The National Task Force on Rule of Law & Democracy is a nonpartisan group of former government officials and policy experts. We have worked at the highest levels in federal and state government, as prosecutors, members of the military, senior advisers in the White House, members of Congress, heads of federal agencies, and state executives. We come from across the country and reflect varying political views.

We care deeply about our nation and its democratic values. And we are concerned about the erosion in recent years of critical norms and practices, built up over time, that ensure government officials use their power primarily to further the public interest, not partisan or personal interests. We have come together to propose reforms, including legislative changes, to bolster these norms and practices, and to strengthen the future of our democracy.

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The White House suppressed a report showing a toxic substance that is present in several states’ water supplies endangers human health at levels far lower than previously reported by the EPA.

Political officials have the prerogative to make policy decisions, and even challenge the science and methodology of career experts, but accurate, nonpolitical, government-supported research and analysis should be protected. Indeed, government research has shifted the course of human history through, for example, the space race, cures for disease, food- and water-safety measures, and computer and internet technology innovations.

Effective government also depends on a reliable process for filling senior government positions with qualified professionals who are dedicated to doing the people’s work. Recent presidents have filled critical jobs with unqualified cronies while leaving other posts vacant, and have found ways to sidestep the Senate’s approval role, nullifying a crucial constitutional check. For their part, lawmakers have rubber-stamped some nominees who are unqualified or have conflicts of interest while dragging their feet on considering others, often based on whether or not the Senate majority and the president share a party.

The consequences are readily apparent: less than half the senior roles at the Departments of Justice and Homeland Security are filled; at least a dozen agencies — including two cabinet departments — are run by non-Senate-confirmed acting officials two years into this administration; and the Senate confirmation process takes five times longer than it did 40 years ago.

If left unchecked, both of these trends are likely to do damage. Government research that is guided by politics, not the facts, can lead to ineffective and costly policy, among other harms, and a dysfunctional appointments process risks stymieing vital government functions. Both developments also threaten to exact a long-term price, if allowed to stand. They risk creating a vicious cycle, opening the door to abuse by future administrations, which may push the envelope ever further.

We are committed to teaching future administrations the opposite lesson — that these abuses of power violate broadly recognized standards of honest and effec-
To fix the process for filling senior government positions, we offer proposals that would

- encourage the appointment of qualified and ethical people to key government posts,
- make it harder for presidents to sideline the Senate during the process,
- streamline the confirmation process for executive branch nominees, and
- protect national security by fixing the vulnerable White House security clearance process.

Our proposals narrowly target areas that are ripe for executive abuse. But as former federal government officials, we have seen up close how other factors contribute to government dysfunction and undermine democratic values. We conclude this report by highlighting these factors — in particular, our broken campaign finance system, the president’s expansive emergency powers, the weakening of Congress as a check on the executive, and the politicization of the judiciary — and we reaffirm the essential role that a functioning system of checks and balances plays in protecting our democracy.
The process of governing, while inherently political, must still be grounded in an accurate assessment of reality. For this reason, the United States has long invested significant government resources in research and the production of objective data on virtually every issue that impacts society and public policy, mostly through a range of executive branch agencies and departments. As executive leaders, presidents and their political appointees at government agencies can and should set their agencies’ research and policy priorities and weigh scientific research against economic and other factors when making policy decisions, but it is inappropriate for them to manipulate or suppress research in order to justify policy objectives or for personal, financial, or partisan political gain. Recognizing this, American leaders have long respected the principles that government research should be both insulated from undue political influence and shared with the scientific community and the general public. For the most part, this ensured that U.S. policy, no matter its ideological orientation, was informed by sound empirical data.

The benefits of this approach are clear: important, unbiased research has undergirded policies that have improved the lives of Americans, making our air and water cleaner, saving lives on the roads and in the sky, and leading to the development of life-saving drugs. The use and public availability of unbiased research also bolstered public trust in the legitimacy of the policy-making process.

Under recent administrations, this principle has been breaking down. A few examples are representative:

- George W. Bush administration officials suppressed and undercut the findings of a leading climate change expert.¹

- Obama administration officials inserted a misleading phrase into a public draft report on fracking that downplayed the impact on drinking water, a move that was protested by members of the EPA’s Science Advisory Board, a panel of independent scientists.²

- Trump administration officials at the Department of the Interior (DOI) removed from a government document warnings about the environmental impact of a proposed wall on the southern border.³

The Appendix includes a more extensive list of such violations.

Perhaps even more troubling, the value of scientific and technical research, and of objective data itself, is now contested. While politicians have long tried to spin the results of government research to their advantage, in the past a broad consensus held that this kind of manipulation was clearly improper. And government officials at least paid lip service to the idea that policy should be guided by unbiased information, analyzed without political pressure. When examples of manipulation did come to light, those responsible generally paid a price.⁴

In recent years, adherence to this ideal has weakened. We have seen efforts to recast the scientific and research communities as little more than special interest groups whose conclusions carry no more weight than those of other such groups.⁵ We have also seen attempts to dismiss inconvenient facts — especially on hot-button political issues like climate change and immigration — by labeling them biased or partisan.⁶ And even more alarming, we have seen outright efforts to manipulate data for personal or political gain.

These developments pose several dangers. Politicized research can lead to flawed government policy, undertaken to achieve a political goal rather than to advance the public interest. When government officials undermine objective scientific analysis for political ends, scientists may leave government service or self-censor their work.⁷ Bad or undisclosed science also undermines judicial review established to ensure agencies are following the law. Flawed government science or research — about, for instance, the health effects of alcohol consumption⁸ or the environmental impact of various pollutants⁹ — nonetheless can carry an imprimatur of authority, allowing it to gain traction with the media and public and causing a range of long-term harms. Without access to the underlying research, Americans cannot properly evaluate their government’s decisions or have confidence that those decisions are being guided by the facts. And the broader efforts to undermine the value assigned to scientific and technical research threaten to weaken the expectation...
that our government should even attempt to base policy on an accurate understanding of objective reality.

These dangers are too great for us to merely hope that the norms that are now breaking down will repair themselves. In today's hyperpartisan climate, we need additional guardrails to cultivate an environment of free scientific inquiry, monitor political officials' influence on experts' work, ensure public access to government research and data, and deter and punish political interference. To protect the integrity of government science and research, we need Congress to act.

The Ideal of Unbiased and Accessible Government Research

The federal government has sponsored scientific research since at least the mid-19th century, when Congress created the National Academy of Sciences “to guide public action in reference to science matters.” With the emergence of a powerful central government and complex administrative state in the 20th century, the quest for accurate information to undergird policy led the federal government, in the years following World War II, to become a major funder of scientific research and data. Over the course of the country's history, Congress has created a slew of agencies, subagencies, and offices, the sole or primary purpose of which is to produce scientific research and data. Prominent examples include the National Aeronautics and Space Administration (NASA), the National Institutes of Health (NIH), the Centers for Disease Control and Prevention (CDC), the Census Bureau, and the Defense Advanced Research Projects Agency (DARPA). There are also more than 200 scientific and technical advisory committees — some created by Congress, others by the agencies themselves — made up of experts from academia, industry, state and local governments, and the nonprofit sector who generally serve without pay or for a modest stipend. Moreover, Congress has relied upon expert, nonpartisan offices within the legislative branch to provide guidance on complex subjects, such as the Congressional Research Service (CRS), the Joint Committee on Taxation (JCT), the Office of Technology Assessment (now defunct), and the Congressional Budget Office (CBO). These agencies, offices, and committees were established to produce unbiased research and data by qualified experts following accepted professional standards of objectivity and empiricism.

The principle that government research and data should be unbiased and apolitical is longstanding. In a 1935 report, President Franklin Roosevelt’s Science Advisory Board wrote that science must be “free to report and interpret the facts . . . as [it finds] them, and not as the government of the day may wish to have them reported or interpreted.” Vannevar Bush, who as director of the Office of Scientific Research and Development in the 1940s was the architect of modern federal government research programs, promoted a vision of government research being performed in an environment of free scientific inquiry — a vision that has enjoyed wide support. Half a century later, President George H.W. Bush explained, “Science, like any field of endeavor, relies on freedom of inquiry; and one of the hallmarks of that freedom is objectivity. . . . [G]overnment relies on the impartial perspective of science for guidance.”

It has also long been understood that, as a governing principle, research and data should be accessible to the public. This fosters accountability in two ways. First, it provides the transparency that deters — and allows us to recognize and root out — manipulation of scientific information. Second, it gives the public a chance to test and assess the data on which policy decisions are based, and to improve the quality of that information. “A democracy works best when the people have all the information that the security of the Nation permits,” President Lyndon Johnson said when he signed the Freedom of Information Act (FOIA) in 1966. “No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”

For the second half of the 20th century, administrations more or less adhered to these twin ideals of unbiased research and public access to information. A few relevant laws — such as the Administrative Procedure Act (APA) and FOIA — provided broad, indirect checks to ensure research quality. More important, a strong set of informal norms and practices emerged to uphold these ideals. They included proactive disclosure of completed, peer-reviewed scientific reports; respect for government science as separate from political decision-making; and a tradition of selecting highly regarded scientists with relevant subject-matter expertise to give scientific advice to government policymakers.

This system never worked perfectly. On a number of occasions, for example, presidents tried to suppress or alter expert reports that exposed deficiencies in their policy initiatives. The Johnson White House imposed an explicit political test in the selection of members of the President’s Science Advisory Committee (PSAC), based on their attitudes toward the Vietnam War. The Nixon administration suppressed a government report that criticized the cost of a project to develop a high-speed passenger jet, as well as the performance of the aircraft. After a physicist on the PSAC testified to his technical reservations about the project before Congress, President Richard Nixon dissolved PSAC and abolished the office of the presidential science adviser. President Ronald Reagan’s Defense Department delayed the release of an expert
Past Responses to Abuse and Their Shortcomings

After past assaults on the integrity of government research and data, both the executive branch and Congress spearheaded reforms. These responses have been worthwhile first steps, and they underscore the value placed on objective science-based policymaking. However, they have generally been too narrowly focused or have lacked sharp-enough teeth to have a lasting impact.

When one administration has crossed the line, subsequent administrations have responded with efforts to rebuild scientific integrity. For instance, in the 1940s and 1950s, government officials and members of the public grew concerned about the power of advisory committees, created by private-sector industries, that attempted to influence federal government operations. In response, the Truman and Kennedy administrations created standards for the composition and functioning of these advisory committees. (Congress subsequently strengthened these directives by establishing statutory standards.) In the years after President Nixon’s controversial move to dissolve PSAC, several presidents took steps to restore the role of science advice in the White House. First, President Reagan’s science adviser created a White House Science Council that reported to him, and then President George H. W. Bush created the President’s Council of Advisers on Science and Technology (PCAST), an advisory body administered by the White House Office of Science and Technology Policy (OSTP) that reports directly to the president. Presidents Bill Clinton, George W. Bush, Barack Obama, and Donald Trump have maintained the PCAST, but President Trump has not yet appointed any members to it. After a spate of episodes of political interference in government research and data under President George W. Bush, during which political officials in the White House and federal agencies censored scientists’ work and ordered experts to change their analyses in order to justify the administration’s policy objectives, President Obama in 2009 issued a memorandum on the need to maintain “the highest level of integrity in all aspects of the executive branch’s involvement with scientific and technological processes.” The memo also required federal agencies to create and implement scientific integrity policies.

As with other executive branch efforts, the Obama administration initiative was a good first step, but it was not enough. In practice, the scientific integrity policies produced by the agencies vary significantly in their scope and specificity, as well as in the degree to which they have been implemented.

Turning to the public availability of government research, there have been similar limitations to addressing science-related transparency concerns through executive action. In response to criticisms during the Reagan administration that the White House’s Office of Information and Regulatory Affairs (OIRA), which oversees the implementation of government-wide policies and reviews draft regulations, allegedly succumbed to pressure from business groups, President Clinton issued an executive order mandating that agencies make publicly available their underlying analyses of the costs and benefits of regulatory actions. The order also required agencies to publicly identify the substantive changes between draft rules submitted to OIRA for review and the actions subsequently announced, and to identify those changes in the regulatory actions that were made at the suggestion or recommendation of OIRA. Another executive order, issued in 2011 by President Obama, required that agencies ensure the objectivity of any scientific or technological information, or processes used to support regulatory actions. The Clinton and Obama executive orders — still in effect — express the principle that rulemaking should be transparent and based on high-quality research. But even when followed, they have shortcomings. The Clinton order requires disclosure only of changes made by
Advisory Committee Act (FACA), Though the Obama order establishes a standard of objectivity for the rulemaking process, it contains no mechanism for accountability. And executive orders, of course, can be changed from one administration to the next.

Congress has also taken steps to prevent abuse, but its efforts have been either vetoed or too limited. In the midst of the Nixon administration’s effort to undermine science advice in the White House, Congress established OSTP in the Executive Office of the President to advise on science and technology issues. Congress also created the Office of Technology Assessment (OTA), which gave lawmakers their own source of “competent, unbiased information” about technology and its impact on the world. Unfortunately, Congress withdrew the latter agency’s funding in 1995.

Building on the Truman and Kennedy administrations’ efforts to limit corporate influence over government science advice, Congress passed in 1972 the Federal Advisory Committee Act (FACA), which requires that advisory committees be balanced in the points of view represented, insulated from inappropriate outside influence, and transparent with lawmakers and the public about their activities and makeup. A decade later, during the Reagan administration, the principles of FACA were thwarted when political officials at the EPA created a “hit list” of scientists serving on EPA science advisory committees. The list included disparaging comments about the scientists’ purported views, such as “reported to be liberal and environmentalist” and “get him out fast, extreme anti-nuclear type.” In response, Congress passed legislation to reduce the EPA administrator’s discretion in choosing advisory board members, with stronger conflict-of-interest screenings and greater protections against committee members’ removal. The legislation was vetoed by President Reagan.

Some reform efforts that have been signed into law have not gone far enough. In the 1970s, when an epidemiologist conducting a government-funded study concluded that low-level radiation exposure caused cancer in nuclear workers, government officials pressured him to suppress his findings and publicly refute those of a similar study. When he refused, they terminated his contract. In response, Congress conducted hearings and passed the Radiation-Exposed Veterans Compensation Act of 1988 and the Radiation Exposure Compensation Act in 1990. Though these laws attempted to right the wrongs of this specific episode, they did not do much to stop similar abuses in other areas. Congress lacked, and still lacks, the capacity and expertise to legislate substantive, science-based solutions every time political officials in the executive branch interfere with government science. Broader safeguards to protect against politically motivated interference are necessary.

The mechanisms Congress has created for fighting improper politicization are not sufficient. Inspectors general can play an important role in uncovering misconduct, but their investigations often wrap up long after scientific analysis has been altered and policy decisions based on it have been made. Regulatory analysis and government research products may be obtained through FOIA requests, but it often takes months, if not years, for those requests to be fulfilled, and there are reports from the DOI and the EPA that information that should have been released pursuant to FOIA has been withheld for political reasons. Similarly, political manipulation can sometimes be challenged in court under the APA, which requires that the agency policymaking process be transparent and allow for public participation. But litigation is time-consuming and expensive for everyone involved, and courts often lack the technical expertise needed to evaluate the quality of scientific research, and without a record of revisions and contacts, it is difficult to prove political interference. And plenty of egregious cases of politicization are not illegal under current law.

Congress has also taken steps to ensure government research is made public. During the Obama administration, it directed OSTP to prioritize and coordinate the development of agency policies to promote public access to unclassified federally funded research. In turn, OSTP issued a directive requiring federal agencies to create public-access plans to proactively make available government-generated scientific data and peer-reviewed, published research. By 2017, 22 federal agencies and departments had issued public-access plans pursuant to OSTP’s directive. Although the policy is still in effect, there have been episodes in which completed research — often about politically controversial topics, such as climate change — was withheld from public view. Moreover, this executive branch directive lacks an enforcement mechanism.

Ultimately, the long list of recent efforts to politicize research or keep it hidden from the public — documented more fully in the Appendix — makes clear that we need to do much more. In practice, only rules that have the force of law behind them and that apply across the government can provide the enforcement mechanisms needed to ensure the integrity and transparency of government research and data.
Proposal 1

Congress should pass legislation that establishes scientific integrity standards for the executive branch and requires agencies to create policies that guarantee those standards.

Here, it is instructive to look at a success story. During the George W. Bush administration, NASA’s public affairs office censored government research for political reasons, adding uncertainty to scientific findings, changing report titles to obscure findings, eliminating politically controversial terms such as “global warming,” and altering scientists’ quotations. But NASA had laws and agency mechanisms in place to respond to this attack on scientific integrity. The agency’s inspector general found that the episode violated the National Aeronautics and Space Act’s requirement that NASA offer “the widest practicable and appropriate dissemination” of information about its work. In response, the NASA administrator renewed the agency’s commitment to scientific openness and reformed its public relations policy.

Other agencies, however, lack such safeguards, underscoring the need for government-wide rules. Notwithstanding the existence of Obama-era scientific integrity policies, there have been continued reports of political interference in the scientific process at federal agencies. For instance, EPA officials recently blocked agency scientists and contractors from presenting research about climate change and related ecological issues at a professional conference. Agency officials at the Departments of Agriculture, Energy, and the Interior have similarly prevented staff from attending scientific conferences. At the Department of Health and Human Services (HHS), the CDC, and the United States Geological Survey (USGS), agency officials have increased scrutiny of scientists’ communications with congressional representatives and the media about their research. An employee at the National Parks Service reports being instructed to avoid using terms such as “climate change” in internal project proposals. And the EPA has introduced a proposed “transparent science” rule that, despite its name, would limit EPA scientists’ access to high-quality research because it would prohibit the agency from using research whose underlying data is not made publicly available. (It would, in effect, bar a substantial number of environmental and public health research studies involving privacy-protected personally identifiable health information from agency consideration.)

Congress should respond to these and other potential threats to the integrity of government research and data by passing legislation that promotes a culture of openness and scientific inquiry, free from politically motivated suppression and manipulation. Specifically, Congress should pass legislation to require agencies to implement and publish scientific integrity policies that apply to both employees and contractors who perform government and government-funded research at federal agencies, as well as federally funded research and development centers.

The policies should contain the following principles and elements:

>> Science and the scientific process at federal agencies shall be free from politics, ideology, and financial conflicts of interest.

>> Scientists at federal agencies shall be able to review content released publicly in their names or that significantly relies on their work as government scientists, so that they can respond to changes to, or inaccurate representations of, their work.

>> Agencies shall have a clear, consistent, transparent, and predictable procedure for handling disagreements about scientific method and conclusions.

>> Agencies shall designate a nonpolitical agency official or officials, with relevant scientific expertise, to be charged with monitoring and supporting scientific integrity, with appropriate insulation from political officials.

>> Agencies shall conduct routine scientific integrity training for all agency personnel who use science to any significant degree in their jobs.

Other countries have similar policies. For instance, last year, Canada’s chief science adviser published a government-wide policy on scientific integrity, with directives against falsifying data, destroying records, and ignoring conflicts of interest, and a process to deal with infractions.
Proposal 2

Congress should pass legislation requiring agencies that perform scientific research to articulate clear standards for, and report on, how political officials interact with career researchers.

