

SOLUTIONS FOR A STRONGER DEMOCRACY

Seven Solutions to Rein In Abuses of Executive Power

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American public institutions urgently need repair and renewal. The 2024 election was the first time since the 1800s that the incumbent party lost the White House for the third time in a row. Public trust in government has plunged to historic lows. Citizens plainly feel left behind, economically unmoored, and dissatisfied with the government that serves them.

Crisis can bring innovation. As Lincoln urged, we must “think anew.” What will matter most is not what we are against but what we are for.

This is the fifth in a series of policy agendas. The Brennan Center began with proposals to combat corruption, reform the Supreme Court, unstick Congress, and protect voting rights. We will soon put forward ideas for constitutional change and more.

Our solutions must match the scale of the challenges. They seek to address the problems of today, not 10 years ago or 1975. The project of reform must engage people from both parties, and no party. The best ideas are neither left nor right: They reflect the urgent desire of the disaffected middle.

Throughout history, reform follows scandal and crisis — often, but not always. If we act, from today’s clashes can come a time of renewal and democratic rebirth.

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The growth of executive power is the great constitutional issue of our time. All presidents want power, and the push and pull between the executive and legislative branches has marked our history. Over the past century, in fits and starts the executive has grown ever mightier, while checks on it have weakened. A strong presidency is important for energy and effectiveness in government, but when those who wield public power can’t be held to account, there is little to stop them from abusing it.

Donald Trump, especially in his second term, has aimed to radically expand executive authority and break free of democratic accountability. Military forces are deployed into American cities on flimsy pretexts to quash dissent. The president has leveraged his office to grow his net worth by \$3 billion. Nonexistent emergencies and antiquated laws provide cover for power grabs that undermine civil liberties and destabilize the economy. The administration encourages violence by immigration agents with promises of “absolute immunity.” It launches a war with no authorization from Congress. Billions of dollars of federal funds are withheld or slow-walked to strong-arm states and private entities into following Trump’s commands. The Justice Department acts as the president’s personal law firm, pursuing his political enemies and supporting his campaign to undermine elections.

Trump's abuses build on his predecessors' expansion of executive authority. But the presidency didn't become this powerful on its own. The other branches are complicit in this dangerous unbalancing of American government.

Congress too often has failed to defend its constitutional powers. Where its authority overlaps with that of the presidency, and even where the Constitution grants it primacy, Congress has repeatedly ceded ground to overreaching presidents with minimal resistance. That pattern became especially pronounced after 9/11, when Congress, in the name of national security, handed presidents overbroad powers that have enabled the government to conduct secret wars and evade constitutional protections against spying on Americans.¹

The Supreme Court, led by Chief Justice John Roberts, also bears much blame. The decision in *Trump v. United States*, conferring on presidents vast immunity from criminal law, will go down as one of history's worst decisions. The Roberts Court has repeatedly twisted the law to Trump's benefit, often through unexplained decisions on its shadow docket. To be sure, there have been exceptions. For instance, the Court has notably rejected Trump's misuses of presidential emergency powers, including his attempt to impose worldwide tariffs. But by and large, the arc of justice under the Roberts Court has bent toward Trump.

Following periods of executive power expansion, Congress has reasserted its role and established new checks. After the abuses of Watergate and the Vietnam War, for example, Congress enacted a slew of reforms to curb the imperial presidency, including new laws aimed at setting reasonable campaign finance limits, checking the president's war powers, and safeguarding Congress's funding authority.

Now, a half century later, there is once again an urgent need to draw tighter bounds around the presidency. They must be redrawn, and our system of checks and balances reinforced, before the shift in power toward the presidency becomes permanent. Every power a president claims becomes a precedent for future occupants of the White House; every constraint a president breaks can become one that the next president feels less bound to respect. Left unchallenged, today's exceptional claims become tomorrow's accepted practice.

It's past time for Congress to reassert its authority and stand for the bedrock principle that this country has no kings.

>> End presidential immunity for crimes.

