was that obstruction? No. It did not hamper any later investigation, which proceeded under another Director. Even if it had some influence on an early investigation, I do not believe that Clinton should have been subject to questioning and investigation on that basis. However, if *mens rea* is the only determinative factor, should Clinton have been investigated for obstruction based on his conversations and motivations for the replacement of the Director? What Barr was seeking was some objective standard for acts of obstruction that would be tethered directly to the core concerns of the statute without implicating faithfully lawful acts like appointment and removal decisions.

I have previously written that I believe Trump can be charged with obstruction if there is evidence that he used official powers, including his appointment and termination authority, to terminate or interfere with the investigation into his actions or those of his campaign. However, this act would be tied directly to the evidence-gathering function of the investigation under a conventional meaning of obstruction. Thus far, the evidence does not create such a nexus but more details may arise from the expected report of the Special Counsel.

Once again, it is important to keep in mind that this entire controversy concerns only a narrow issue of one possible criminal allegation based on a single provision in the criminal code. What Barr is raising is how to properly define a specific obstruction crime when the act does not fit the classic definition and involves a presidential function. Some acts that may not be obstruction may be other crimes committed by a president. Not only did Barr affirm (and reaffirm) that a president could be charged with obstruction but he has gone further to state that it is fundamentally wrong to argue “that a President can never obstruct justice whenever he or she is exercising a constitutional function”—the very position advanced by members of the Trump legal team. Barr praised the appointment of Robert Mueller and has repeatedly committed to guaranteeing that Mueller be allowed to complete his work. He has maintained that “I believe it is in the best interest of everyone—the President, Congress, and, most importantly,

the American people—that this matter be resolved by allowing the Special Counsel to complete his work. The country needs a credible resolution of these issues.” He has further stated “I also believe it is very important that the public and Congress be informed of the results of the Special Counsel’s work. For that reason, my goal will be to provide as much transparency as I can consistent with the law.” That position is consistent with Barr’s position in the memorandum and in his public comments. It is consistent with Barr’s lifetime of work as a federal lawyer. Most importantly, it is consistent with the Constitution that Barr has repeatedly sworn to support and defend.

## VI. CONCLUSION

As noted at the start of my testimony, the evaluation of any nominee to the Office of Attorney General should ultimately turn on two words: *Domina Justitia*. When the Justice Department substituted those words for *domina regina sequitur*,” it reaffirmed that it acted in the name and in the interest of the law, not a president. I believe that this distinction resonates deeply with General Barr today as it did 27 years ago when he first appeared for confirmation as Attorney General of the United States.

Thank you again for the honor of addressing this Committee and I would be happy to answer any questions that the members may have.

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