When a political official with no background in biology forced DOI scientists to reverse their findings on an issue of endangered species protection, she was criticized in the press and scrutinized by the department’s inspector general, prompting her to resign (see Appendix). But the embarrassment this episode from the George W. Bush administration caused has not deterred other political officials from tampering with government scientists’ work; on the contrary, many officials have continued to do so with relative impunity. For instance, during the Obama administration, the Fish and Wildlife Service (FWS) decided against protecting the sagebrush lizard under the Endangered Species Act because, as a senior regional official put it, the service did not want to “list a lizard [with a habitat] in the middle of oil country during an election year.” The biologist reviewing the process was instructed to report directly to a senior official, instead of her immediate supervisor, about the matter. That supervisor subsequently raised concerns about FWS’s decision and later alleged that he was transferred in retaliation for doing so.

During the current administration, when U.S. Customs and Border Protection asked FWS for its input on how animals would be affected by the construction of the president’s proposed border wall, FWS officials removed from the agency’s response letter several warnings by career biologists and wildlife managers about the wall’s potential impacts on the area’s rare cats and other animals. Before the letter was drafted, aides to then Interior Secretary Ryan Zinke communicated to FWS officials that “we are to support the border security mission,” regardless of scientific assessments about the impact of that mission on animals the agency is charged with protecting.

These examples — each of which led to the provision of incomplete or inaccurate information to decisionmakers — demonstrate the need for stronger protections from political staff using their oversight of agencies to interfere in the substance of scientific work. While the scientific...
In addition, scholars have called for similar reforms, and members of Congress looking to hold the executive branch accountable have at times sought contact logs in response to allegations of politically motivated manipulation of scientific research.

Proposal 3

Congress should pass legislation to define and prohibit politically motivated manipulation and suppression of government research and data in the executive branch. It should also prohibit discrimination and retaliation against government researchers on the basis of their scientific conclusions.

Promoting a culture of scientific integrity and shining a light on senior political officials' contacts with agency scientists are important steps to protect government science and data. But they must be supported by mechanisms to deter and punish inappropriate politicization.

To be sure, political officials have the authority and prerogative to set research and regulatory priorities and direct career experts accordingly. But it undermines the important and longstanding role of unbiased science in policymaking when political officials interfere with completed scientific research in order to make it appear to support their policy objectives.

To date, there have been some executive branch efforts to prohibit scientific misconduct. The Federal Policy on Research Misconduct addresses fabrication, falsification, and plagiarism in proposing, performing, and reviewing research, and in reporting research results. However, this policy does not focus on the specific problem of political interference in government research.

As in Proposal 1, this legislation would codify a policy that the executive branch has already imposed itself numerous times. For instance, several administrations have adopted policies that limit White House contacts with agencies pertaining to pending regulatory matters. And some agencies have rules requiring that communications by the White House be disclosed in the rulemaking record if they are of substantial significance and clearly intended to affect the ultimate decision.
relief are low. There should be consequences for wrongdoers — not merely for retaliating against whistle-blowers, but for the underlying misconduct — in order to hold them accountable and deter malfeasance.

At times, inspectors general police political interference in government research and data. But their authority to investigate wrongdoing often turns on agency-specific legislation and regulations rather than a government-wide standard that prevents improper political interference. Inspectors general also have limited power to impose penalties. Instead, that is left in the hands of agency heads, who may themselves be implicated in wrongdoing or susceptible to political pressure.

Congress should enact legislation that makes it unlawful for government officials to

- **tamper with the conduct of federally funded scientific research or data** for personal, financial, or partisan political gain;

- **censor findings of such research or analysis for the same reasons**;

- **direct the dissemination of scientific information** that the directing official knows is false or misleading, and

- **retaliate or discriminate against government researchers** for the development or dissemination of scientific research or analysis that the researchers reasonably believe to be accurate and valid.

To ensure that this legislation does not penalize legitimate supervisory interventions in scientific research, differences of opinion, and merely negligent errors in scientific judgment, there should be a clear standard for intent. Thus, a finding of prohibited political interference should require that there be a significant departure from accepted practices of the relevant research community, the misconduct be committed intentionally, knowingly, or recklessly, and the allegation be proven by a preponderance of evidence.

This legislation would strengthen the longstanding aims of several existing executive branch protocols as well as statutes that prohibit public employers from retaliating against employees who assist in their administration or enforcement. It would create a clearly defined, government-wide prohibition against improper influence over government research and data that has until now existed only in specific statutes or as a matter of executive branch policy. Similar legislation has been introduced: the Scientific Integrity Act, introduced this year, would prohibit the alteration and suppression of scientific and technical findings, as well as intimidation of and retaliation against research staff. And the Restore Scientific Integrity to Federal Research and Policymaking Act, introduced in 2005 in response to threats to scientific integrity during the George W. Bush administration, would have made political interference a prohibited personnel practice.
Proposal 4

Congress should pass legislation to ensure the proper functioning of science advisory committees.

Federal policy benefits from the knowledge of subject-matter experts across the country. But we cannot expect every expert in life-saving technologies or medicines to be a federal employee. Science advisory committees help policymakers tap into outside expertise. To give a few examples, the Federal Reserve and the Consumer Financial Protection Bureau rely on expert advice about financial stability from academics, consumer advocates, and industry leaders who serve as members of advisory committees, and HHS convenes advisory committees composed of health-care professionals and researchers from across the country when responding to new health risks, such as antibiotic-resistant bacteria. The work of these advisory committees, too, is at risk of political interference. Indeed, notwithstanding the guardrails meant to ensure balance in the points of view represented on science advisory committees, these committees have been undermined and politicized in a variety of ways under recent administrations, often affecting the quality and independence of the advice they provide.

Both Presidents Clinton and Trump issued executive orders requiring executive departments and agencies to reduce the number of advisory committees by one-third, and President Trump has placed a cap on the total number of advisory committees across the government. The George W. Bush administration disbanded advisory committees when they attracted opposition from religious and industry groups for their scientific conclusions and removed experts on pediatric lead exposure from an advisory committee that issues recommendations to prevent childhood lead poisoning, replacing them with members who had direct ties to the lead industry. The revamped panel issued recommendations at odds with research showing serious cognitive damage resulting from lead exposure. The Obama administration was criticized for naming a proponent of a debunked theory about links between vaccines and autism to the President’s Committee for People with Intellectual Disabilities and appointing a major donor to Democratic candidates and the Clinton Foundation to the State Department’s International Security Advisory Board, despite his lack of background in nuclear security.

During the present administration, several committees have not met, in violation of their charters; administration officials have failed to fill vacancies on science advisory committees; agency officials have dismissed science advisory committee members who come from academia and other subject-matter experts and replaced them with officials from only Republican state governments, and with representatives from regulated industries who hold views that are outside the scientific mainstream on topics such as climate change and the health effects of exposure to toxic chemicals. At the EPA, political officials have abandoned the practice of deferring to career staff’s recommendations for appointment of advisory committee members, further increasing the membership of political actors and industry representatives.

As a result of these abuses, many agencies either do not receive independent science advice in policymaking or receive advice that is skewed in favor of the regulatory agendas of political leaders or the interests of regulated industries. To ensure that policymaking is informed by high-quality, objective science, Congress must address the shortcomings of the current federal science advisory committee system. Specifically, Congress should pass legislation to:

>> Create more accountability in the science advisory committee membership selection process by publishing the criteria for evaluation of nominees, allowing the public to comment on candidates, and releasing the names and roles of the key officials involved in the selection process. As one means to ensure that highly qualified scientists are among those under consideration for appointment to science advisory committees, Congress could require that the National Academies of Sciences, Engineering, and Medicine (NASEM) provide lists of nominees for the agencies to consider (to be made available to the public simultaneously). Finally, Congress could articulate educational and professional requirements for at least some of the members of specific advisory committees.

>> Increase protections against vacancies on science advisory committees and the politically motivated removal of advisory committee members, such as by creating staggered terms for members of standing committees, for-cause removal protection for members, and a default selection process in the event that vacancies are not filled promptly.

>> Increase transparency surrounding science advisory committee members’ financial and professional ties. This should be done by extending disclosure requirements that apply to participants designated as “special government employees” to those designated as “representatives,” and potentially by expanding the scope of information required to be disclosed — such as the
historical professional affiliations of nominees and the sources of funding for their research\textsuperscript{140} — in order to better capture potential sources of influence. Congress should also require contemporaneous disclosure of recusals and conflict-of-interest waivers.\textsuperscript{141} Finally, Congress should specify that receiving grants from the agency that hosts the advisory committee is not a conflict of interest.

\textbf{Proposal 5}

\textbf{Congress should enact legislation requiring proactive disclosure of government research and data.}

Another success story underscores how legislation can ensure that government research be available for public use. The National Climate Assessment, a major government report on climate change, is required by law to be submitted to Congress.\textsuperscript{146} In 2018, the report was released on the day after Thanksgiving, which was seen by many as an attempt to downplay its findings by releasing them on a day when fewer Americans than usual were paying attention to the news.\textsuperscript{150} President Trump told reporters, “I don’t believe” the report’s findings that the world’s temperature is rising and human actions likely play a role in it.\textsuperscript{151} And the administration announced plans to convene a White House panel to challenge established scientific conclusions about the severity of climate change and humanity’s contributions to it.\textsuperscript{152} Despite these attempts to discredit and bury the report’s findings, experts’ scientific conclusions are now available to Congress and the public, establishing a sound basis for policymaking, accountability, and scientific progress.

But there are plenty of valuable government research products that, unlike the National Climate Assessment, are not required by current law to be made public. To be sure, agencies throughout the federal government have a two-century-long history of proactively making completed research reports, finalized data, and similar materials produced and used by the government available to the public.\textsuperscript{153} For instance, the CDC’s Morbidity and Mortality Weekly Report (MMWR), an early version of which began publication in 1878,\textsuperscript{154} is published to this day as a matter of agency practice, not law.\textsuperscript{155} It has an international readership that consists predominantly of health-care practitioners, public health officials, epidemiologists, researchers, and educators.\textsuperscript{156} If the MMWR were not published, or the information it contains were censored or manipulated for political purposes, life-saving research would be delayed or hampered.

The norm of proactively disseminating government research products is breaking down. There is an increasing tendency among political officials to restrict public access to government research and data, as documented in the Appendix.\textsuperscript{157} For instance, the EPA and the White House suppressed a report from HHS’s Agency for Toxic

\textbf{Establish safeguards to better ensure that science advisory committees meet as required by their charters.}\textsuperscript{142} This would be in addition to the existing requirement that such information is published in the Federal Register.\textsuperscript{143}

\textbf{Create a mechanism for peer review of science advisory committees’ work in the event that there are credible claims from members of the public that a committee’s work deviates significantly from the scientific consensus of the relevant research community.}\textsuperscript{144} This would build on ad hoc measures agencies have used when the validity of advisory committees’ scientific conclusions is called into question.\textsuperscript{145} NASEM has at times performed such independent peer review of scientific conclusions.\textsuperscript{146} Frivolous challenges would be deterred because the review process would not interfere with the publication of the findings and because a peer review confirming the science advisory committee’s conclusions would bolster the credibility of the committee.

\textbf{Require agency leaders to provide an explanation when a science advisory committee’s term is not renewed} and make the explanation available to the public, in order to hold administration officials accountable when they determine that scientific advice is no longer needed.\textsuperscript{148}

These recommendations would increase the quality of the advice provided by science advisory committees. Additionally, they would give the public, the press, and Congress more insight into the motivations and deliberations of committee members, and create incentives for committees to improve their credibility as stewards of science working in the public interest, potentially deterring the types of abuses that have occurred with increasing frequency during recent administrations. Numerous scholars, scientific integrity advocates, and good-government groups have long called for similar reforms.\textsuperscript{147} In 2016, 2017, and 2019, the House of Representatives passed, with bipartisan support, FACA amendments that would increase transparency and decrease conflicts of interest for advisory committees.\textsuperscript{148}
Substances and Disease Registry that showed that a class of toxic chemicals, which have contaminated water supplies near military bases, chemical plants, and other sites in several states, endangers human health at a far lower level than the EPA had previously called safe. Emails between White House and EPA officials show that the reason for suppressing the report was a concern that it would be a “public relations nightmare.”

While many research and data products that the government proactively discloses could be obtained through FOIA requests in the event that agency officials withheld them, as noted above, FOIA requests can take a long time to be fulfilled. Additionally, information is often withheld improperly in FOIA responses. Thus, FOIA does not guarantee timely and complete access to research the government has historically shared with the public.

Building on past efforts, Congress should codify guarantees for public access to government-funded research and data, in electronic form, and to impose safeguards against removal of this information from the public domain. The legislation should contain provisions to:

>> Codify the presumption of disclosure for government-funded research and data, and specify a time frame within which the information must be disclosed after it is completed or published. To the extent practicable, and in compliance with applicable legal restrictions, privileges, protections, and authorities, completed data and research findings, such as peer-reviewed research papers accepted for publication in journals, should be made available to the public.

>> Require free online public access to government-funded research and data that are in the public domain, with protections for intellectual property rights and other proprietary interests. The legislation should also require that research and data repositories contain descriptions of available materials written in plain language. Further, the legislation should put forth clear standards delineating the grounds for withholding government-funded research and data and require agencies to memorialize in writing the grounds on which materials are withheld, with records to be maintained by the agency.

>> Require agencies to establish safeguards against the removal of government research and data, including advance notice to the national archivist of planned data removal.

>> Create an enforcement mechanism to ensure compliance with public access requirements, along with remedies for noncompliance. These should include not only disclosure of the improperly withheld information and restoration of improperly removed information, but also penalties, such as cost-shifting in the event of agency wrongdoing and discipline for responsible agency personnel, depending on the magnitude of and motive for noncompliance. The legislation should also permit private individuals and organizations to request that materials be made publicly available, and allow for the filing of complaints in federal court in the event that a request is denied or ignored.

This proposal would codify and standardize a practice to which many agencies already adhere, whether pursuant to statute or agency practice. It aligns with other legislation recently passed by Congress that requires government data assets to be made publicly available in electronic form, and numerous other bills lawmakers have introduced to further codify the norm of public access. Guaranteeing public access to government-funded research and data would foster scientific progress, a more informed public, and greater accountability for policymakers.
Proposal 6

Congress should enact legislation requiring disclosure of the nonpolitical expert regulatory analysis that underlies agency rulemaking.

Laws passed by Congress tend to be broad policy mandates. Regulatory agencies are charged with using their expertise to craft the detailed rules and procedures needed to implement the law. This means that, for all the press and public attention devoted to Capitol Hill, the success or failure of a new measure passed by lawmakers can often depend on what happens when agencies interpret and implement Congress’s directives.

Pursuant to the APA, agencies must publish a notice of a proposed rule; give the public a chance to submit written data, views, or arguments regarding the proposed rule; consider all relevant matter presented during the comment period; and provide a statement of the basis and purpose for the final rule. But existing mechanisms are inadequate to ensure real transparency. As discussed above, although litigation under the APA is possible, it is costly and time-consuming, and past executive orders aimed at improving transparency and accountability in the rulemaking process have not gone far enough. Recent manipulations of the rulemaking process, such as on the issues of wetland protection and food safety at slaughtering facilities, make clear that it can be gamed with relative ease by determined political actors.

This kind of manipulation deprives courts, Congress, and the public of the expert analysis needed to evaluate the government’s policy decisions. Indeed, by hiding or changing expert analysis, political officials can thwart agencies’ statutory missions to protect public health and welfare and subvert the administrative process.

To ensure public access to the regulatory analysis underlying rulemaking, Congress should:

>> Require agencies to publish the nonpolitical expert analysis underlying regulatory actions as part of the administrative record. Congress should specify that the version of the scientific analysis to be published is the final version prepared by nonpolitical agency experts, before it has been reviewed by political officials at the agency or in the White House.

>> Require substantive alterations of the regulatory analysis made by or at the suggestion of political officials — both in the agency and the White House — to be published in the administrative record, as well, along with an explanation of the changes made to the analysis.

This proposal would address political interference in expert analysis of draft regulations that occurs within agencies, as well as when draft regulations reach the White House. It would not hinder political officials from exercising their prerogative to make policy decisions, or even from challenging the science and methodology of career experts, as is their right. It would merely preserve the nonpolitical analysis of agency experts for the public, Congress, and the courts to consider when evaluating agency decision-making — and, in the process, deter political officials from making changes for improper reasons.

The proposal would build on an existing framework. It would modestly extend the disclosure, required by the Clinton and Obama executive orders, of proposed rules that agencies submit to the Office of Management and Budget (OMB) and of changes made in the White House. It would standardize a requirement that is found in a variety of existing laws. It is in line with legislation introduced recently to address related issues. And it responds to calls from both the Administrative Conference of the United States and outside scholars for improved transparency in the regulatory process.
The abuses we have documented reveal fissures in our democratic guardrails, but they originate with individual actors — often the president, but also his political appointees throughout the executive branch. These officials wield tremendous power. Recognizing there is no substitute for character and quality in those selected to occupy positions of public trust, we turn to the norms and practices for appointing professionals to critical government positions.

Of all the president’s powers, his power to appoint top executive branch officials is among the most far-reaching.193 Because no president can be personally involved in all of the countless actions taken by his administration each day, his ability to carry out change and improve the effectiveness of the federal government is in large part dependent on the people chosen to run it.

The Founders understood this — even at a time when the federal government was far smaller than today. “There is nothing I am so anxious about as good nominations,” Thomas Jefferson wrote soon after entering the White House in 1801, “conscious that the merit as well as reputation of an administration depends as much on that as on its measures.”194

That is why the Constitution extends our system of checks and balances to the appointment process by making the president’s authority to appoint senior officers subject to the Senate’s “advice and consent.”195 The Senate, argued Alexander Hamilton in the Federalist Papers, would serve as “an excellent check upon a spirit of favoritism in the President” and a guard against “the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity.”196

It did not always work out that way. Though every president after Washington has had occasional nominees opposed by the Senate,197 without recognized standards for evaluating nominees, presidents enjoyed substantial deference.198 Early in our history, this contributed to the development of a patronage system, in which key government posts — usually those that did not require Senate confirmation, but sometimes also those that did — were doled out to political supporters and party functionaries.199 By the late 19th century, the result was a federal government rife with corruption and cronyism, with few mechanisms to ensure that top officials were qualified for the positions they held.200

As the government grew larger and more complex to keep pace with a rapidly industrializing economy, the need for reform became apparent. The Pendleton Act first established an apolitical civil service in 1883, run on principles of professionalism and merit.201 And the high-profile Teapot Dome scandal of the 1920s helped push things further in the same direction. By the middle of the 20th century, a set of expectations had developed for the political appointments process: though presidents should have wide latitude in staffing their administrations, the Senate should ensure that nominees are reasonably well qualified and free from clear conflicts of interest.202 And candidates for vacant positions should be nominated by the president, and have their nominations considered by the Senate, in a timely manner.203

These expectations were not always met, but they helped maintain Americans’ faith in the basic integrity and effectiveness of government and those who led it.