Since the founding, former presidents could be prosecuted after their terms ended for crimes they committed in office.² The principle was uncontroversial, even among presidents. Indeed, the Constitution expressly contemplates this.³ Presidents and their staffs faced a strong deterrent against abusing their power because wrong-

doing that was left unchecked by the other branches could later form the basis of a criminal case.

The Supreme Court upended that understanding in its 2024 opinion in *Trump v. United States*.⁴ In a radical departure, six justices — three appointed by Trump — held that the Constitution grants presidents immunity from prosecution in a potentially broad range of cases. This new immunity removes a critical barrier to whole swaths of illegal activity, such as issuing corrupt pardons or accepting bribes in exchange for cabinet appointments. *Trump v. United States* is also ridden with ambiguities that could be exploited to extend immunity to subordinates who commit crimes when carrying out presidential orders.

Congress can still create civil laws restricting the conduct of federal officials who act at the president's command, and litigants have been able to use that kind of law to curb some executive power abuses through the courts. Congress can also impeach presidents for their crimes. But civil lawsuits face their own limitations, and impeachment is famously difficult. And because the Supreme Court grounded presidential immunity in the Constitution, Congress now has limited ability to counter presidential malfeasance with criminal penalties.

The White House is exploiting this decision. Administration officials have falsely claimed that immigration agents who inflict violence on the public have "absolute immunity."⁵ A marketplace for pardons has emerged, where donations are seemingly traded for clemency.⁶ And the decision lurks behind other acts of lawlessness, such as the apparent crimes committed in launching military strikes against civilians in Latin America.⁷

Given the gravity and severity of the Court's error, a constitutional amendment is warranted. That amendment should restore the baseline that presidents, as well as subordinates carrying out presidential orders, can be criminally prosecuted for their actions in office, just like anyone else. It should also give Congress — not the Court — the authority to determine whether any immunity should be granted going forward, following transparent, public, and democratic deliberation on the issue. Congress should have the authority to withdraw any immunities it grants.

Strong models for an amendment along these lines already exist.⁸ An amendment like this would restore and strengthen a principle necessary for our democracy to function: Not even the president is above the law.

The most complete reform would also place limits on another tool presidents may use to aid in lawbreaking: the clemency power. As the Brennan Center has previously advocated, Congress should amend the Constitution to prohibit presidents from pardoning themselves or members of their inner circle, including immediate family members and senior administration officials.⁹ Presidents should also be barred from granting clemency to people convicted of crimes ordered by the president or committed on the pres-

ident's behalf. These changes would preserve a president's ability to grant mercy while making it harder to use clemency as a shield for corruption and a back door to escape accountability even when immunity is unavailable.

>> Bolster Congress's role as a check on the president's emergency powers.

With just a signature, presidents can declare a national emergency and unlock special powers contained in more than 130 statutory provisions. These run the gamut from the seemingly trivial to the near-dictatorial, including powers to shut down or take over communications infrastructure, freeze Americans' bank accounts, and control domestic transportation. They are intended for sudden, fast-moving crises that Congress can't address quickly or flexibly enough. But presidents of both parties have stretched the meaning of "emergency" far beyond reason, enabling them to draw from a growing stockpile of statutory authorities with few real safeguards.

There are currently 51 active states of emergency, and the longest-running has lasted 47 years.¹⁰ Any emergency that persists for generations is, by definition, not an emergency; it's a problem that can be addressed through ordinary lawmaking. Yet presidents have used emergency powers to bypass Congress and unilaterally advance their policy goals.¹¹

The National Emergencies Act once allowed Congress to terminate emergencies with a simple majority vote and without the president's signature. But the Supreme Court struck down that procedure, known as a legislative veto, in 1983. Today, ending an emergency effectively requires a two-thirds majority in both chambers to override a presidential veto.