It was not inevitable that we would come to treat government jobs as public trusts rather than spoils to reward political supporters or friends and family. Indeed, the system has been threatened in the past: Watergate and associated scandals were enabled in part by the Nixon administration’s abuse of the federal bureaucracy and personnel process, including the placement in key posts of loyalists willing to put the president’s political fortunes ahead of the good of the country.204 In response, Congress in 1978 passed, and President Jimmy Carter signed, the Ethics in Government Act and the Civil Service Reform Act, which reaffirmed many of the values first embodied in the Pendleton Act nearly a century earlier. They established tougher ethics rules, strengthened the merit system for hiring and promoting personnel, established protections against political retaliation for civil servants, invested greater authority in senior managers, and sought to incentivize high performance.205

Today, this system is at risk, threatened by hyperpartisanship and the erosion of key principles that were once championed by both parties. Again, Congress must respond.

Recent presidents have filled critical positions with unqualified cronies while leaving other posts vacant. They also have found ways to sidestep the Senate’s approval role, nullifying a crucial constitutional check.
And lawmakers have rubber-stamped some unqualified or conflicted nominees while dragging their feet on considering others, often based on whether or not the Senate and the president share a party.

This has culminated in the current administration’s near disregard for the personnel principles embodied in earlier reforms. President Trump has put family members in key adviser jobs. He has been credibly accused of politicizing the security clearance process, risking national security. And he has installed a series of acting officials — who do not require Senate confirmation — in crucial government posts while often delaying nominating a permanent replacement. Two years into his administration, the secretaries of defense, homeland security, and the interior; the directors of the Office of Management and Budget, Immigration and Customs Enforcement, and the Federal Aviation Administration; the FDA commissioner; and the United Nations ambassador were all serving in an acting capacity. “I like acting because I can move so quickly,” Trump has said. “It gives me more flexibility.”

In addition to representing a damaging end run around the Senate’s advice and consent authority, the use of so many acting officials creates instability in the leadership of crucial agencies, including those responsible for national security. And the broader breakdown in the political appointments process seen over recent decades has even more dire consequences. It harms the government’s ability to perform essential functions, deters qualified candidates from pursuing careers in public service, and undermines Americans’ faith in the people and programs responsible for making and administering policy.

To ensure an appointments process based on professionalism, merit, and an active role for the Senate, Congress needs to act.

Streamlining, and Restoring Democratic Accountability to, the Appointment of Senior Executive Branch Officials

Of the approximately 4,000 political positions in the executive branch, the Senate provides advice and consent for around 1,200 of them, known as “PAS” positions (for “Presidential Appointments with Senate confirmation”). The occupants of these positions wield tremendous influence — the most senior PAS officials manage entire departments responsible for protecting our environment, engaging in national defense, administering a fair and impartial system of justice, promoting economic growth and business development, and representing America’s interests abroad. Their significance is the reason why the Senate’s advice and consent are required for the president to fill them.

Congress has also recognized the need for some flexibility when vacancies arise. In 1868, Congress passed the Vacancies Act to provide “breathing room in the constitutional system for appointing officers,” authorizing presidents to temporarily fill critical positions while the confirmation process proceeded. Through the Vacancies Act, Congress recognized the inherent dangers of long-term vacancies in the executive branch, but also sought to preserve the Senate’s advice and consent authority.

When Congress perceived abuses in the president’s use of his Vacancies Act powers, it responded with additional safeguards. President Clinton was perceived as working around the Senate to permanently install an acting official to lead the Civil Rights Division of the Justice Department. In response, Congress in 1998 passed the Federal Vacancies Reform Act (FVRA), which included a number of mechanisms to preserve the Senate’s advice and consent authority even when the president appoints an acting official. And in 2011, amid bipartisan concern about the slow pace of the Senate’s confirmation process, Congress approved a law that cut the number of executive branch jobs requiring Senate approval.

Today, the challenges facing the appointments process are even stiffer: there is no longer an expectation that presidents or Congress will even try to quickly fill important positions. Critical posts are frequently left vacant for extended periods of time, either because the president does not make an appointment or because the Senate does not move to confirm a president’s nominee. The Senate confirmation process for such positions now takes five times longer than it did 40 years ago. Two years into the Trump administration (with a Senate dominated by members of the president’s party), only 431 of 713 key positions requiring Senate confirmation were filled with Senate-confirmed personnel, with less than half of the key positions filled at the Departments of Justice or the Interior. This puts the Trump administration nine months behind the average presidential administration in filling key appointments in government, and with more positions vacant than at the same point in the past five presidential administrations.

President Trump is not alone among recent presidents in having a high vacancy rate. One analysis of administrations from Presidents Carter to George W. Bush found that PAS positions were on average vacant for one-quarter of an administration’s tenure, and the length of vacancies in federal agencies is on an upward trend. The 9/11 Commission Report found that the George W. Bush administration did not have critical
subcabinet officers in place until the summer of 2001, which created the potential for disruption in national security policy.\textsuperscript{223} And with 15 months left in the Bush administration, a significant number of senior officials vacated their positions,\textsuperscript{224} leaving three cabinet posts — at the Departments of Justice, Agriculture, and Veterans Affairs — to be filled by acting officials. Other PAS positions were filled by acting officials for extended periods, including the administrator of the Centers for Medicare and Medicaid Services, the general counsel of the Department of Homeland Security, and over a quarter of U.S. attorneys.\textsuperscript{225} President Obama had his own challenges with vacancies long into his second term. About a quarter of the PAS positions at the State Department were vacant for months after his re-election, and it took him almost a year to name a secretary of commerce.\textsuperscript{228} And the Transportation Security Administration had no permanent director when the “underwear bomber” tried to bring down a passenger plane headed to Detroit on Christmas Day 2009.\textsuperscript{227}

The Senate’s obstruction is partly to blame. For example, senators sometimes tie political nominations to unrelated policy goals or use anonymous holds to stall key nominees.\textsuperscript{229} And the Senate now routinely holds pro forma sessions to prevent the president from making recess appointments while Congress is adjourned.\textsuperscript{230} These tactics were deployed at unprecedented rates during the Obama administration when the Senate was controlled by the opposition party.\textsuperscript{231}

Presidents deserve their share of blame, too. That is in part for nominating candidates who are more partisan, more hostile to the missions of their prospective agencies, and less qualified than previously.\textsuperscript{232} More important, presidents have at times avoided putting forward nominees to fill vacant PAS positions at all, instead using legislative loopholes to employ acting officials for indefinite periods.\textsuperscript{233} President Trump publicly admitted he was “in no hurry” to fill PAS positions with permanent staff.\textsuperscript{234}

Other reasons are structural. There are many more PAS positions today than there were just a few decades ago.\textsuperscript{235} This is because of new boards and commissions (and, less often, the creation of new agencies) in the federal government, as well as the continued thickening of government, with more layers of political leadership added during each new administration.\textsuperscript{236} Meanwhile, the resources available to the executive branch for vetting nominees and to the Senate for evaluating them have not increased at anything like the same rate. As a result, Senate committees report ever-increasing nomination workloads.\textsuperscript{237}

Causes aside, the drawn-out process creates a needless obstacle to the effective administration of government and undermines policymaking. Career civil servants, who typically act as temporary standard-bearers when vacancies arise, generally do not have the needed clout to drive policy or persuade other senior political officials. They also may lack the standing to modify or push back against a president’s policy directives when necessary. It is troubling, for example, that President Trump adopted and implemented the first iteration of his “travel ban” without a director of Immigration and Customs Enforcement or a commissioner for Customs and Border Protection in place;\textsuperscript{238} that he embarked on a historic diplomatic mission to North Korea without an ambassador to South Korea;\textsuperscript{239} and that major preparations for the 2020 Census were made without a permanent director of the Census Bureau, the largest statistical agency in the federal government.\textsuperscript{240} And it was troubling that the Fish and Wildlife Service had an acting director when the Obama administration was responding to the BP Deepwater Horizon oil spill.\textsuperscript{241}

Research shows that long-term vacancies damage agencies in several other ways.\textsuperscript{242} They can delay or hamper needed reforms to programs and services.\textsuperscript{243} Opportunities for efficiencies or improvements are more likely to be ignored or put on the back burner.\textsuperscript{244} Agency morale generally deteriorates.\textsuperscript{245}

When presidents insist on leaving a PAS position vacant, rather than working with Congress to fill it, they are abrogating congressional authority — after all, the Senate either has the constitutional obligation to provide advice and consent or it has determined the position’s duties warrant its advice and consent.\textsuperscript{246} Going further and exploiting statutory loopholes to circumvent the Senate entirely by installing in powerful posts acting officials, who are often political allies, is even worse. It gravely undermines democratic principles. Because these acting officials are not subject to Senate confirmation, their backgrounds and qualifications are subject to less scrutiny and public examination, and they are less accountable to Congress and the people once in place.

To restore an effective appointments system, presidents need to put forward qualified nominees in a timely manner, and Congress needs to expeditiously consider them. The following proposals would help ensure this happens.
Proposal 7

Congress should fix the Federal Vacancies Reform Act to prevent presidents from cutting the Senate out of the appointments process.

The FVRA of 1998 deploys multiple mechanisms to prevent presidents from circumventing the Senate’s advice and consent authority. It limits the classes of officials who are eligible to act in a PAS role and also the length of time (generally 210 days) during which they may act. The time limit creates an incentive for the president to nominate individuals for Senate consideration. The statute also motivates the Senate to act on those nominations by suspending the time limit upon the president’s nomination, lest the Senate wants the acting official to continue serving without its review.

But the FVRA has proven inadequate. The statute purports to limit presidents to selecting from three classes of individuals to serve as acting officials in vacant PAS roles: the “first assistant” to the vacant office, another PAS official in the executive branch, or a senior official who has been serving in the same agency as the vacant office for at least 90 of the previous 365 days. However, a loophole in the law allows presidents to insert people from outside these three classes — and wholly outside of government — into vacant offices and empower them to lead offices or agencies without submitting their nominations to the Senate. Delays in the confirmation process, as well as genuine interest in keeping government running, contribute to the pressure on presidents to exploit this loophole. For example, after his earlier nominee to serve as assistant attorney general for civil rights in the Department of Justice was rejected by the Senate, President Obama appointed someone from outside of government to serve as the principal deputy assistant attorney general for civil rights and then elevated her (as the first assistant) to the role of acting assistant attorney general for civil rights. The Civil Rights Division has historically played a key role in handling difficult and publicly prominent cases, making evident a president’s interest in selecting and retaining a division head with aligned interests. Obama’s appointee ran the division for more than two years, well beyond the time limits imposed in the FVRA, and without the...
As written, it is unclear whether the statute’s provisions apply when the president terminates a PAS official. This provides an avenue for a president to circumvent democratic accountability without hampering the effective functioning of government and several senators, including members of the president’s party, had expressed opposition to his potential nomination as USCIS director. Once in the role, Cuccinelli became the acting director of USCIS, in apparent compliance with the FVRA. This maneuver establishes a troubling precedent that future presidents may rely upon to appoint literally anyone to almost any vacant position, despite the FVRA’s stated limitations.

The FVRA is prone to abuse in another important way. As written, it is unclear whether the statute’s provisions apply when the president terminates a PAS official. This provides an avenue for a president to circumvent the confirmation process by firing officials and continuously appointing acting officers instead of nominating a permanent replacement. Some believe this abuse was exemplified by Jeff Sessions’s recent departure as attorney general and the president’s subsequent designation of Matthew Whitaker (who formerly served as chief of staff to Sessions, a non-Senate-confirmed role) as the acting attorney general. Trump requested Sessions’s resignation, after relentlessly attacking him in public, despite the Senate’s continued defense of Sessions. The uncertainty over whether the FVRA is triggered when a president fires an official created doubt about whether Whitaker’s designation was lawful.

The FVRA also currently lacks an effective enforcement mechanism. This means that officials may serve, either intentionally or inadvertently, as acting officials for longer than permitted by law. Currently, the law’s primary enforcement mechanism relies on a person who has been injured by an agency’s action challenging that action in court, based on the theory that it was taken by an improperly designated or appointed acting official. But FVRA litigation is rare. The FVRA does not impose sufficient accountability on the violating agency.

To preserve its role in the appointments process and democratic accountability without hampering the effectiveness of federal agencies, Congress should pass legislation reforming the FVRA to eliminate avenues for the most egregious abuses. The legislation should at a minimum:

- Impose additional limits on the class of people who may serve as acting officers or perform the duties of a vacant PAS office until the president nominates a permanent replacement. The president should not be able to completely work around Congress by installing individuals from outside government to serve as acting PAS officials for seemingly indefinite periods of time. We do not believe Congress intended to arm the president with such broad and disrupting appointment powers — even with temporary effect — when it adopted the FVRA. Congress should strengthen the existing limits in the FVRA by conditioning an individual’s ability to serve as an acting official on a minimum period of prior service in the federal government. Furthermore, to minimize operational disruptions when vacancies arise, presidents should be required to first choose from eligible individuals within the same agency as the vacancy before selecting an official from an outside agency.

As we are mindful of the president’s appointment prerogatives, we recommend that once a formal nomination for a permanent successor is submitted to the Senate, the president should be free to select from the broader class of individuals currently eligible to serve as acting officials under the FVRA. By tying the nomination of a permanent successor to a broader class of eligible acting officials, Congress would create an incentive for presidents to nominate individuals for Senate confirmation — without a nominee, the president would be limited to selecting an individual who satisfies the new tenure-of-service requirement to serve as the acting officer.

Likewise, the prospects of the president selecting from a broader class of individuals to act in a vacant office should motivate the Senate to seriously and timely consider a nominee. Should the president name an individual who is obviously unconfirmable, the Senate could quickly reject the nominee and the class of eligible acting officials would once again be limited to the existing class in the FVRA. This proposal also protects the president’s prerogatives should the Senate simply refuse to act on a nominee; in such situations, we believe the president’s constitutional responsibilities and the effective functioning of government weigh in favor of additional executive flexibility.

- Limit the class of people eligible to serve as an acting officer when the vacancy arises from the president’s firing of a Senate-confirmed official. To prevent abuse, when the president fires a PAS official, only someone serving as the first assistant to the vacant office at the time the vacancy arises, and who has served for a defined minimum period of time, should be eligible to perform the functions of the vacant role. If the first assistant position is vacant, or the tenure requirement is not satisfied, then the statute could allow the president to select a senior career official from within the agency (who satisfies the tenure requirement) to serve as the acting officer.
As many of us have experienced firsthand, the confirmation process simply takes too much time and requires too many resources at every stage. It begins prior to the president’s nomination, where the longest reported delays occur. Prospective nominees complete voluminous forms for the White House vetting process, the FBI background investigation, the Office of Government Ethics (OGE) conflict-of-interest analysis, and the appropriate Senate committee review (in some cases, more than one committee’s form). These forms include duplicative and overly broad questions that request information in varying formats, creating a maddening and time-consuming predicament for nominees.

Then, the nominees wait for these concurrent reviews to be completed. Almost all of them undergo a “full field” background investigation by the FBI — an investigation that exceeds the broadest scope of investigation in use throughout the rest of the executive branch before their nomination is submitted to Congress. This practice is generally followed regardless of whether the PAS position is part-time or full-time, and regardless of whether the position handles classified or national security information. On average it takes between six and eight weeks, and it requires a lot of resources.

Finally, nominees are formally considered by the Senate, where, as we have discussed, they may sit in purgatory for extended periods of time. Presidents George W. Bush and Obama each proposed that the Senate adopt rules to require timely consideration of nominees. Such changes in Senate rules would be a good start. That being said, Congress does have a legitimate gripe that its resources for considering nominees have not kept pace with the increase in the number of nominees.

There is no single solution for reducing the length of the nomination and confirmation process, but there are several steps Congress can take to begin moving in the right direction. Drawing from our collective experience in the executive and legislative branches, and from the wealth of good ideas that others have already put forward, we propose focusing on three key reforms that we believe would have an immediate and lasting impact by returning a degree of normalcy to the confirmations process. Congress should:

Create a task force to identify positions that should no longer require Senate confirmation. The task force, in consultation with executive branch agencies, should determine which positions do not need Senate confirmation, and then delegate authority for filling these positions to agency heads or the president. As a part of its review, the task force could also identify positions that should require Senate confirmation but currently do not, such as director of the CDC.

Reduce the paperwork burden associated with the vetting of nominees by harmonizing the information requested on the forms required by the executive branch and various Senate committees, and by supporting the creation of a secure electronic “smart form” that can be used by both Congress and the executive branch. Creating a single set of core questions, which agencies and committees could supplement, would reduce both the time required by nominees to complete the forms and the risk of inadvertent errors or discrepancies.
Almost everyone who has looked closely at this problem supports these solutions. In fact, legislation adopted in 2011 on a bipartisan basis, which removed the confirmation requirement from 163 positions, shows there is an appetite for these reforms. Still, there is more work to be done. For instance, the Morris K. Udall Scholarship Commission, the James Madison Memorial Fellowship Foundation, and the Barry Goldwater Scholarship and Excellence in Education Foundation together account for 19 PAS positions. While these are valuable programs, it is worth examining whether confirmation is necessary. Other scholarship boards do not require Senate confirmation, and eliminating the confirmation requirement from positions like these would free up resources in the Senate, the White House, and the FBI for vetting and confirming nominees for higher-level positions.

The Senate would not reduce its influence by eliminating the confirmation requirement from some positions. It would retain its considerable oversight tools for ensuring accountability in government programs and functions. At the same time, reducing the nominations workload would allow it more time for other confirmation and legislative priorities.

A bipartisan Working Group on Streamlining Paperwork for Executive Nominations (Working Group), established by the 2011 legislation, provided a road map for creating a core questionnaire for nominees that would make the executive branch’s and Senate committees’ forms more consistent, as well as for developing a smart form that would reduce redundancies in the forms. At the time of the Working Group’s review, the Senate and executive branch forms requested information on 18 similar topics, comprising an average of 60 percent of the total topics addressed by each of the forms in use. Because the information is requested in slightly varying formats, the submission process is burdensome for nominees. For example, both questionnaires aim to identify potential conflicts of interest that run afoul of the same law, but they do so using slightly different questions, which may require different answers to ensure complete accuracy.

The Working Group found that adopting one set of core questions, which committees and agencies could supplement if they saw fit, would reduce the time required by nominees to complete necessary paperwork. Developing an electronic smart form, in accordance with stringent information-technology security standards, would do even more. It would allow nominees to insert biographical, professional, and other data into one system, with modifiable permissions, that could be accessed by executive branch agencies, as well as congressional staff. In addition to reducing the paperwork burden, it would increase efficiencies in officials’ reviews. The cost savings would substantially outweigh the $5 million price tag (and $1 million annual operating expenses) estimated by the Working Group to develop and maintain the smart form.

The Working Group also expressed support for a tiered background investigation system, as have other experts. As the Homeland Security Committee report states, it makes no sense to subject a nominee to the Postal Rate Commission to the same level of scrutiny or background investigation as the deputy secretary of defense. It also makes no sense to conduct background investigations that are more extensive than those required for the highest level of security clearance on nominees to part-time boards and commissions who will never access classified information.

Though presidents have the authority and discretion to order the level of background investigation they see fit for their nominees, they are unlikely to reduce the level of investigation without Congress’s express support (since Senate committees may demand — and have grown accustomed to — a heightened level of review). This change would speed up the executive branch’s processing of nominees; it would reduce the average length of investigations for select positions, while also freeing up scarce FBI resources for investigations of other nominees.

Both branches have incentives to act on these ideas. If Congress works to streamline the nomination process, the president is less likely to abuse his appointment authority by deploying acting officials or installing partisan advisers in lieu of duly confirmed officials. On the flip side, reform would benefit the president by making it easier for him to install permanent and duly confirmed officials at agencies, who are better able to implement his agenda and influence agencies’ work.

Ensuring That Qualified and Ethical Personnel Are Appointed to Leadership Positions

When public officials were increasingly placing their family members on the federal payroll, and after President Kennedy appointed his brother attorney general, Congress passed and the president signed a federal statute prohibiting nepotism in federal hiring, including in the appointment of officials to PAS positions. The reform put fairness
and merit above favoritism and privilege.\textsuperscript{205} Then, when Watergate led the public to question the government’s ability to impartially administer basic programs, Congress passed and the president signed the Ethics in Government Act and the Civil Service Reform Act.\textsuperscript{206} These laws sought to bolster public trust by creating a more professionalized and ethically accountable government.\textsuperscript{207}

These safeguards aim to protect the integrity of government decision-making at the highest levels. Nepotism stokes distrust in the idea that the government treats everyone the same. It undermines the integrity of policymaking — not just because the hired family member might not have the skills required for the position, or might put family interests over public ones, but also because it quashes open and honest dialogue by others.\textsuperscript{208}

Of course, presidents still use some positions as rewards for friends and political allies. But this has typically been limited to positions that carry prestige and personal benefit but are without significant policymaking responsibility — like an ambassadorship in the Caribbean or membership on the Kennedy Center Board of Trustees.\textsuperscript{209} Presidents have understood that certain critical positions require specialized skills or expertise or should be filled by people without partisan affiliation.\textsuperscript{210}

In recent years, presidents have increasingly appointed people — often former associates or political allies — without the requisite qualifications for important positions. Michael Brown was famously appointed by President George W. Bush to run the Federal Emergency Management Agency (FEMA), despite lacking emergency management experience, and after a nine-year stint as commissioner of the International Arabian Horse Association. Brown reportedly got the FEMA job thanks to his friendship with Bush’s 2000 campaign manager.\textsuperscript{211} Members of both parties said Brown was at least partially to blame for FEMA underestimating the impact of Hurricane Katrina and then mishandling the response.\textsuperscript{212}

President Obama’s nominees to several ambassadorial posts in his second term were criticized for their surprising lack of knowledge about their prospective host countries.\textsuperscript{213} Some argued that, unlike his predecessors’, President Obama’s picks were inappropriate due to the importance of the posts he sought to fill with political allies — with one nominated to serve in Hungary at a time of growing international alarm over far-right Hungarian lawmakers’ attitudes toward minorities.\textsuperscript{214} President Trump has gone further, appointing more ambassadors based on personal connections or political patronage than any president in the past 40 years.\textsuperscript{215}

Worse, the current administration has embraced candidates who lack relevant qualifications or who are opposed to the objectives of the office or agency they have been tapped to lead. Secretary of Energy Rick Perry was nominated despite not knowing that the Department of Energy managed the nuclear stockpile of the United States, and despite previously suggesting that the department should be abolished.\textsuperscript{216} Ben Carson is the secretary of housing and urban development, though he has no previous government, housing, or development experience and publicly tried to persuade President Trump that there were better ways he could serve the administration.\textsuperscript{217}

The Trump administration’s approach to positions not requiring Senate confirmation has been worse. For instance, President Trump has appointed his son’s wedding planner as a regional administrator at the Department of Housing and Urban Development, and the husband of a former household employee to a position in a regional Environmental Protection Agency office. Neither had relevant qualifications.\textsuperscript{218}

These appointments set a troubling precedent for future
Proposal 9

Congress should amend the federal anti-nepotism law to make clear that it applies to presidential appointments in the White House.

For most of its history, it was uncontested that the anti-nepotism statute broadly applied to all federal officials, including the president. Despite this, presidents have from time to time considered installing family members in official positions. For example, President Carter considered formally appointing family members to a presidential commission and a position in the White House. President Reagan considered appointing a family member to the Presidential Advisory Committee on Private Sector Initiatives. And more recently, in 2009, President Obama considered appointing his brother-in-law and his half-sister to two advisory commissions. All past presidents were advised by the office principally charged with interpreting laws for the executive branch, the Department of Justice’s Office of Legal Counsel (OLC), that doing so would violate the anti-nepotism statute.

This has not disturbed the traditional role that the first lady has played in championing substantive policy issues during the president’s term in office. Indeed, courts have recognized the first lady’s unique role exists in harmony with the policy goals of the anti-nepotism statute. In 2017, the OLC changed course and concluded that the anti-nepotism statute does not extend to presidential appointments to positions in the White House, opening the door for President Trump to depart from his predecessors and appoint his daughter and son-in-law to senior positions.

Nepotism also may impact the White House’s official decision-making process, particularly when the president’s family members work in proximity to the president. Indeed, for a period of time, Kushner participated in the presidential daily briefing (PDB), where intelligence officials brief the president on the most sensitive national security matters of the day. When members of the president’s family participate in policy deliberations, more expert staffers may be less inclined to provide candid advice or voice disagreement for fear of alienating the president or his family. In this way, nepotism not only undermines public trust; it threatens to weaken government policy. Perhaps most troubling, people who owe their jobs to nepotism may prioritize the president’s personal standing over the nation’s — one reason they may have been appointed in the first place.

These are the risks Congress sought to protect against by passing the anti-nepotism statute. To respond to the OLC’s 2017 opinion that the statute does not apply to presidential appointments in the White House, Congress should amend the statute to clarify that it does. Some have argued that even if the statute applied to
the White House, it would only prevent the president’s family members from receiving a salary, not from serving in their official roles.333 Accordingly, Congress should also bolster the statute’s existing enforcement mechanism to require the removal of anyone appointed in violation of the statute.

Before the OLC’s 2017 opinion, most assumed the anti-nepotism statute applied to the White House.334 But now that the norm has been breached, there is a danger that future presidents may follow in President Trump’s footsteps. Amending the statute would restore the former, widely held interpretation.335 Congress has the authority to impose this reasonable limitation on the president’s appointment powers, which is similar to other congressionally imposed limitations, such as those in the Hatch Act, the criminal conflict-of-interest law, and other regulations on federal employees’ conduct.336

Proposal 10

Congress should adopt additional statutory qualifications for certain senior executive branch positions.

As detailed above, recent presidents have appointed unqualified friends or political allies to important government posts that have the authority to influence government policy in the areas of science and national security, among others. To prevent further abuse, Congress should conduct a review of senior executive branch positions (to include critical management positions or positions at the assistant secretary level and above)337 and adopt additional statutory qualifications for those positions that warrant subject-matter or other appropriate expertise. The qualifications should set a floor for future incumbents. They should not be so restrictive that they preclude appointments of people from diverse and varying backgrounds, to the detriment of the country.

There is a long history of Congress mandating by statute that presidential appointees and career personnel meet specified requirements.338 Some statutory qualification provisions require that executive branch personnel have certain experience, skills, or educational backgrounds. For instance, the Post-Katrina Emergency Management Reform Act of 2006 established a requirement that the director of FEMA have knowledge of emergency management and five years’ leadership and management experience.339 Other statutory qualification provisions address characteristics such as citizenship status and residency, requirements that have often been applied across the board to personnel at federal agencies.340

Additionally, Congress has required that certain appointments be made without regard to political affiliation and that others reflect specific political party affiliations, often to maintain the ideological balance of multimember commissions.341 Statutes may also prevent appointees from having specific conflicts of interest. For instance, the U.S. trade representative cannot have “directly represented, aided, or advised a foreign entity . . . in any trade negotiation, or trade dispute, with the United States.”342 Similarly, the National Security Act of 1947, amended in relevant part in 2008, requires that the secretary of defense be a civilian who has not been in military service for at least seven years.343 As we have seen, Congress is able to waive these statutory qualifications, as it did for President Trump’s former secretary of defense, James Mattis.344

Reforming the Security Clearance Process for Senior Government Officials

Recent testimony and news reports have revealed significant vulnerabilities in the White House’s security clearance process. The Trump White House has reportedly overturned an unprecedented number of clearance determinations made by career security professionals.345 A significant number of senior White House staff have been permitted to operate with interim security clearances for extended periods of time.346 Information that in other administrations would likely have been grounds for denial of a security clearance or even termination has been overlooked for senior staff.347 And nominees to cabinet and other senior positions have been put forward for Senate confirmation without the completion of their background investigations.348

It is increasingly clear that existing White House procedures for issuing security clearances do not ensure fairness or consistency and do not protect against erroneous outcomes. For example, notwithstanding his obligation to disclose on his security clearance questionnaire that his ex-wife had obtained a restraining order against him, former White House staff secretary Rob Porter held an interim security clearance for months.349 He resigned when allegations of domestic abuse — with accompanying documentary evidence — became public.350 If not for the public reports, the White House might have continued
to ignore the derogatory information.

The dustup over Porter revealed that a reported 30 to 40 White House officials were still operating with interim clearances over a year into the administration.\(^{351}\) Most troubling among them was Kushner, who omitted important information about his foreign contacts from his security clearance questionnaire and has reportedly been identified by foreign adversaries as a manipulable target. Nonetheless, Kushner operated with an interim clearance for over a year and received access to highly classified information, including in the PDB.\(^{352}\) Kushner’s top secret security clearance was reportedly rejected by two White House security specialists, but their supervisor overruled them and approved the clearance.\(^{353}\) Kushner’s was one of at least 30 cases in which the White House personnel security director is reported to have overruled career security experts and approved top secret security clearances for Trump officials.\(^{354}\)

Taken together, these actions demonstrate a stunning disregard for a process that is critical to protecting national security. Recognizing that the president retains ultimate authority for deciding who has access to classified information,\(^{355}\) there are meaningful steps Congress should take to reform the existing security clearance process in the White House.

The White House has partially attributed the use of interim clearances to a backlog in the background investigation process.\(^{356}\) It has a point. As of early 2018, approximately 700,000 people across the government were waiting to get their clearances approved or renewed.\(^{357}\) While Congress and the executive branch are moving forward with proposals to reduce this longstanding backlog, Congress should also take concrete steps to improve the White House’s security clearance process.\(^{358}\)

### Proposal 11

**Congress should reform the White House security clearance process.**

Presidents from both parties have established procedures for issuing security clearances that are meant to protect information that could threaten national security if it got into the wrong hands.\(^{359}\) The procedures establish minimum and uniform standards, though they create exceptions that appropriately recognize a president’s constitutional authority, as commander in chief, to share classified information with individuals when they deem it necessary.\(^{360}\)

Following the revelations about Porter, President Trump’s then chief of staff, John Kelly, acknowledged the need for reform.\(^{361}\) In fact, as an initial step, Kelly suspended the issuance of interim clearances absent extraordinary circumstances and his explicit approval,\(^{362}\) and supported the revocation of long-term interim clearances.\(^{363}\) More substantial and permanent reforms are needed.
Such steps are within Congress’s authority. Although the Supreme Court has recognized the president’s constitutional authority to grant security clearances, it has also suggested that Congress may regulate that authority, and Congress has imposed restrictions on both the interim and permanent security clearance processes without constitutional challenge. Limiting the duration or validity of interim security clearances would be a restriction on the process for granting security clearances, similar to the process restrictions Congress has imposed before. The president could continue to prioritize or expedite investigations of security clearance applicants, and no applicant who went through the proper procedures would be denied a security clearance if the president wanted that person to have a clearance.

Legislation introduced in the last Congress would require the president to submit a report to Congress every three months listing the security clearance information for everyone working in the White House and the Executive Office of the President. This legislation serves the same goal as our proposal: to strengthen, and improve, the accountability of, the background check and security clearance process. It is important for Congress not only to monitor the security clearance status of White House personnel but also to safeguard the security clearance process by reducing the access to sensitive information enjoyed by unvetted personnel, and by ensuring that security clearance determinations are made in the national interest.

Specifically, Congress should reduce the backlog in the White House’s background investigation process and install safeguards in the security clearance process by passing legislation to:

**>> Allocate more resources to the FBI for completing background investigations** for White House security clearances and presidential nominees. In addition to reducing the average processing time for an investigation, additional FBI resources would reduce the need for the White House to prioritize different candidates’ or nominees’ investigations over others.

**>> Limit the length of time that White House officials may operate with interim clearances.** This would make permanent a reform supported by Kelly to discontinue long-term interim clearances issued to White House officials.

**>> Require that the director of the White House personnel security office be a career professional** with specific expertise in the security clearance process.

Similar to existing executive orders and presidential directives, the legislation could also explicitly recognize a president’s unique power to provide access to classified materials as the president sees fit. The measures would help ensure that appointees serving in senior positions satisfy the same security standards that apply to other national security officials, while providing additional resources for relieving an existing bottleneck in the background investigation process.
Checks and Balances to Safeguard Democracy and Rule of Law

In this report, we have proposed ways to strengthen the guardrails that promote fundamental democratic values and protect against abuse by the executive branch. But these guardrails depend on a functioning system of checks and balances. The Constitution establishes three coequal branches: intended to blunt arbitrary power and the potential for tyranny. This system is threatened by both internal and external forces: Congress’s ability to appropriately check abuse has atrophied, the independence of the judiciary has been called into question, and the integrity of the entire political system is jeopardized by the corrosive influence of money in politics. For our proposals to protect essential democratic values, our system of checks and balances needs to be recalibrated and defended.

Congress

Congress needs to reestablish itself as an appropriate check on abuse — from the executive and also from its own ranks. Members of Congress are meant to serve not only as legislators, but also as investigators who seek “the fullest information in order to do justice to the country and to public offices.” This necessarily requires Congress to operate as a separate and independent branch, regardless of the president in power. However, congressional procedures and customs have evolved to hinder the ability of Congress to perform as a coequal branch — while also allowing legislators to abuse their power — and complicate the ability of voters to hold their representatives and Congress as a whole accountable. This is epitomized in the Senate’s rubber-stamping of unqualified nominees put forward by presidents of the same party as the Senate’s majority, discussed at length above. In this and many other ways, Congress appears to have tolerated executive branch abuse of shared constitutional powers, without providing Americans with a transparent explanation for its actions. For instance, war powers are shared under the Constitution, but Congress has appeared to defer to the executive instead of responding when it oversteps. Trump’s use of the National Emergencies Act to marshal resources for building a wall on the country’s southern border is the most recent example. Congress failed to block the president’s national emergency declaration, despite his explicitly circumventing Congress’s appropriations power and strong public opposition to his move.

The lack of meaningful congressional oversight when the same parties occupy Congress and the White House also warrants highlighting. Investigatory authority is an essential component of the legislative power endowed to Congress; it is a mechanism for ensuring that laws are faithfully executed without bias or malfeasance. When used right, it can uncover fraud and waste in federal programs, protect the rights of minorities, or uncover abuses of power and corruption. But in today’s polarized environment, the majority party appears to use this authority for its own political benefit, rather than for ensuring good policy and governance. The result is increased opportunity for executive branch abuse due to a lack of oversight when the president is of the same party as the majority in Congress, and increased potential for legislators’ abuse of power and political grandstanding when the president is of a different party.

Congress also needs to keep its own houses in order. By exempting itself from ethics, employment, and accountability laws, Congress has created a clear double standard. Recent scandals involving insider trading allegations and the use of taxpayer funds for settling sexual misconduct cases highlight the deficiencies in its ethics regime. For Congress to serve as an effective and independent check on the executive, it must meet the same standards it should demand of the executive.

To that end, Congress needs to develop a more robust oversight structure, with mechanisms for insulating the process from hyperpartisanship. Reform of the National Emergencies Act is also badly needed to eliminate a tool for presidential abuse. The Brennan Center for Justice has put forward a package of reforms that would, among other things, refine the criteria for emergency declarations, require a connection between the nature of the emergency and the powers invoked, and prohibit indefinite emergencies. There is growing momentum for some of these reforms with the Article One Act, which advanced out of the Senate Homeland Security and Governmental Affairs Committee at the end of July.

As another means to fulfill its constitutional duties, Congress should renew its longstanding commitment to nonpartisan congressional research agencies, such as the Congressional Budget Office, including by creating a...
modernized technology assessment entity, so that Congress can more effectively perform oversight, guard against executive branch manipulation of research and data, and make informed policy decisions in response to — and in anticipation of — 21st century technological needs.  

Finally, Congress must seriously consider ways to reform its institutional culture. There is no shortage of proposals. 395 Holding members of Congress personally liable for sexual harassment and retaliation settlements was a good place to start. 396 Extending the Freedom of Information Act and conflict-of-interest rules to Congress would substantially further the effort. 397 Momentum is growing for reform, and we are confident Congress can meet the challenge, as it has before. 398

Judiciary

Likewise, our democratic system depends on an independent judiciary. We believe the judiciary has held up as an effective check on executive abuse, 399 but recent political attacks on judges threaten judicial independence and risk undermining public confidence in the courts.

While there is nothing wrong with publicly disagreeing with a court ruling, criticism of judicial decisions should not turn into personal attacks on judges and their heritage. 400 This is particularly true when the president is the messenger, given the bully pulpit presidents enjoy. Nor should presidents allege, without evidence, that a judge was biased or the courts unfair simply because they ruled against him. 401

Such attacks can put judges’ safety at risk. They also threaten the legitimacy of the judiciary in the eyes of the public. 402 Our legal system relies on a shared understanding that even when you are on the losing side of a court case, you need to respect the outcome. President Trump’s issuance of a pardon to former Arizona sheriff Joe Arpaio for disobeying a court order hints at a future where court orders are not respected by all parties. 403

The broader political context heightens the need for vigilance. The judicial confirmation process is more politicized than ever in recent memory — with the Senate taking extraordinary steps to eliminate procedural safeguards that previously ensured a semblance of bipartisanship in the process. 404 And public confidence in the Supreme Court is declining. 405 Fortunately, the American judicial system is among the strongest and most resilient in the world. 406 To protect against continued abuse by the executive branch, that must remain the case.

Money in Politics

The unfettered flow of money into our political system contributes to a culture that is more accepting and inviting of abuse. The current rules allow moneymed interests to provide substantial support to public officials before, during, and after their public service. 407 These rules create incentives for public officials to put their personal or political interests ahead of the public interest. They also reduce the likelihood that other public officials will hold bad actors accountable.