Congress should amend the National Emergencies Act to constrain executive overreach.¹² Emergency declarations should expire automatically after 30 days unless Congress approves a one-year extension, renewable annually with Congress's assent. And presidents should be required to share detailed reports on their uses of emergency powers. Proposals along these lines have received widespread bipartisan support, with versions of these reforms overwhelmingly passing out of the relevant House and Senate committees in 2024.¹³

Additionally, Congress should amend specific emergency statutes whose extensive delegations of power and inadequate safeguards make them susceptible to misuse. Of particular concern is the International Emergency Economic Powers Act, the most frequently invoked presidential emergency authority.¹⁴ Sanctions imposed under this law can equate to a "financial death sentence" lasting years or decades.¹⁵ Although the Supreme Court blocked Trump's effort to use the law to set global tariffs, the potential for other abuses remains.

>> Limit domestic military deployment.

In his second term, President Trump has sought to use the military as a domestic police force. He has federalized National Guard units and deployed or attempted to deploy them in three cities to quash protests against his administration's aggressive immigration enforcement policies. He has also requested or supported state deployments of National Guard forces — including the deployment of several states' forces to Washington, DC — for the ostensible purpose of fighting crime.¹⁶

Presidents have authority to use the military at home under antiquated laws dating as far back as the 1700s. But these powers are intended for grave emergencies, and previous presidents have used them sparingly.¹⁷ That approach honors American traditions and principles recognizing military interference in civilian life as a danger to democracy and personal liberty. This administration's actions, however, have revealed the risk of relying on presidential self-restraint.

Soldiers are trained to fight foreign enemies, not to police American communities. Using them in the latter role endangers civilians and service members alike. A military presence on city streets can also chill core First Amendment freedoms, including speech and association. Presidents need to be able to deploy troops domestically when genuine emergencies overwhelm civilian capacity. But that authority must be tightly bounded. As it stands, the guardrails are far too weak.

The most potent domestic deployment law is the Insurrection Act. It is the principal exception to the Posse Comitatus Act of 1878, which bars federal troops from acting as civilian police without congressional authorization. The Insurrection Act gives presidents significant discretion to deploy troops domestically to address rebellion or violence or to enforce federal law. Its criteria for deployment are vague and overbroad, and it provides no express role for Congress or the courts to check abuse.

A Brennan Center proposal urges Congress to narrow and clarify when the Insurrection Act can be invoked and what it permits.¹⁸ Any invocation should expire automatically after seven days unless a simple majority in each house of Congress approves an extension through expedited procedures. And the law should explicitly authorize judicial review to ensure that a decision to deploy troops is backed by substantial evidence.

Additional loopholes need to be closed as well. Quirks in the structure and rules governing the National Guard let presidents sidestep limits on domestic deployment without ever invoking the Insurrection Act.¹⁹ Congress should extend the Posse Comitatus Act to cover any federally requested or federally directed deployments of the Guard.²⁰

>> Protect Congress's power of the purse.

There's a reason the Constitution gives Congress broad authority to decide how taxpayer dollars are spent: Congress is the branch closest to the American people. That control is a safeguard against executive overreach. When it comes to fulfilling a presidential agenda, the executive's pen is only as mighty as the congressional purse backing it.

Tussles over control of federal spending are nothing new. Richard Nixon's attempts to block billions in congressionally appropriated funds spurred lawmakers to pass the Impoundment Control Act of 1974.²¹ The law requires the president to ask Congress for permission before impounding, or refusing to spend, funds it has already appropriated. But the system still relies on the White House Office of Management and Budget (OMB). Before federal agencies can spend the funds approved by Congress, the OMB generally must issue an apportionment — a legally binding plan detailing how and when an agency can spend its funds.

By and large, subsequent administrations followed that process. But in his second term, President Trump and the OMB have attempted to withhold, delay, or claw back hundreds of billions of dollars Congress already approved for lifesaving scientific research, education, public safety initiatives, and other essential government services.²² The administration has also tried to impose conditions on a broad swath of federal funding to bully states, localities, and other funding recipients into complying with the president's partisan agenda.²³ In many instances, these conditions are wholly unrelated to the funding Congress authorized.²⁴

Congress must reassert its constitutional authority over the purse to ensure that taxpayer dollars are spent as lawmakers intended. To start, it should limit the president and the OMB's ability to unilaterally block the flow of congressionally approved funds through the apportionment process. Congress should permit selected agencies, programs, and funds to receive their apportionments automatically on a fixed schedule, rather than using the OMB as an intermediary. Programs with predictable, formula-driven spending would be good candidates, as would programs for which delays in spending would particularly frustrate Congress's intent — for example, certain federal education grants and veterans' benefits. Congress could adjust these automatic apportionments in each new appropriations bill, ensuring that spending doesn't continue indefinitely by default.