The Founders recognized these risks when they enshrined the Foreign and Domestic Emoluments Clauses in the Constitution, prohibiting federal officials from receiving payments that might bias them. 408 The Due Process Clauses of the Fifth and Fourteenth Amendments serve a similar purpose by, among other things, prohibiting judges from presiding in cases in which they have a personal interest. 409

The norms and unwritten rules we have considered — including those concerning conflicts of interest and financial disclosure guidelines, and the evenhanded administration of the law — serve to mitigate the threats posed by money in our politics. As they have eroded, the power of money in politics has become more pronounced. 410

If the country is serious about preventing abuses of power, Congress should consider ways to interrupt and reduce the unfettered flow of money into our political system at the same time that it moves to shore up longstanding democratic norms. This is not a partisan issue — past reforms have been led by leaders of both political parties. 412 And there is no shortage of ideas. The Brennan Center for Justice has put forward a number of proposals, including small-donor public financing of political campaigns, transparency rules for “dark money” organizations, safeguards against foreign funds in elections, and stronger contribution limits to reduce the influence of super PACs. 415 These reforms are possible even within the current legal framework established by the Supreme Court’s recent campaign finance jurisprudence. 417 The public broadly supports reform — and we believe members of all political parties can come together, as they have in previous eras, to pass effective campaign finance laws.
Appendix of Scientific Integrity Issues

Threats to Scientific Integrity

- When responding to questions from a Senate committee, the secretary of the interior cherry-picked facts and misrepresented research performed by the Fish and Wildlife Service (FWS) about caribou in the Arctic National Wildlife Refuge to support her case for oil exploration there.419 (George W. Bush administration)

- A White House aide and former oil industry lobbyist edited government reports to downplay links between carbon emissions and climate change.420 (George W. Bush administration)

- Environmental Protection Agency (EPA) officials allowed the White House to make last-minute edits to proposed public health standards and misrepresented an internal scientific committee’s research in publicly defending the standards.421 (George W. Bush administration)

- The public affairs office at the National Aeronautics and Space Administration (NASA) added uncertainty to scientific findings, changed report titles, and altered scientists’ quotes, undercutting research on the threat of climate change. One political appointee in the public affairs office denied a request from NPR to interview a top climate scientist, saying his own job was “to make the president look good.”422 (George W. Bush administration)

- EPA officials made last-minute changes to a major public-facing draft report on the impact of fracking on drinking water, downplaying the risks. After EPA scientists challenged the edits, they were removed from the final report.423 (Obama administration)

- National Institutes of Health (NIH) officials met with alcohol industry representatives to solicit funding to study the benefits of moderate drinking, then allowed the industry representatives to give input on the study’s design.424 (Obama administration)

- The secretary of health and human services (HHS) publicly overruled the Food and Drug Administration’s (FDA) determination that over-the-counter emergency contraceptives were safe for minors, questioning the underlying research despite her lack of scientific training.425 Her decision was immediately criticized as politically motivated, and a judge presiding over a lawsuit challenging the action agreed, finding the secretary’s action “politically motivated, scientifically unjustified, and contrary to agency precedent.”426 (Obama administration)

- EPA officials blocked agency scientists and contractors from presenting research about climate change and related ecological issues at a professional conference.427 Agency officials at the Departments of Agriculture, Energy, and the Interior have similarly prevented staff from attending scientific conferences.428 (Trump administration)
- At HHS, the Centers for Disease Control and Prevention (CDC), and the United States Geological Survey (USGS), agency officials increased scrutiny of scientists' communications with congressional representatives and the media about their research. For instance, at the CDC, scientists were prohibited from responding to press inquiries “even for a simple data-related question” without prior clearance from the agency’s communications office, and at the USGS, scientists were required to submit reporters’ questions and their proposed answers to the communications office for review. (Trump administration)

- An employee at the National Parks Service reported being instructed to avoid using terms such as “climate change” in project proposals. (Trump administration)

- The CDC censored scientific language, including terms related to research on gender identity and reproductive health, informing staff that the terms could not be used in official documents under preparation for the agency’s budget. The move was condemned as an effort to limit the effectiveness of public health. (Trump administration)

- Political officials censored a press release about a USGS study, removing references to the dire effects of climate change in the release. The officials also delayed the press release for several months. (Trump administration)

- The authority and reach of a nuclear facilities safety board were curtailed, despite safety risks to American nuclear workers and the general public. (Trump administration)

- The EPA introduced a proposed “transparent science” rule that would prevent the agency from using research for which underlying data are not made publicly available. Oftentimes, the underlying data in environmental and public health research are not published because they involve personally identifiable health information that is protected by privacy laws. The effect of the “transparent science” rule will be to limit EPA scientists’ access to high-quality research, thereby interfering with the scientific process. (Trump administration)

- Officials from the White House’s Office of Legislative Affairs, Office of Management and Budget, and National Security Council barred the Office of the Geographer and Global Issues, a State Department intelligence agency, from submitting written testimony to the House Intelligence Committee warning that climate change is “possibly catastrophic.” The scientist whose work was edited subsequently resigned. (Trump administration)

- The Department of Agriculture (USDA) required agency scientists to label their finalized peer-reviewed scientific publications “preliminary” and “not ... formally disseminated by the U.S. Department of Agriculture,” misleading terms suggesting that the research was not complete and should not be relied upon. (Trump administration)

- High-level Department of the Interior (DOI) officials altered an environmental assessment for seismic surveying prepared by career scientists in order to underplay the potential impact of oil and gas development on Alaska’s coastal plain. They reversed a Bureau of Land Management (BLM) biologist’s conclusion and removed large portions of an agency anthropologist’s analysis of potential impacts on native communities. A third BLM scientist, who studies fish and water resources, identified fundamental inaccuracies that were introduced into his research without his knowledge. (Trump administration)
EPA career scientists recommended that the agency ask the Army Corps of Engineers to conduct a new environmental review for a copper and gold mine planned upstream from Alaska’s premier salmon fishery, due to deficiencies the scientists identified in the environmental review. Political officials at the EPA reviewed the analysis, which was revised to downplay the scientists’ concerns.\(^{442}\) (Trump administration)

The National Oceanic and Atmospheric Administration (NOAA) released a statement contradicting government meteorologists’ forecast and supporting the president’s repeated inaccurate claims that Alabama would be affected by a hurricane, including when he displayed a map of the storm’s path that had been altered to include Alabama. NOAA issued the statement after the acting White House chief of staff reportedly instructed the secretary of commerce to have NOAA — a branch of the Department of Commerce — publicly disavow an earlier statement by NOAA’s National Weather Service (NWS) clarifying that Alabama was not in the storm’s path, and the secretary of commerce reportedly threatened to fire top employees at NOAA if they did not repudiate NWS’s statement.\(^{443}\) (Trump administration)

**Contacts Between Political Officials and Career Experts That Undermine Scientific Integrity**

- DOI officials frequently interfered with the work of government scientists in order to weaken wildlife protections. In one case, an agency official with no background in biology forced scientists to reverse findings that would have made a species of prairie dog eligible for protection.\(^{444}\) (George W. Bush administration)

- Officials at the FWS, which is part of the DOI, removed warnings from career scientists about the impact of a proposed border wall on local wildlife from a letter sent to U.S. Customs and Border Protection. Before the letter was drafted, DOI political aides told FWS officials, “we are to support the border security mission.”\(^{445}\) (Trump administration)

- Department of Labor (DOL) officials ordered career researchers to revise a study showing the negative financial effects on restaurant workers of a proposed “tip pooling” rule,\(^{446}\) which would reverse a previous regulation that stated tips are the property of employees, and permit restaurant managers to take tips from tip pools over workers’ objections.\(^{447}\) (Trump administration)

- After EPA researchers produced a study showing economic benefits to protecting wetlands from pollution, aides to the agency’s administrator told them to produce a new study showing no such benefits.\(^{448}\) (Trump administration)

- After a field supervisor for the FWS determined that it was “reasonably certain” that threatened and endangered species could be harmed by a development project and called for a biological assessment to be performed, a high-level political appointee at the DOI communicated that the field supervisor’s determination “was not the position of the administration,” and he was pressured to reverse his determination.\(^{449}\) (Trump administration)
Retaliation and Threatened Retaliation Against Career Experts

- A senior biologist at the DOI’s FWS was fired after he filed a legal complaint alleging that agency officials knowingly used flawed science in the agency’s assessment of the endangered Florida panther’s habitat and viability in order to facilitate proposed real estate development. The FWS subsequently conceded that it had used flawed science, reinstated the biologist, and published a revised analysis. (George W. Bush administration)

- The director of the Centers for Medicare and Medicaid Services threatened to fire a top actuary if he shared his estimates of the cost of the administration’s Medicare prescription drug bill. The actuary’s estimate was significantly higher than the one released by the Congressional Budget Office. (George W. Bush administration)

- A senior radiation biologist in the low-dose radiation research program at the Department of Energy was reassigned and then fired for insubordination and inappropriate workplace communication after she spoke favorably about the program during a congressional briefing. At the time, the department was planning to end the program and reallocate funds to different research projects. The scientist was subsequently reinstated. (Obama administration)

- The DOI’s top climate change scientist was reassigned to an accounting role, despite no training in accounting, after he highlighted the dangers climate change poses for Alaska’s Native communities. Five days after the reassignment, the interior secretary testified before Congress that the department planned to use reassignments as part of its effort to reduce employees, the inference being that he expected employees to quit in response to undesirable transfers. The climate scientist eventually resigned from government service. (Trump administration)

- A scientist working under a contract with the National Park Service resisted efforts by federal officials to remove all references to human causes of climate change in her scientific report, drawing media attention. She was previously told that she would be hired for a new project but was later told that no funding was available for the work. The scientist asked her supervisor at the agency, “Is this because of the climate change stuff?” He responded, “I don’t want to answer that.” (Trump administration)

- Economists in the Economic Research Service (ERS) of the USDA published findings showing the negative financial impacts on farmers of the administration’s trade and tax policies. Subsequently, the secretary of the USDA announced a restructuring plan that would reduce the ERS’s insulation from political officials and require staff relocation across the country. Six economists quit on a single day due to concerns about retaliation for the conclusions of their research. (Trump administration)

Attacks on Science Advisory Committees

- Advisory committees at HHS were disbanded when they attracted opposition from religious and industry groups for their scientific conclusions. (George W. Bush administration)

- The secretary of HHS removed experts on pediatric lead exposure from a CDC ad-
A candidate for a position on an advisory board that researches Arctic issues — including the impact of proposed drilling in a wildlife refuge, a key administration priority — said the first question she was asked in an interview was, “Do you support the president?” (George W. Bush administration)

The EPA issued a memo that discouraged members of its Science Advisory Board from speaking publicly, even in their outside capacity, about any scientific issue under consideration by the board, without EPA approval. Watchdogs warned that the new rule could lead scientists to avoid contributing to the public conversation on key issues. (Obama administration)

A proponent of a debunked theory about links between vaccines and autism was appointed to the President’s Committee for People with Intellectual Disabilities, and a major donor to Democratic candidates and the Clinton Foundation was appointed to the State Department’s International Security Advisory Board, despite his lack of background in nuclear security. (Obama administration)

The Advisory Committee on Climate Change and Natural Resource Science, established to offer advice to the interior secretary about climate change, stopped meeting. A scheduled meeting was canceled, and then the panel’s charter expired. (Trump administration)

The National Park System Advisory Board, which works with DOI officials to designate national historic and natural landmarks, did not convene for an entire year, leading ten of its 12 members to quit in frustration. The board was later reconstituted with new members who were all either registered Republicans or had voted in Republican primaries. Three had given more than $500,000 to Republican candidates and causes, while a fourth was a former national chair of the American Legislative Exchange Council, an influential conservative lobbying group. Whereas the board’s members had previously included professors from universities, none of the 11 new members was an academic. (Trump administration)

The Department of Energy’s advisory committees held fewer meetings in 2017 than in any year since 1997, when records began. Throughout 2017, the administration did not contact members of the Secretary of Energy Advisory Board, a high-level committee that produces detailed reports on complex scientific topics and has been used frequently by past secretaries. The department subsequently announced the reconstituted board’s eight new members, five of whom were from industry. The chair was the chief executive officer of a major oil company. She replaced a professor emeritus of chemistry at the Massachusetts Institute of Technology. (Trump administration)

At the EPA, political officials abandoned the practice of deferring to career staff’s recommendations for appointment of advisory committee members, increasing the membership of political actors and industry representatives. (Trump administration)
The number of industry representatives and consultants quadrupled on the EPA’s Science Advisory Board, while representation of academics decreased from 79 to 50 percent. The list of new appointees to the Science Advisory Board includes industry representatives, officials from Republican state administrations, and independent scientists who have criticized major federal environmental regulations. (Trump administration)

The EPA announced that it would not renew members of the Board of Scientific Counselors (BOSC) with expiring appointments — contrary to past practice — and cancelled upcoming meetings of the board’s subcommittees. Those who did not return to the BOSC included university professors, as well as employees of a scientific foundation, an engineering consulting company, and government agencies or laboratories. (Trump administration)

By statute, the composition of the EPA’s Clean Air Science Advisory Committee (CASAC) must include at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies. Of the seven current members of CASAC, which informs the agency’s standards on ozone and other pollutants, only one has a deep background in air pollution research. This member is also the only independent academic scientist on the committee; other members include state regulators with scientific views outside of the scientific mainstream. Additionally, the chairman of CASAC has questioned studies that connect serious human health problems to air pollution; he has accepted research funding from the American Petroleum Institute (API), an oil industry lobbying group, and the organization reviewed his findings before publication. (Trump administration)

The EPA disbanded a subcommittee of air pollution experts that helped it decide how much soot in the atmosphere is safe to breathe. That task is now handled by the CASAC, a smaller, less expert panel. The CASAC chair wrote a letter to the EPA administrator criticizing the agency’s use of science to set air pollution standards and questioning the long-established scientific view that fine particulate airborne matter is linked to early deaths. “It is hard to overstate just how jarring this is,” one expert at a nongovernmental organization wrote in response. (Trump administration)

After the release of the 2018 National Climate Assessment, a major government report on climate change, the administration announced plans to convene a White House panel to challenge established scientific conclusions about the severity of climate change and humanity’s contributions to it. (Trump administration)

The EPA barred scientists who receive grants from the agency from serving on its advisory committees. The move was presented as an effort to avoid conflicts of interest, but the agency already had policies to prevent such conflicts, and the new rule did not apply to scientists who receive funding from industry. As a result, there are more advisory board members affiliated with industry and fewer university-affiliated researchers. Because the leading experts on topics of concern to the EPA are those who are most likely to obtain highly competitive federal grants, the rule prevents the EPA from getting input from some of the most knowledgeable voices in the field. A former chair of the EPA’s Science Advisory Board called the move “clearly political, not ethical” and said it was aimed at “eliminating independent science advice.” (Trump administration)
Restriction of Public Access to Government Research and Data

- The Federal Bureau of Investigation removed from its annual crime report significant amounts of information that had been included in previous years. The missing data covered violent crime — a top administration priority — as well as domestic violence and drug crimes.\(^{492}\) (Trump administration)

- The EPA stopped collecting data on oil and gas companies’ methane emissions\(^{493}\) and took down web pages containing information about climate change.\(^{494}\) (Trump administration)

- The USDA took offline animal welfare enforcement records, including abuses in dog breeding operations and records of horse farms that alter the gait of horses through the controversial practice of “soring” the animals’ legs.\(^{495}\) (Trump administration)

- USDA officials ordered the department’s main research arm to stop communicating with the public.\(^{496}\) The DOI, the Department of Transportation, and HHS implemented similar rules.\(^{497}\) (Trump administration)

- The Treasury Department removed from its website an economic analysis that found workers pay only a small share of the corporate tax burden. The analysis undercut the administration’s claims that reducing the corporate tax rate, a top priority, would primarily benefit workers.\(^{498}\) (Trump administration)

- Amid criticism of the administration’s response to Hurricane Maria, the Federal Emergency Management Agency removed from its website information about how many people in Puerto Rico had access to drinking water and electricity.\(^{499}\) (Trump administration)

- A Consumer Financial Protection Bureau (CFPB) report omitted warnings about boilerplate deals enabling banks to charge students fees, which had been included in previous agency reports. An unpublished draft of the report states that more than 100 colleges reported being paid by banks to promote “college-sponsored” bank accounts to students, despite the fact that the CFPB had previously “expressed concern over the relationship between revenue sharing provisions in contracts and fees charged to student account holders.” Though the CFPB’s mission is to protect consumers from abusive financial practices, the report contained no discussion of those abusive practices.\(^{500}\) (Trump administration)

- White House and EPA officials suppressed a report from the HHS’s Agency for Toxic Substances and Disease Registry that showed that a class of toxic chemicals, which have contaminated water supplies near military bases, chemical plants, and other sites in several states, endanger human health at a far lower level than the EPA previously called safe. One White House official said the report’s release would cause a “public relations nightmare.”\(^{501}\) (Trump administration)

- The USDA departed from its longstanding practice of disseminating department and department-funded research studies. For instance, in the case of a groundbreaking discovery that rice loses vitamins in a carbon-rich environment — a potentially serious health concern for the 600 million people worldwide whose diet consists mostly of rice — USDA officials withheld a department news release and sought to prevent dissemination of the findings by the department’s research partners.\(^{502}\) (Trump administration)
Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis Underlying Regulatory Actions

- The EPA proposed a sharp reduction in the permissible levels of ozone, a key component of smog. Industry groups and local governments lobbied against the rule. Staff at the Office of Information and Regulatory Affairs (OIRA), a division of the White House Office of Management and Budget (OMB) charged with reviewing agencies’ regulations staffed primarily with economists, lawyers, and people with public policy training, manipulated the EPA's scientific analysis of the proposed ozone rule to cast doubt on the benefits of a lower standard. (George W. Bush administration)

- OIRA altered the EPA’s scientific findings underlying a rule to regulate coal ash. The EPA initially stated that using ponds for storing the most toxic form of coal ash did “not represent the best available technology for controlling pollutants in almost all circumstances.” Revisions made during OIRA review recommended eliminating this conclusion, giving no explanation why. Other changes made during OIRA review included softening data, such as reducing coal-fired power plants’ share of toxic pollutants discharged to surface water from “at least 60 percent” to “50–60 percent.” (Obama administration)

- As noted above, DOL officials proposed a “tip pooling” rule, proposing that the policy would increase the paychecks of low-wage kitchen workers. When career employees at the department produced an economic analysis showing that the proposed “tip pooling” rule would cause restaurant workers to lose money, senior department staff ordered them to revise the analysis to reach a more favorable result with no scientific basis. Senior political staff at OMB were reportedly involved in the decision to delete the unfavorable data. Ultimately, the DOL proceeded with the notice-and-comment process for the rule without publicly disclosing the department’s analysis on the rule’s impact. (Trump administration)

- During the effort to repeal the EPA’s prior definition of the regulatory term “waters of the United States” (WOTUS), career economists complied with agency political officials’ instruction to change their methodology in order to reach the predetermined conclusion that there was no quantifiable benefit to preserving wetlands. Contrary to standard practice, no records were made to document the methodological changes the career staff were ordered to make. When the new definition was announced, the EPA’s head stated that “a detailed mapping of all the wetlands in the country” had not been performed, and the EPA Office of Water chief told reporters that there were no data about the number of streams and wetlands removed from protection under the new definition of WOTUS. However, documents obtained by means of Freedom of Information Act requests show that EPA and Army Corps of Engineers staff determined the percentage of streams and wetlands that would not be protected under the proposed rule, and this information was presented to leaders of both agencies during the course of deliberations about the regulation. (Trump administration)

- The DOL proposed to roll back a safety rule requiring 16- and 17-year-olds in the nursing home industry to be supervised when using hoisting equipment to move patients. In 2011, the National Institute for Occupational Safety and Health (NIOSH) concluded that there were serious safety risks associated with minors’ unsupervised operation of these devices. The DOL was not forthcoming about whether and to what extent department officials consulted with the NIOSH before issuing the rule. In the rulemaking announcement, the DOL refused to publicly
release a survey of vocational training programs it claimed supported the rule.\textsuperscript{536} An advocacy group that obtained the survey identified serious methodological flaws.\textsuperscript{537} (Trump administration)

- The USDA's Food Safety and Inspection Service (FSIS) proposed a rule that would allow factories to speed up line processing for pork while removing some federal food safety inspectors from the premises.\textsuperscript{518} before it had completed the required peer review of the rule's risk assessment.\textsuperscript{519} The rule cites a pilot program — which replaced government inspectors with companies' own employees — as the basis for concluding that the proposed rule would be more effective in ensuring food safety.\textsuperscript{520} However, the USDA's Office of Inspector General (OIG) previously determined that the pilot program was flawed.\textsuperscript{521} The USDA also asserted that worker injuries went down in plants participating in the pilot program but did not make that data or analysis publicly available.\textsuperscript{522} Researchers who obtained work injury data by means of Freedom of Information Act requests concluded that there were significant limitations in the data used by FSIS to draw its conclusion about worker injury rates.\textsuperscript{523} The USDA's OIG is evaluating whether the agency concealed information and used flawed data to develop and promote the rule.\textsuperscript{524} (Trump administration)
About the Task Force Members

**Preet Bharara, Co-Chair**
Preet Bharara is an American lawyer who served as U.S. Attorney for the Southern District of New York from 2009 to 2017. His office prosecuted cases involving terrorism, narcotics and arms trafficking, financial and health-care fraud, cybercrime, public corruption, gang violence, organized crime, and civil rights violations. In 2012, Bharara was featured on *Time*'s “100 Most Influential People in the World.” On April 1, 2017, Bharara joined the NYU School of Law faculty as a Distinguished Scholar in Residence. He is Executive Vice President at Some Spider Studios, where he hosts a CAFE podcast, *Stay Tuned*, focused on questions of justice and fairness. He is also the author of a top-five *New York Times* bestselling book, *Doing Justice: A Prosecutor’s Thoughts on Crime, Punishment, and the Rule of Law*.

**Mike Castle**
Mike Castle is a former two-term governor, nine-term member of Congress, lieutenant governor, deputy attorney general, and state senator of his home state of Delaware. Recently retired from the law firm DLA Piper, Gov. Castle served on the Financial Services, Intelligence, and Education and Workforce Committees during his tenure in the U.S. House of Representatives, and also led a number of congressional caucuses. Since leaving office in January 2011, he has been honored by the Delaware Chamber of Commerce and the University of Delaware, and politicians of both parties have heralded Gov. Castle as a bipartisan leader. As a partner at DLA Piper, he worked on financial issues, international trade, legislative affairs, and health care. He is the Board Chair for Research!America. He received his B.A. from Hamilton College and his J.D. from George-town University.

**Christine Todd Whitman, Co-Chair**
Christine Todd Whitman is President of the Whitman Strategy Group, a consulting firm specializing in environmental and energy issues. She served in the cabinet of President George W. Bush as Administrator of the Environmental Protection Agency from 2001 to 2003, and was Governor of New Jersey from 1994 to 2001. During her time in government, she gained bipartisan support and was widely praised for championing common-sense environmental improvements. Gov. Whitman is involved in numerous national nonprofit organizations focused on legal and environmental causes, including the American Security Project and the O’Connor Judicial Selection Advisory Committee at the Institute for the Advancement of the American Legal System. She is a graduate of Wheaton College in Norton, Massachusetts.

**Christopher Edley, Jr.**
Christopher Edley, Jr. is the Honorable William H. Orrick, Jr. Distinguished Professor of Law at UC Berkeley School of Law, after serving as dean from 2004 through 2013. Before Berkeley, he was a professor at Harvard Law School for 23 years and cofounded the Harvard Civil Rights Project. Prof. Edley co-chaired the congressionally chartered National Commission on Education Equity and Excellence from 2011 to 2013. He served in White House policy and budget positions under Presidents Jimmy Carter and Bill Clinton, held senior positions in five presidential campaigns, and worked on two presidential transitions. He is a fellow or member of the American Academy of Arts & Sciences, the National Academy of Public Administration, the Council on Foreign Relations, the American Law Institute, the advisory board of the Hamilton Project, the Brookings Institution, and the board of Inequality Media. As a National Associate of the National Research Council, he recently chaired committees to evaluate National Assessment of Educational Progress performance standards and design a national system of education equity indicators. Prof. Edley is a graduate of Swarthmore College, Harvard Kennedy School, and Harvard Law School.
Chuck Hagel
Chuck Hagel served as the 24th Secretary of Defense from 2013 to 2015. He is the only Vietnam veteran and enlisted combat veteran to serve as Secretary of Defense. He represented the state of Nebraska in the U.S. Senate from 1997 to 2009. In the Senate, Sec. Hagel was a senior member of the Foreign Relations; Banking, Housing and Urban Affairs; and Intelligence Committees. Previously, Sec. Hagel was Co-Chairman of the President’s Intelligence Advisory Board, a Distinguished Professor at Georgetown University, Chairman of the Atlantic Council, Chairman of the United States of America Vietnam War Commemoration Advisory Committee, Co-Chairman of the Vietnam Veterans Memorial Fund Corporate Council, President and CEO of the USO, and Deputy Administrator of the Veterans Administration. He currently serves on the RAND Board of Trustees, PBS Board, Corsair Capital Advisory Board, and American Security Project Board, and is a Senior Advisor to Gallup. He is a graduate of the University of Nebraska at Omaha.

Amy Comstock Rick
Amy Comstock Rick is the President and CEO of the Food and Drug Law Institute, and was previously the CEO of the Parkinson’s Action Network. Prior to becoming a nonprofit and health leader, Ms. Rick served as the Director of the U.S. Office of Government Ethics (2000–2003) and as an Associate Counsel to the President in the White House Counsel’s Office (1998–2000). She also served as a career attorney at the U.S. Department of Education, including as the Department’s Assistant General Counsel for Ethics. Ms. Rick has also served as President of the Coalition for the Advancement of Medical Research, and as a board member of Research!America, the National Health Council, and the American Brain Coalition. She received her bachelor’s degree from Bard College and J.D. from the University of Michigan.

David Iglesias
David Iglesias is Director of the Wheaton Center for Faith, Politics and Economics and is the Jean & E. Floyd Kvamme Associate Professor of Politics and Law at Wheaton College. Previously, Prof. Iglesias served as a prosecutor focusing on national security and terrorism cases. He was the U.S. Attorney for the District of New Mexico from 2001 to 2007. Prof. Iglesias was recalled to active duty status between 2008 and 2014 in support of Operation Enduring Freedom. He served as a team leader, senior prosecutor, and spokesman with the U.S. Military Commissions, handling war crimes and terrorism cases. He retired from the U.S. Navy as a Captain. Prof. Iglesias received his bachelor’s degree from Wheaton College and his J.D. from the University of New Mexico School of Law.

Donald B. Verrilli, Jr.
Donald B. Verrilli, Jr. is a partner at Munger, Tolles & Olson LLP, and the founder of its Washington, D.C., office. He served as Solicitor General of the United States from June 2011 to June 2016. During that time, he was responsible for representing the U.S. government in all appellate matters before the Supreme Court and in the courts of appeals, and was a legal adviser to President Barack Obama and the Attorney General. Earlier, he served as Deputy White House Counsel and as Associate Deputy Attorney General in the U.S. Department of Justice. He clerked for U.S. Supreme Court Justice William J. Brennan, Jr., and the Honorable J. Skelly Wright on the U.S. Court of Appeals for the D.C. Circuit. He received his B.A. from Yale University and J.D. from Columbia Law School.
Endnotes

1 National Aeronautics and Space Administration Office of the Inspector General, Investigative Summary Regarding Allegations That NASA Suppressed Climate Change Science and Denied Media Access to Dr. James E. Hansen, a NASA Scientist (Washington, D.C.: National Aeronautics and Space Administration, 2008), available at https://oig.nasa.gov/docs/OI-STI/Summary.pdf. The inspector general’s office found that the public affairs office added uncertainty to scientific findings, changed report titles to obscure findings, eliminated controversial terms such as “global warming,” and altered quotations from scientists. Ibid., 22, 27–32.

2 Tom DiChristopher, “Major EPA Fracking Study Downplayed Risks to US Water Supply, Investigation Finds,” CNBC, Dec. 1, 2016, https://www.cnbc.com/2016/12/01/major-epa-fracking-study-downplayed-risks-us-water-supply-investigation-finds.html. Records of communications obtained through Freedom of Information Act requests indicate that the changes were made after EPA officials and media consultants met with advisers to President Obama to discuss marketing the study; Scott Tong and Tom Scheck, “EPA’s Late Changes to Fracking Study Downplay Risk of Drinking Water Pollution,” Marketplace, Nov. 30, 2016, https://www.marketplace.org/2016/11/29/world/epa-s-late-changes-fracking-study-portray-lower-pollution-risk. The EPA’s Science Advisory Board contested the report’s conclusions on the grounds that they either lacked quantitative evidence or were inconsistent with underlying data and recommended that the EPA revise the report’s findings to clearly link evidence provided in the report. Letter from Peter S. Thorne, chair, Science Advisory Board, and David A. Dzombak, chair, SAB Hydraulic Fracturing Research Advisory Panel, to Gina McCarthy, administrator, Environmental Protection Agency (Aug. 11, 2016), available at https://www.documentcloud.org/documents/3011057-EPA-SAB-16-005-Unsigned.html.


7 See examples under “Reitallation and Threatened Retaliation Against Career Experts” in the Appendix.

8 In 2013 and 2014, officials and scientists from the National Institutes of Health (NIH) met with alcohol industry representatives to solicit funding for a study of the benefits of moderate drinking. They also allowed industry representatives to give input on study design. After their actions were publicly reported, the NIH ended the trial. Rony Caryn Rabin, “Major Study of Drinking Will Be Shut Down,” New York Times, June 15, 2018, https://www.nytimes.com/2018/06/15/health/alcohol-nih-drinking.html.


14 The JCT was established to assist in “every aspect of the tax legislative process.” “JCT About Page Overview,” The Joint Committee on Taxation, accessed July 2, 2019, https://www.jct.gov/about-us/overview.html.


16 The CBO was established to provide objective, nonpartisan information to assist Congress in making effective budget and economic policy. Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601–688.


21 For instance, President Reagan’s surgeon general, C. Everett Koop, a political conservative who was deeply religious and had authored a book opposing abortion, was lauded for writing a comprehensive report about Acquired Immune Deficiency Syndrome (AIDS) that laid out sound, science-based public health policy objectives. In the foreword of the report, he wrote, “At the beginning of the AIDS epidemic, many Americans had little sympathy for people with AIDS.


23 5 U.S.C. § 552. For more details about FOIA and government science, see Proposal 5.


28 Steven Thomma, “Gore SaysOMB Editing Amounts to ‘Science Fraud,’” Philadelphia Inquirer, May 9, 1989.

29 See examples listed under “Threats to Scientific Integrity” and “Contacts Between Political Officials and Career Experts That Undermine Scientific Integrity” in the Appendix.

30 See examples listed under “Restitution and Threatened Retaliation Against Career Experts” in the Appendix.


37 See Appendix for examples of political interference in government research during the Bush administration.


42 President Obama issued Executive Order 13,563, which supplemented and reaffirmed the principles of regulatory review established in Executive Order 12,866. 3 C.F.R. 215 (2011).


58 For instance, during the Obama administration, Health and Human Services Secretary Kathleen Sebelius publicly overruled the Food and Drug Administration’s determination that over-the-counter emergency contraceptives were safe for minors, questioning the underlying research despite her lack of scientific training. Gardner Harris, “Plan to Widen Availability of Morning-After Pill Is Rejected,” New York Times, Dec. 7, 2011, https://www.nytimes.com/2011/12/08/health/policy/sebelius-overrules-fda-on-freer-sale-of-emergen-


61 The Public Access Memo mandates the creation of public-access plans and clarifies that the push for disclosure does not extend to laboratory notebooks, preliminary analyses, drafts of scientific papers, plans for future research, peer review reports, or communications with colleagues. John Holdren, Director, Office of Science and Technology Policy, “Increasing Access to the Results of Federally Funded Scientific Research” (official memorandum, Washington, D.C.: Executive Office of the President, 2013).


63 See examples under “Restriction of Public Access to Government Research and Data” in the Appendix.

64 For example, the first sentence of a news release drafted by a scientist was, “The ozone hole that develops over Antarctica was larger this year than in 2004 and was the fifth largest on record.” The public affairs office changed that sentence to read, “NASA researchers[] . . . determined the seasonal ozone hole that developed over Antarctica this year is smaller than in previous years.” National Aeronautics and Space Administration Office of the Inspector General, Allegations That NASA Suppressed Climate Change Science. See also Andrew C. Revkin, “Climate Expert Says NASA Tried to Silence Him,” New York Times, Jan. 29, 2006, https://www.nytimes.com/2006/01/29/science/earth/climate-expert-says-nasa-tried-to-silence-him.html. George Deutsch, a politically appointed public affairs officer at NASA, rejected a request from a producer at NPR to interview James E. Hansen, then director of NASA’s Goddard Institute for Space Studies, reportedly calling NPR “the most liberal” media outlet in the country and that his job was “to make the president look good.” Ibid.

65 The National Aeronautics and Space Act, 51 U.S.C. § 2012(a) (3).


69 See examples listed under “Threats to Scientific Integrity” in the Appendix.


78 See Scientific Integrity Act, H.R. 1709, 116th Cong. § 2(3) (2019); Scientific Integrity Act, S. 775, 116th Cong. § 3(3) (2019).


80 See Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019). See also Holly Doremus, “Scientific and Political Integrity in Environmental Policy,” Texas Law Review 86 (2008): 1647–48 (“Outside of regulatory agencies, federal research units modeled along academic lines should allow scientists to speak out just as academic scientists are free to do. Within regulatory agencies, there is some justification for overseeing contacts with the press; at some level those agencies must speak with one voice. But no such concern exists with respect to research science units. . . . It is never appropriate for any political appointee or public affairs officer to screen submissions of scientific literature.”).

81 See ibid., 1645 (advocating for creation of dissent channels at agencies where scientific research is performed). See also Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

82 See ibid. See also Doremus, “Scientific and Political Integrity,” 1645–46 (calling for independent scientific ombudsmen to whom agency technical staff could forward concerns about scientific underpinnings of regulatory decisions and public communications). Congress has created similar positions, such as the director of the Office of Research Integrity in HHS. 42 U.S.C. § 289b(a)(2). The director is required by statute to be experienced and specially trained in the conduct of research and have experience in the conduct of investigations of research misconduct and is appointed by the secretary of the department.

Some agencies have scientific integrity officers (SIOs) to administer scientific integrity policies. See, e.g., U.S. Environmental Protection Agency, Scientific Integrity Policy (Washington, D.C.: Environmental Protection Agency, 2017), 10, available at https://www2.epa.gov/sci-integrity/scientific-integrity-officers.


86 The Scientific Integrity Act would require scientific integrity...
policies to ensure, inter alia, that: scientific conclusions are not made based on political considerations; personnel actions for scientific personnel are not made based on political considerations; procedures in place are as necessary to ensure the integrity of scientific and technological information and processes on which the federal agency relies in its decision-making or otherwise uses. Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

87 The Data Quality Act (DQA, also known as the Information Quality Act) directs the White House Office of Management and Budget (OMB) to issue guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000). This appears to provide modest protections for the quality of government data disseminated to the public. However, the DQA has been criticized as a vehicle for special interest groups to impede or suppress government research by means of nonmeritorious petitions challenging the objectivity of government data. See Wendy Wagner, “The Perils of Relying on Interested Parties to Evaluate Scientific Quality,” American Journal of Public Health 95 (2005); Thomas O. McGarity et al., Truth and Science Betrayed: The Case Against the Information Quality Act, Center for Progressive Reform, 2005, 2, http://www.progressivereform.org/articles/ija.pdf. In many instances, such challenges have relied on industry-funded studies, which have themselves been faulted by mainstream scientific opinion. See Stephen M. Johnson, “Junking the Junk Science Law: Reforming the Information Quality Act,” Administrative Law Review 58 (2006): 37; Derek Araujo, Daniel Horowitz, and Ronald A. Lindsay, Protecting Scientific Integrity, Center for Inquiry, 2007, 7, https://centerforinquiry.org/wp-content/uploads/2018/05/scientific-integrity.pdf. For these reasons, we believe that another legislative approach is warranted to protect scientific integrity.


89 See examples listed under “Contacts Between Political Officials and Career Experts That Undermine Scientific Integrity” in the Appendix.


91 Grandoni and Elipher, “Interior Dept. Officials Downplayed Concerns.”


95 The recently introduced Scientific Integrity Act calls for agencies to have “the appropriate rules, procedures, and safeguards… in place to ensure the integrity of the scientific process within the covered agency.” Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).


97 See, e.g., 47 C.F.R. § 1.1200 et seq. (Federal Communications Commission regulations governing ex parte communications).

98 See, e.g., Wendy Wagner and Tom McGarity, “Deregulation Using Stealth ‘Science’ Strategies.” Duke Law Journal 68 (2019): 1783–1800 (calling for firewalling of scientific literature review and analysis from policy input); Science for Policy Project, Improving the Use of Science in Regulatory Policy, Bipartisan Policy Center, 2009, 4, available at https://bipartisanpolicy.org/wp-content/uploads/files/BPC%20Science%20Report%20final.pdf (calling for measures to differentiate between questions that involve scientific judgments and questions that involve judgments about economics, ethics, and other matters of policy); Angus Macbeth and Gary Marchant, “Improving the Government’s Environmental Science,” New York University Environmental Law Journal 17 (2008): 157 (proposing institutional separation of scientific assessments from the political environment inherent to regulatory decisions); Doremus, “Scientific and Political Integrity,” 1644–45 (calling for contacts between political appointees and nonmanagement career technical staff to be limited during the technical stages of regulatory development and requiring agencies to establish procedures for making science-intensive regulatory decisions, as well as for the preparation of scientific reports to Congress and the public); Alternative Facts on the Rise in Federal Decision Records, Public Employees for Environmental Responsibility, Jan. 31, 2019, https://www.peer.org/news/press-releases/alternative-facts-on-the-rise-in-federal-decision-records.html (linking to suggested statutory clarification; “Antidote to Alternatives Facts Act,” which would require administrative record to include “[c]ommunications that the agency received from other agencies and from the public, and any responses to those communications,” “[m]inutes from meetings and the memorialization of pertinent telephone conversations,” and “[n]on-printed communications, not limited to e-mail, computer tapes, discs, and other electronic records, as well as microfilm and microfiche”).

99 For instance, after the EPA’s Clean Air Science Advisory Committee (CASAC) publicized the OMB’s changes to the committee’s research, Senator Barbara Boxer requested that the EPA provide her material showing the agency’s contacts with the OMB and representatives of the mining and agricultural industries. Janet Wilson, “EPA Panel Advises Agency Chief to Think Again,” Los Angeles Times, Feb. 4, 2006, https://www.latimes.com/archives/lax-xpm-2006-feb-04-me-eap4-story.html.