Congress should also clarify that federal funding beneficiaries, such as state governments and nonprofit grant recipients, can go to federal district court to enforce the Impoundment Control Act and relevant appropriations laws against presidential overreach. While this recourse is already available, congressional action would head off

distorted judicial readings of the law that could shut recipients out of court.

Equally important, Congress should strengthen and streamline judicial review of any unlawful conditions the president places on federal grants. The law should establish a presumption that allows recipients to quickly challenge those conditions in court: If a recipient shows that funds were not apportioned or released as Congress required, a court should temporarily block the conditions unless the government can show compliance with the law.

>> Strengthen Congress's power to design and constrain the executive branch.

Over a century and a half, Congress created a wide variety of federal agencies and made many of them independent from the president's direct control. These laws aimed to empower the agencies to make decisions on critical issues based on the long-term public good. Think of the Federal Deposit Insurance Corporation or the Federal Energy Regulatory Commission, the Federal Election Commission or the Federal Trade Commission, the National Labor Relations Board or the National Transportation Safety Board, to name just a few. These were set up to stabilize our banking system and our energy markets, to oversee compliance with election and antitrust law, to ensure fair labor practices, and to investigate airplane and train crashes — free from the pressures of shortsighted actors seeking political gain. This system of independent agencies was foundational to the modern federal government.

Now the Supreme Court has demolished it with opinions such as *Trump v. Slaughter* and *Seila Law v. Consumer Financial Protection Bureau*. These cases were ostensibly about whether President Trump could fire independent agency heads. But they gesture to a more radical proposition: that the president has unfettered authority to direct executive agencies to carry out his vision of law and policy, including the authority to ignore Congress's statutes when they get in his way.

Today the president can control numerous agencies that Congress set up to be beyond his direct reach. Congress must check those agencies and, where necessary and feasible, perform functions those agencies once performed. Congress could start by invigorating its *own* agencies, making them hubs of policy generation and executive oversight.

To get there, Congress should first pass a law reclaiming its authority to appoint the heads of existing congressional agencies like the Library of Congress and the Government Accountability Office (GAO). The new law should clarify that these agencies are strictly under the jurisdiction of the legislative branch and do not involve the president. Proposed legislation would do just this.²⁵

Next, Congress should expand its ability to perform oversight over the formerly independent agencies. It can,

of course, do this by expanding its own committees' direct oversight work. But it can also do so through its legislative agencies. The GAO, which already serves as the government's auditor, could play an expanded role. That could include assuming supplementary investigative powers akin to those held by inspectors general, who typically have been housed in the executive agencies they investigate. Those functions could be shifted to the legislative branch to avoid presidential interference and supplement existing GAO investigations into waste and fraud.

Congress could also increase the GAO's role in regulatory review — or even create an entirely new Office of Regulatory Review, as the GAO itself has proposed.²⁶ This review would ensure that regulations align with Congress's stated policy objectives. The reviewing agency could also recommend follow-up actions for members of Congress to take, such as legislatively overriding improper regulations or reducing appropriations to misaligned agencies. Even if Congress does not act on those recommendations, such suggestions could generate useful political pressure and set up future presidential administrations to reverse course.

While these statutory fixes can be useful, the most direct way to counter the Court's rulings in *Slaughter* and *Seila Law* is a constitutional amendment restoring Congress's authority to decide the best structures for executive branch agencies. Congress needs flexibility to meet the demands of our modern society and economy; this includes the latitude to create independent agencies where warranted (and non-independent agencies, too). A constitutional amendment would overturn the Court's decisions in these cases, allowing Congress to insulate agency heads from removal and restoring the understanding that agency regulations are exercises of legislative, not executive, power.