100 For examples of politically motivated manipulation of government research, and retaliation against government scientists for their research, see “Retaliation and Threatened Retaliation Against Career Experts” in the Appendix.


105 Ibid., 1 (citing the statutory and regulatory requirement of “the widest practicable and appropriate dissemination” of information concerning the agency’s activities and results).

106 5 U.S.C. app. § 4(a)(5) (inspectors general have the responsibility to “recommend corrective action”).

107 We believe that the term “government official” should be defined to include at least federal employees and contractors who, inter alia, engage in or manage scientific activities, analyze or publicly communicate information resulting from scientific activities, or use scientific information in policymaking. See Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

108 As a point of comparison, the recently introduced Scientific Integrity Act would prohibit “dishonesty, fraud, deceit, misrepresentation, coercive manipulation, or other scientific or research misconduct.” Ibid., § 4 (2019). See also Restore Scientific Integrity to Federal Research and Policymaking Act, H.R. 839, 109th Cong. § 3(a) (2005); S. 1358, 109th Cong. § 3(a) (2005).

109 As a reference point, the Scientific Integrity Act would prohibit suppression, alteration, interference, or otherwise impeding the timely release and communication of scientific or technical findings, as well as the implementation of institutional barriers to cooperation and the timely communication of scientific or technical findings. Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 3 (2019). See also Restore Scientific Integrity to Federal Research and Policymaking Act, H.R. 839, 109th Cong. (2005); S. 1358, 109th Cong. (2005).

110 Of note, the 2005 Restore Scientific Integrity bill would have prohibited this conduct. H.R. 839, 109th Cong. § 3(a) (2005); S. 1358, 109th Cong. § 3(a) (2005).

111 See ibid. See also Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019) (prohibiting the following conduct: intimidating or coercing an individual to alter or censor, or retaliate against an individual for failure to alter or censor, scientific or technical findings).

112 See 65 Fed. Reg. 76,262 (Dec. 6, 2000) (“A finding of research misconduct requires” that “[t]here be a significant departure from accepted practices of the relevant research community[,]”).

113 Ibid. The 2005 Restore Scientific Integrity bill would have required that the employee directing the dissemination of scientific information know that the information was false or misleading as a predicate for liability. Restore Scientific Integrity to Federal Research and Policymaking Act, H.R. 839, 109th Cong. § 3(a) (2005); S. 1358, 109th Cong. § 3(a) (2005).


121 See, e.g., 5 U.S.C. app. 2 §§ 1–16.

122 See examples under “Attacks on Science Advisory Committees” in the Appendix.


See examples under “Attacks on Science Advisory Committees” in the Appendix. See also Reed et al., Abandoning Science Advice, 8 (reporting that, as of 2018, total membership of science advisory committees at the Department of Commerce was down 13 percent from 2016).

132 Mark Hand, “Government Watchdog to Investigate Scott Pruitt’s Shakeup of EPA Advisory Boards,” ThinkProgress, Mar. 7, 2018, https://thinkprogress.org/gao-investigating-epa-advisory-boards-b615407c3644/ (“Normally, when candidates are nominated to serve on advisory committees, EPA’s career scientists and lawyers provide input to the administrator regarding which nominees have the right scientific expertise and which have conflicts (sic) of interests. And normally, the administrator follows the career staff’s recommendations. But under Pruitt, political appointees are playing key roles in selecting committee members.”). A recent report from the Government Accountability Office found that the EPA did not follow agency protocols to document staff input on advisory committee candidates and did not consistently ensure that committee members met federal ethics requirements. United States Government Accountability Office, EPA Advisory Committees: Improvements Needed for the Member Appointment Process, GAO-18-280 (Washington, D.C.: Government Accountability Office, 2019), https://www.gao.gov/assets/2019/07/document_gw_05.pdf. See examples under “Attacks on Science Advisory Committees” in the Appendix.

133 This is already the practice of some advisory committees. For instance, the EPA’s Science Advisory Board (SAB) publishes the criteria for selection of committee members. See United States Environmental Protection Agency, Reorganization of the EPA Science Advisory Board: A Report of the EPA Science Advisory Board Staff Office, EPA-SAB-04-001 (Washington, D.C.: Environmental Protection Agency, 2003), 7, 9, https://yosemite.epa.gov/sab/sabproduct.nsf/Web/ReorgSAB-$File/sab04001.pdf.

134 See, e.g., Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. § 2(b) (2019) (providing for a public nomination process, with public comment); Science for Policy Project, Improving the Use of Science (calling for greater transparency in the selection process); National Academies of Sciences, Engineering, and Medicine, Optimizing the Process for Establishing the Dietary Guidelines for Americans: The Selection Process (Washington, D.C.: National Academies Press, 2017), 67–80, available at https://www.nap.edu/read/24637/chapter/5 (discussing ways to increase transparency in advisory committee member nomination and selection process, including by allowing the public to comment on nominees). In the case of discretionary advisory committees, federal regulations require agencies to develop a membership balance plan that describes how the agency will attain fairly balanced membership. 41 C.F.R. § 102-3.60.

135 The EPA routinely seeks nominees from the National Academies of Sciences, Engineering, and Medicine as a matter of agency practice. See United States Environmental Protection Agency, Reorganization of the EPA Science Advisory Board, 7 (“The Committee [Designated Federal Officer] has responsibility for developing a list of candidates, based on recommendations from credible sources, such as . . . the National Academy of Sciences[.]”).

136 Congress has established similar requirements in some circumstances. See, e.g., Clean Air Act, 42 U.S.C. § 7409(d)(2) (requiring the EPA administrator to appoint “at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies” to CASAC); Occupational Safety and Health Act of 1970, 29 U.S.C. § 656(a)(1) (requiring the National Advisory Committee on Occupational Safety and Health to be composed of representatives of management, labor, occupational safety and occupational health professions, and the public, to be selected upon the basis of their experience and competence in the field of occupational safety and health).

137 The Environmental Research, Development, and Demonstration Act of 1983, S. 2577, 97th Cong. (1982); H.R. 6323, 97th Cong. (1982), would have required that the terms of board members be one to three years and be staggered so that the terms of no more than a third of the total membership of the board expires within a single fiscal year, and that each member of the board serve a full term unless such member were unable, for involuntary reason, to discharge board duties or had violated conflict of interest regulations.

138 See ibid. (requiring that, if a vacancy on the board were not filled by the administrator within 90 days, the nominating committee would appoint, within 60 days, a member to fill such vacancy from its list of recommended nominees). See also Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. § 3(b) (2019) (establishing process for filling vacancies occurring before scheduled solicitation for nominations by means of appointing a member from a list of individuals who were previously nominated for membership on the advisory committee); Agricultural Marketing Service, “Fruit and Vegetable Industry Advisory Committee (FVIAC): Notice of Intent to Renew Charter and Call for Nominations;” 82 Fed. Reg. 147 (Aug. 2, 2017) (“[T]he USDA is seeking nominations to fill future unexpected vacancies . . . . These nominations will be held as a pool of candidates that the Secretary of Agriculture can draw upon as replacement appointees if unexpected vacancies occur.”).


140 See, e.g., Sidney Shapiro, Closing the Door on Public Accountability, Center for Progressive Reform, 2009, http://www.progressive- reform.org/perspFACA.cfm (proposing disclosure of the historical affiliations of advisory committee members and sources of funding); National Academies of Sciences, Engineering, and Medicine, Establishing the Dietary Guidelines, B3 (advocating for policy to address biases and conflicts of interest); Berman and Carter, “Policy Analysis: Scientific Integrity” (calling for requiring both voting and nonvoting advisory committee members to provide complete information on affiliations and conflicts of interest); Daniel Schuman, “Is It Time to Revisit the Federal Advisory Committee Act?” Sunlight Foundation, Sept. 23, 2009, https://sunlightfoundation.com/2009/09/23/revisiting-it-faca/ (proposing that all members of federal advisory committees file financial disclosure reports and conflict of interest forms and that there be regular audits).


There is substantial support among legislators and experts for improved transparency around recusal agreements and conflict of interest waivers for advisory committee members. See Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. § 4(a) (2019) (requiring disclosure of recusal agreements). See also Shapiro, Closing the Door (advocating public disclosure of “the existence of a waiver and to explain the nature of the conflict of interest and the grounds for the waiver” at the time the waiver is made); Science for Policy Project, Improving the Use of Science (calling for greater clarity in defining conflicts of interest and public disclosure of waivers).

142 See Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. §§ 4(a)–(b) (2019) (requiring advisory committee charters to contain the estimated number and frequency of meetings and requiring charters, notices of future meetings, and meeting minutes to be published on agency websites).

143 5 U.S.C. app. § 10(a)(2).


145 For instance, in 2001, the Bush administration asked the National Academy of Sciences to review the findings of the Inter-governmental Panel on Climate Change (IPCC) and provide further assessment of climate science. The National Academy of Sciences’ panel affirmed the IPCC’s conclusions. National Research Council, Climate Change Science: An Analysis of Some Key Questions (Washington, D.C.: National Academies Press, 2001), available at https://www.nap.edu/read/10139/chapter/.

146 See Exec. Order No. 12,838, 3 C.F.R. 590 (1993) (requiring that reasons be provided for the termination of advisory committees). Under FACA, the General Services Administration (GSA) is charged with performing an annual review to determine, among other things, whether advisory committees should be abolished. 5 U.S.C. app. § 7(b)(4).

147 See Examining the Federal Advisory Committee Act (statement of Sidney A. Shapiro, on behalf of the Center for Progressive Reform); Science for Policy Project, Improving the Use of Science; National Academies of Sciences, Engineering, and Medicine, Establishing the Dietary Guidelines; Protecting Science, Climate Science Legal Defense Fund et al.


See examples under “Restriction of Public Access to Government Research and Data” in the Appendix.


Ibid. (“In more than one-in-three cases, the government reversed itself when challenged and acknowledged that it had improperly tried to withhold pages. But people filed such appeals only 14,713 times, or about 4.3 percent of cases in which the government said it found records but held back some or all of the material.”).

See, e.g., 51 U.S.C. § 20112(a)(3) (providing for “the widest practicable and appropriate dissemination of information concerning [NASA’s] activities and the results thereof”). In 2015, Congress enacted legislation requiring the secretary of defense to “promote, monitor, and evaluate programs for the communication and exchange of research, development, and technological data,” “through development and distribution of clear technical communications to the public, . . . and civilian . . . decision-makers that convey successes of research and engineering activities supported by the Department and the contributions of such activities to support national needs.” National Defense Authorization Act of Fiscal Year 2016, Pub L. 114-92, 129 Stat. 726, 768 (2015).

At Congress’s behest, the Obama administration issued a directive requiring federal agencies to create public-access plans to proactively make available government-generated scientific data and peer-reviewed, published research, including outside data and research funded by government grants. America Competes Reauthorization Act of 2010, Pub. L. No. 111-358, § 103(a), 124 Stat. 3982, 3986–88 (2010). The Public Access Memo clarifies that the push for disclosure does not extend to laboratory notebooks, preliminary analyses, drafts of scientific papers, plans for future research, peer review reports, or communications with colleagues. John Holdren, “Increasing Access to the Results.”

This proposal is different from the “transparent science” rule announced at the EPA, “Strengthening Transparency in Regulatory Science,” 83 Fed. Reg. 18,768 (Apr. 30, 2018). Our proposal seeks to standardize and modernize the longstanding practice of making completed, peer-reviewed government-funded research and data available to the public. For more information about the “transparent science” rule, see Proposal 1.


For a definition of “data,” see Save America’s Science Act, H.R. 1232, 115th Cong. § 2 (2017).

For a workable scope of research to be proactively disclosed, see FASTR Act, H.R. 3427, 115th Cong. § 4(d) (2017); S. 1701, 115th Cong. § 4(d) (2017).

Of relevance, under the Bayh-Dole Act (the Patent and Trademark Law Amendments Act.), 35 U.S.C. §§ 200–212 (1980), small businesses and nonprofit organizations may elect to retain ownership of the inventions made under federally funded research and contract programs, while also giving the government the license to practice the subject invention. In turn, the organizations are expected to file for patent protection and to ensure commercialization upon licensing for the benefit of public health.


The Public Access Memo indicates that national, homeland, and economic security are legitimate grounds for withholding government research and data. Public Access Memo 3. The National Technical Information Service is required to “respect and preserve the confidentiality of any scientific or technical information, data, patents, inventions, or discoveries in, or coming into, the possession or control of the Department of Commerce, the classified status of which the President or his designee or designees certify as being essential in the interest of national defense[.] . . . . 15 U.S.C. § 1151.

See Paperwork Reduction Act, 44 U.S.C. § 3506(d)(3) (1980) (requiring agencies to “provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products”). See also Lamdan, “Lessons from DataRescue,” 244 (“A statutory solution . . . would be to include explicit language regulations . . . that specify what information must be made available.”).
requiring continued access to and online archives for electronic government records.”).

170 See 44 U.S.C. § 3303a (requiring the archivist to publish notice in the Federal Register before disposing of federal records).

171 A useful model is the Federal Records Act, pursuant to which agency heads and the archivist can initiate actions through the attorney general for recovery or other redress. Federal Records Act, 44 U.S.C. § 3106 (1950). The Save America’s Science Act contains the same mechanism for recovery of removed data. H.R. 1232, 115th Cong. § (2) (2017). The FASTR Act does not have an enforcement mechanism, but agencies are required to submit reports to Congress with information about the effectiveness of their public access plans. H.R. 3427, 115th Cong. § (4)(f) (2017); S. 1701, 115th Cong. § (4)(f) (2017).

172 See Public Online Information Act of 2017, S. 621, 115th Cong. § 7(e)(2) (2017). See also Lamdan, “Lessons from DataRescue,” 246–47 (advocating to provide citizens with a cause of action when the government obstructs online access to government records or destroys online materials without creating an accessible historical archive).


175 The term “nonpolitical expert regulatory analysis” refers to all factual information and data, not limited to technical information, sampling results, survey information, and engineering reports or studies, used to support an agency’s regulatory actions. See Alternative Facts, Public Employees for Environmental Responsibility (linking to suggested statutory clarification, “Antidote to Alternatives Facts Act”); Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

176 See Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, “The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy,” Wake Forest Law Review 47 (2012): 472 (discussing the belief that “[m]odern regulatory statutes can provide no more than the skeleton, and must leave to administrative bodies the addition of flesh and blood necessary for a living body”).


179 5 U.S.C. § 553(c).

180 Ibid.

181 Ibid.

182 See, e.g., Ben Penn, “Worker Attorneys Plot Lawsuit to Block Trump Tip Pool Rule,” Bloomberg BNA, Jan. 26, 2018, https://news.bloomberglaw.com/daily-labor-report/worker-attorneys-plot-law-suit-to-block-trump-tip-pool-rule (“Several worker rights’ groups are analyzing whether the new proposed rule’s absence of a quantitative economic analysis may run afoul of the [Administrative Procedure Act] . . . if the final version of the rule does in fact include the full analysis[,] . . . That’s because this might prove the DOL was capable of running a similar analysis in the proposed rule, but chose not to, rendering the entire process ‘arbitrary and capricious.’”).


184 See examples under “Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis Underlying Regulatory Actions” in the Appendix.

185 See the example about the “waters of the United States” (WOTUS) rule under “Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis Underlying Regulatory Actions” in the Appendix.

186 See the example about the USDA’s Food Safety and Inspection Service (FSIS) under “Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis Underlying Regulatory Actions” in the Appendix.

187 Under the Administrative Procedure Act, courts review the administrative record to ensure that agency regulations are not arbitrary and capricious. 5 U.S.C. § 706(2)(A). If agency officials manipulated or suppressed underlying scientific analysis of regulations, however, it would be difficult for reviewing courts to properly determine whether the agency’s action was arbitrary and capricious.

188 By “substantive alterations,” we mean changes to the principal conclusions reached in the regulatory analysis or the methodology used to reach those conclusions, including the discounting of scientific studies relied upon in the analysis. It is not intended to include changes concerning typographical errors, or changes that do not alter data or conclusions reached in the underlying analysis.

189 To the extent that presidents’ administrations might assert executive privilege to shield political decision-making from exposure, law professor Nina Mendelson argues that communications from OIRA to agencies would not likely qualify as a privileged “presidential communication” because it is not a communication to or by the president or a communication made for the purpose of assisting a direct decision made by the president. Nina A. Mendelson, “Disclosing ‘Political’ Oversight of Agency Decision Making,” Michigan Law Review 108 (2010): 1170 n. 210. We find this analysis persuasive. Cf., e.g., Center for Biological Diversity v. Norton, 336 F. Supp. 2d 1155, 1161 (D.N.M. 2004) (upholding determination that deliberative process privilege shields details of agency scientific recommendations from disclosure in litigation).

190 For instance, the Clean Air Act requires the EPA to disclose the factual data on which proposed rules are based, as well as the methodology used in obtaining and analyzing the data. 42 U.S.C. § 7607(d)(3)(A)–(B). Similarly, pursuant to statute, if the secretary of HHS receives a recommendation from the department’s Advisory Commission on Childhood Vaccines, the secretary must either conduct a rulemaking in accordance with the recommendation or publish a “statement of reasons” for refusing to do so in the Federal Register. 42 U.S.C. § 300aa-14(c)(2). Moreover, the secretary may not propose a regulation without giving the commission an opportunity to provide recommendations and comments. Ibid., § 300aa–14(d).

191 For instance, the 2017 version of the Scientific Integrity Act would have required that each federal agency make publicly available scientific or technological findings that are considered or relied upon in policy decisions and regulatory proposals. Scientific Integrity Act, H.R. 1358, 115th Cong. § 6(a) (2017); Scientific Integrity Act, S. 338, 115th Cong. § 6(a) (2017). The Anti-Corruption and Public Integrity Act would require agencies to disclose changes to draft rules made by the OMB and, in the event that rules are withdrawn after they are submitted to the OMB, to publish the reasons for the withdrawal. Anti-Corruption and Public Integrity Act, S. 3387, 115th Cong. § 9.
192 See Administrative Conference Recommendation 2013-3: Science in the Administrative Process, Administrative Conference of the United States, 2013, available at https://www.acus.gov/sites/default/files/documents/Science%20Recommendation%20AP-PROVED-FINAL_1.pdf; Mendelson, “Disclosing ‘Political’ Oversight,” 1164 (proposing to require agencies to summarize the content of regulatory review in issuing rulemaking documents); Science for Policy Project. Improving the Use of Science (“[t]raining studies relevant to regulatory policy,…[agencies] should make their methods for filtering and evaluating those studies more transparent.”); Holly Doremus, “A Challenge for the Obama Team: Put Science and Federal Scientists to Better Use,” Ecology Law Currents 136 (2009): 157 (calling for disclosure of unvarnished recommendations of agency scientists that feed into policy decisions); Sidney A. Shapiro, “‘Political’ Science: Regulatory Science After the Bush Administration,” Duke Journal of Constitutional Law and Public Policy 4 (2009): 42 (calling for publication of scientific documents without edits or alterations by agency officials); Wendy Wagner and Rena Steinzor, eds., Rescuing Science of the Environment (Durham: Duke University Press, 2009). (calling for mandatory disclosures of health and safety information used to formulate public policy.”); Alternative Facts, Public Employees for Environmental Responsibility (linking to suggested statutory clarification, “Antidote to Alternatives Facts Act,” which would require administrative record to include “all factual information and data, not limited to technical information, sampling results, survey information, engineering reports or studies” and “[d]raft documents that were circulated for comment either outside the agency or outside the author’s immediate office, if changes in these documents reflect significant input into the decision-making process”).