The amendment could read: "To give effect to laws it enacts, Congress has the plenary authority to structure executive branch offices and to delegate to executive branch officers and agencies all necessary powers."

>> Reform war powers.

The Constitution gives Congress, not the president, the power to raise and regulate the military and to declare war. President Trump, through his unauthorized war against Iran, is the latest in a long line of chief executives who have claimed an inherent authority as commander in chief to use force abroad without Congress's approval.

Even when lawmakers have authorized force, presidents have treated those authorizations as a springboard to pursue objectives and targets that Congress never contemplated. For instance, multiple presidents have used Congress's 2001 approval of military action against those who had planned or aided the September 11 attacks to pursue terrorist groups that didn't even exist at the time. What's more, Congress and the public are often kept in the dark about the true extent of U.S. war-making.

Congress needs to reclaim its constitutional role in matters of war and peace. That means demanding the withdrawal of U.S. forces and cutting off funding for wars it hasn't approved, like the one against Iran. It also means sunseting the outdated and overstretched 2001 authorization for the use of military force. A new select committee in the House or Senate could pave the way for these and other actions by investigating any misuses of the president's war powers.²⁷

To curb future abuses, Congress should strengthen the War Powers Resolution, as bipartisan groups of lawmakers have proposed for years.²⁸ The law constrains when the president can involve U.S. forces in military "hostilities," but it fails to define that and other key terms. Presidents have taken advantage of this ambiguity. Congress should amend the law to explicitly prohibit any use of force without prior congressional authorization, except when necessary to repel an ongoing or imminent attack against the United States.

The law should also require future use-of-force authorizations to specify their objectives, targets, and geographic scope. These authorizations should expire within two years unless Congress renews them. And Congress should have effective mechanisms for ending unauthorized military operations, including automatic funding cutoffs and recourse to the courts.

Finally, Congress should block wartime overreach at home, starting with the repeal of the Alien Enemies Act of 1798.²⁹ Trump invoked this wartime authority in peacetime to target Venezuelan immigrants for detention and deportation without due process. The statute — which was infamously used during World War II to justify the internment of 31,000 non-U.S. citizens of Japanese, German, and Italian descent — is highly susceptible to abuse and has no place in modern law.

>> Rein in warrantless government spying on Americans.

The Fourth Amendment and various federal laws are supposed to shield Americans from warrantless government spying. Yet loopholes and insufficient safeguards have allowed the executive branch to skirt those protections. Its foreign intelligence dragnet can, and often does, catch Americans.

One of the most controversial surveillance authorities is Section 702 of the Foreign Intelligence Surveillance Act, which governs foreign intelligence collection inside the United States or from U.S. companies.³⁰ It was designed to target foreigners abroad whose communications are handled by U.S. service providers, but it has routinely been misused to access Americans' phone calls, texts, emails, and other data without a warrant. The Brennan Center and others have argued that this practice is unconstitutional and called for reforms to the law.³¹

Less public attention goes to Executive Order 12333, which governs much of the government's surveillance activity outside the United States.³² The executive order offers even weaker privacy protections than those afforded by Section 702.³³ Operations conducted under the order are not reviewed by courts and receive only limited congressional oversight. While agency policies limit the intentional targeting of Americans, Americans' communications are inevitably swept into the surveillance of foreign targets — so-called “incidental” collection. And unlike Section 702, Executive Order 12333 allows the government to collect large volumes of data without tying it to specific targets, a practice known as bulk collection. In 2022, senators revealed that the CIA had used this

authority for bulk collection programs that retrieved Americans' data.³⁴

Several reforms are needed to better protect privacy and restore Fourth Amendment rights that have fallen victim to technological advances and legal loopholes. First, Congress should prohibit warrantless surveillance targeting Americans, wherever it occurs, and set firm limits on how incidentally collected data is retained, shared, and used. It should also require agencies to get a court order before searching data collected under Section 702 or Executive Order 12333 for Americans' information. Finally, Congress should ban or tightly restrict bulk collection under the executive order to reduce the amount of Americans' data swept up by foreign intelligence surveillance.

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