193 Congress recognizes the importance of this power and has historically deferred to the president’s judgment on important appointments, particularly at the cabinet level. In fact, only eight nominees for cabinet positions have ever been rejected. Michael J. Gerhardt, “Norm Theory and the Future of the Federal Appointments Process,” Duke Law Journal 50 (2001): 1690–91.


195 “[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the President may by Law vest the Appointment of such inferior Officers, as he thinks proper, in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2.

196 The Federalist No. 76 (Alexander Hamilton).


200 See Harvard Law Review Association, “Public Employment,” 1626 (discussing the civil service reform movement as a “moral crusade” that perceived an “inherent evil” in the spoils system).

201 Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883). For a discussion of the historical context in which the Pendleton Act was implemented, see Gerhardt, The Federal Appointments Process, 275–77 (explaining that the perception of corruption and cronyism under President Grant, followed by a major cronyism scandal in New York and the assassination of President Garfield, led to the successful passage of civil service reform nationally).


210 This number has increased over time as PAS positions are added. “When President Kennedy entered office, he had 850 Senate-confirmed positions to fill. That number had increased to 1143 by the time President George W. Bush took office, and by the

211 See Carey, Presidential Appointments, 10–11.


213 Congress, in passing the 1868 Vacancies Act, sought to balance the need for “breathing room in the constitutional system for appointing officials to vacant positions” while recognizing that there are “political and legal consequences of staffing high positions with non-appointed ‘acting’ officials.” Doolin, 139 F.3d at 211.


215 See NLRB v. Sw. Gen., Inc., 137 S. Ct. 929, 936 (2017); Committee on Governmental Affairs, U.S. Senate, Report Together with Additional and Minority Views to Accompany S. 2176, S. Rep. No. 105-250, at 3 (1998). Several statutes governing the president’s ability to appoint acting officials preceded the FVRA. Its immediate predecessor, the Vacancies Act of 1868, had created a default rule that the “first assistant” perform the functions of a vacant office but allowed the president to appoint another PAS official to the vacancy. Act of July 23, 1868, ch. 227, 15 Stat. 168. The Vacancies Act authorized only 10 days of service by an acting official, though it was later lengthened to 30 days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733.


220 Ibid.


224 Philip Shenon, “Interim Heads Increasingly Run Federal Agencies,” New York Times, Oct. 15, 2007, https://www.nytimes.com/2007/10/15/washington/15interim.html (“While exact com- parisons are difficult to come by, researchers say the vacancy rate for senior jobs in the executive branch is far higher at the end of the Bush administration than it was at the same point in the terms of Mr. Bush’s recent predecessors in the White House.”).

225 Ibid.


231 From 2009 to 2013, during the Obama administration, the Congressional Research Service reported there were 82 clture motions on nominations. Prior to 2009, there had only been 86 clture motions ever filed on nominations. The number of clture motions filed by senators is one way to approximate the number of times the Senate needed to vote to break a filibuster on a nominee. Richard S. Beth and Elizabeth Rybicki, “Nominations with Clture Motions, 2009 to the Present,” Congressional Distribution Memorandum, Nov. 21, 2013 (Washington, D.C.: Congressional Research Service), https://www.documentcloud.org/documents/838702-crs-filibuster-report.html. In total, nearly one-third of President Obama’s nominations were returned or withdrawn. For those nominations that were confirmed, the process took four months under President Obama compared to two months under President Reagan. Anne Joseph O’Connell, “Acting Leaders: Recent Practices, Consequences, and Reforms,” Brookings Institution, July 22, 2019, https://www.brookings.edu/research/act-ing-leaders/.

232 See Proposal 8.

233 See Proposal 7.


time to nominate a permanent replacement by increasing the length of an acting appointment to 210 days.

249 The default rule under the FVRA is that the first assistant, typically the deputy to the vacant office, serves as the acting official. “First assistant” is a term of art but not defined in the FVRA. Some statutes specifically identify a position as a first assistant, but some do not. Ibid., 9–10.

250 The text of the FVRA limits the president to one of three classes of individuals to fill vacant PAS positions, when not superseded by another statute: (1) the first assistant to the vacant office, (2) another Senate-confirmed official in the executive branch, or (3) a senior official who has been serving in the same agency as the vacant office for at least 90 of the previous 365 days. 5 U.S.C. § 3345(a).


253 To cite a few examples of President Trump’s acting officials continuing to perform the duties of vacant offices beyond the 210-day time limit imposed by the FVRA: the former acting assistant secretary for energy efficiency and renewable energy at the Department of Energy continued leading the office as the principal deputy assistant secretary after reaching the statutory time limit — his title modified, but his role unchanged; the former acting director of the Office of Nuclear Energy led the office as the principal deputy assistant secretary; and at the Advanced Research Projects Agency-Energy, the former acting director led the office as its deputy director. Dayen, “Trump’s Acting Directors.”


256 Though several organizations and civil rights groups have argued that Cuccinelli’s appointment is unlawful, the Department of Homeland Security and the White House have said the appointment is consistent with the FVRA. Letter from Democracy Fund Foundation, et al. to Attorney General William Barr. July 22, 2019, available at https://democracyforward.org/wp-content/uploads/2019/07/Cuccinelli-Letter-final-to-send.pdf.


240 Steven Dillingham was not confirmed to lead the Census Bureau until January 2, 2019, only one year before the start of the national head count and after significant decisions pertaining to it were made. Tara Bahnamour, “Senate Confirms New Census Bureau Director as 2020 Survey Approaches,” Washington Post. Jan. 3, 2019. https://www.washingtonpost.com/local/social-issues/ senate-confirms-new-census-bureau-director-as-2020-survey-approaches/2019/01/03/559992d2-0fa0-11e9-831f-3aa2c2be4cb.html.


244 Kamarck, “Federal Vacancies.”


246 Though the Senate is constitutionally required to provide advice and consent for some officers, Congress may delegate appointment authority for “inferior officers” to the president or agency head. The majority of current PAS positions are comprised of “inferior officers.” It is generally recognized that the distinction between “principal” and “inferior” officers rests on whether the officer has a superior other than the president. See U.S. Const., art. II, § 2, cl. 2; Morrison v. Olson, 487 U.S. 654, 669–77 (1988); Edmond v. U.S., 520 U.S. 651, 663 (1997). (“We think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”).


248 5 U.S.C. § 3345 et seq. The FVRA was intended to resolve differences between Congress and certain executive departments in the interpretation of the 1868 Vacancies Act. Committee on Government Affairs, U.S. Senate, Report to Accompany S. 2176 to Amend Sections 3345 Through 3349 of Title 5, United States Code (Commonly Referred to as the “Vacancies Act”) to Clarify Statutory Requirements Relating to Vacancies in Certain Federal Offices, and for Other Purposes, S. Rep. 105-250, at 4 (1998) (“The selection of officers is not a presidential power. The President may choose whom he wishes to nominate, but the Senate has the power to advise and consent before those nominees may assume office.”). See Patrick Hein, “In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights,” California Law Review 96 (2008): 272 (“The Reform Act sought to ‘bring[] to an end a quarter-century of obfuscation, bureaucratic intransigence, and outright circumvention’ through three primary amendments. First, the Reform Act was intended to prevent another seemingly illegal appointment like [Bill Lann] Lee’s by stating explicitly that the Vacancies Act is the exclusive statutory means for temporarily filling vacant office and consent positions in the executive branch, unless Congress explicitly legislates otherwise. Second, the Reform Act broadened the Vacancies Act’s applicability by creating a third category of individuals who may serve in an acting capacity. Finally, the Reform Act provided the President with more


The earlier departure of former Secretary of Veterans Affairs (VA) David Shulkin serves as another example, where Trump designated Robert Wilkie, a PAS official from the Department of Defense, to serve as the acting secretary of the VA after ostensibly firing Shulkin. See Vladeck, “Federal Vacancies Recusal Act and the VA.”


Others argued that the DOJ’s own succession statute — specifying that the deputy attorney general “may exercise all the duties” of the attorney general upon a vacancy in that office — superseded the FVRA. 28 U.S.C. § 508. See John Bies, “Matthew Whitaker’s Appointment as Acting Attorney General: Three Lingering Questions,” Lawfare, Nov. 8, 2018, https://www.lawfareblog.com/matthew-whitakers-appointment-acting-attorney-general-three-lingering-questions (considering whether the FVRA supplants DOJ’s own succession statute).

263 See, e.g., letter from Thomas H. Armstrong, general counsel, Government Accountability Office, to Donald Trump, President (May 9, 2018), available at https://www.gao.gov/assets/700/692014.pdf (informing the president that the acting general counsel of the air force had served beyond the statutory 300-day limit); Letter from Susan A. Poling, general counsel, Government Accountability Office, to Barack Obama, President (Mar. 30, 2015), available at https://www.gao.gov/assets/670/669447.pdf (informing the president that the acting inspector general of the Department of Veterans Affairs had served beyond the statutory 210-day limit).

264 See, e.g., Doolin, 139 F.3d 203 (D.C. Cir. 1998); Sw. Gen., Inc. v. NRLB, 796 F.3d 67 (D.C. Cir. 2015).


266 Given the unique role of inspectors general, we think Congress should include separate provisions that dictate who may serve as an acting inspector general. See, e.g., Michael Stratford, “Trump Backtracks on Replacement of Education Department Watchdog,” Politico, Feb. 1, 2019, https://www.politico.com/story/2019/02/01/elizabeth-warren-education-betsy-devos-1138082 (White House reversing appointment of Education Department’s deputy general counsel as acting inspector general amidst protests that appointment threatened office’s independence from department leadership); Miranda Green, “Trump Appoints Social Security Administration Watchdog to Also Oversee Interior,” The Hill, June 1, 2019, https://thehill.com/policy/energy-environment/447713-trump-appoints-social-security-administration-watchdog-to-also (appointment of Social Security Administration inspector general as acting inspector general of Department of the Interior, pending confirmation of permanent inspector general at department).

267 Though we do not advocate for a specific length of prior federal service, one option is the FVRA’s current tenure requirement for senior officials who may serve as acting officers; prior service within the agency for at least 90 of the previous 365 days. 5 U.S.C. § 3345(a).

268 Professor Stephen I. Vladeck has argued for a similar approach. Instead of allowing for a president to choose between the first assistant, any PAS official in the executive branch, or another senior non-PAS official in the same agency, he argues: “Congress should require the president first choose the ‘first assistant;’ then, if that office is also vacant, any Senate-confirmed officer in the same agency; then . . . a non-Senate-confirmed senior official only if no Senate-confirmed officers from that office remain; and finally . . . a Senate-confirmed officer from a different agency only if no qualifying senior officials from the same agency remain. Steve Vladeck, “Trump Is Abusing His Authority to Name Acting Secretaries: Here’s How Congress Can Stop Him,” Slate, Apr. 9, 2019, https://slate.com/news-and-politics/2019/04/trump-acting-secretaries-dhs-fvra-tenure-reform.html.

269 The default rule under the FVRA is that the first assistant, typically the deputy to the vacant office, serves as the acting official. Some statutes specifically identify a position as a first assistant, but some do not. Committee on Governmental Affairs, Report to Accompany S. 2176, 12. To avoid debate, Congress could specifically identify the first assistant to any PAS position where it is not already identified in the relevant statute or regulation.

270 Again, we do not advocate for a specific length of prior federal service, but one option is the FVRA’s current tenure requirement for senior officials who may serve as acting officers; prior service within the agency for at least 90 of the previous 365 days. 5 U.S.C. § 3345(a).

271 The senior career official should satisfy the same tenure and pay requirements required by the FVRA. 5 U.S.C. § 3345(a)(3) (The president may designate a senior official to perform the duties of a vacant office within their agency if the senior official (1) has served in the agency for at least 90 of the last 365 days, and (2) receives a rate of pay at GS-15 of the General Schedule or above.).


276 For instance, the SF 86 and the Senate questionnaires ask differently worded questions about the nominee’s criminal conviction history. Some questionnaires require the nominee to provide information about any criminal conviction, whereas the SF 86 asks particular questions about different types of offenses and covers a different timeframe. Working Group on Streamlining Paperwork for Executive Nominations, Report to the President and the Chairs and Ranking Members of the Senate Committee on Homeland Security & Government Affairs and the Senate Committee on Rules & Administration (Washington, D.C.: Executive Office of the President, 2012), 18–22, 29–33, available at https://www2.oge.gov/Web/OGE/nfl?/02CE8939COF0ED8A828A5257AEA600655818/$FILE/243f-5cad63461f6bb89728a57e65955213.pdf.


278 However, there are reports of President Trump nominating individuals prior to the completion of their background investigation. See Ed O’Keefe and Sean Sullivan, “Ethics Officials Warn Against Confirmations Before Reviews Are Complete,” Washington Post, Jan. 7, 2017, https://www.washingtonpost.com/politics/ethics-officials-warn-against-confirmations-before-reviews-are-complete/2017/01/07/e85a9f73e-d348-11e6-9cb0-54ab630851e8_story.html.

279 Working Group on Streamlining Paperwork for Executive Nominations, Streamlining the Process, 1.

280 Ibid, 14.


284 The Constitution’s Appointments Clause provides Congress with the power to vest the appointment of “inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.” U.S. Const. art. II, § 2, cl. 2.


286 In November 2012, the Working Group on Streamlining Paperwork for Executive Nominations reported that a standard questionnaire had already been adopted by several Senate committees, including the Homeland Security and Government Affairs Committee; the Rules Committee; the Health, Education, Labor, and Pensions Committee; and the Committee on Veterans’ Affairs. Working Group on Streamlining Paperwork for Executive Nominations, Streamlining the Process, 2. See also Working Group on Streamlining Paperwork for Executive Nominations, Report to Senate Committee on Homeland Security, 2.

287 A select group of senior positions, including members of the cabinet, are typically subject to an investigation more intensive than the “full field” investigation. Working Group on Streamlining Paperwork for Executive Nominations, Streamlining the Process, 5–6.

288 The requirement was removed from positions that generally fell into four categories: (1) legislative and public affairs positions; (2) internal management positions (e.g., chief financial officers and chief information officers); (3) officials who reported to another PAS official; and (4) members of part-time boards and commissions that play advisory roles. S. Rep. No. 112-24, at 6–7. For the full list of positions no longer requiring Senate confirmation, see Carey, Presidential Appointments, 19.

289 Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012). The bill garnered bipartisan support in the Senate and was cosponsored by senators of both parties: Senators Lamar Alexander (R-TN), Harry Reid (D-NV), Mitch McConnell (R-KY), Joe Lieberman (D-CT), Susan Collins (R-ME), Scott Brown (R-MA), Jeff Bingaman (D-NM), Richard Blumenthal (D-CT), Dick Durbin (D-IL), Mike Johanns (R-NE), Dick Lugar (R-IN), Jack Reed (D-RI), Sheldon Whitehouse (D-RI), Tom Carper (D-DE), Jon Kyl (R-AZ), Michael Bennet (D-CO), and Patty Murray (D-WA).


291 See, e.g., Fulbright Foreign Scholarship Board, 22 U.S.C. §
As the Senate Homeland Security and Government Affairs Committee reported in 2011, reducing the number of positions subject to Senate confirmation would allow the Senate to more responsibly and effectively exercise its advice and consent powers. S. Rep. No. 112-24, at 7–8.


Ibid., 16.

Ibid., 5.

Ibid., 33.

Working Group, Streamlining the Process. Nonpartisan organizations have also recommended establishing a tiered system. See, e.g., Felzenberg, “Fixing the Appointment Process.”

William A. Galston and E. J. Dionne Jr., A Half-Empty Government Can’t Govern: Why Everyone Wants to Fix the Appointments Process, Why It Never Happens, and How We Can Get It Done. Brookings Institution, 2010, 5, available at https://www.brookings.edu/wp-content/uploads/2016/06/1214_appointments_galston_dionne.pdf (“We . . . suggest a tiered-system of background checks, with the most stringent reserved only for top-level positions.”); Eliminating the Bottlenecks: Streamlining the Nominations Process: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs, 112th Cong. 101 (2011) (statement of Norman J. Ornstein, resident scholar, American Enterprise Institute) (“There is simply no need for . . . full background checks for many non-security and non-major posts; a sliding scale from full investigations for key posts down to simple computer background checks for more minor posts would suf- fice.”); Partnership for Public Service and Boston Consulting Group, Presidential Transition Guide, Third Edition, 2018, 230, available at https://ourpublicservice.org/wp-content/uploads/2018/03/Presidential-Transition-Guide-2018.pdf (“[A] new executive order could be issued to adopt a tiered clearance process based on the type of position to which an individual has been nominated and whether an individual has previously been cleared. Those appointed to non-sensitive positions and those with previous clearances, or who are moving between government posts, could qualify for more streamlined background checks. This change would reduce the time required to fill vacancies and save time and resources for the FBI.”).

There is at least one precedent for conducting more limited background investigations for certain types of positions. In the final year of the Obama administration, the Presidential Personnel Office began requesting more limited investigations for nominees to part-time positions that did not require a security clearance and did not have national-security-related responsibilities. We do not have evidence of this practice continuing during the Trump administration.


The Federal Anti-Nepotism Statute. Upholding the statute against a...


The legislative history of the anti-nepotism statute clarifies that it would extend to "all persons, including the President, Vice President, and Members of Congress, having authority to make appointments of civilian officers or employees in the Federal service." The Federal Anti-Nepotism Statute. Upholding the statute against a constitutional challenge, a federal court explained that the breadth of the language explicitly applying to the president, members of Congress, and the judiciary — was not a vulnerability because it applies to only "specified kinship relationships." Lee v. Blount, 345 F. Supp. 585, 588 (N.D. Cal. 1972).


Robert B. Shanks, deputy assistant attorney general, Office of Legal Counsel, “Appointment of Member of President’s Family to Presidential Advisory Committee on Private Sector Initiatives” (official memorandum, Washington, D.C.: Department of Justice, 1983).


Association of American Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 904–05 (D.C. Cir. 1993) (“We see no reason why a President could not use his or her spouse to carry out a task that the President might delegate to one of his White House aides. It is reason-able, therefore, to construe [the statute in question] as treating the presidential spouse as a de facto officer or employee.”). See also In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997) (assuming for the sake of decision that the first lady enjoyed official status as a representative of the White House).


Reports indicate that President Trump’s son-in-law, Jared Kushner, has been assigned or taken on responsibility for solving the opioid crisis, bringing peace to the Middle East, reforming the criminal justice system, managing diplomatic relations with key countries (including Saudi Arabia, Mexico, and China), improving the government’s use of data and technology, and reforming veterans’ care. He previously ran his family’s real estate company, cofounded an online investment platform, and purchased a media publishing company. “Jared Kushner: The Son-in-Law with Donald Trump’s Ear,” BBO, Oct. 10, 2018, https://www.bbc.com/news/world-us-canada-37986429.


Blake, “Donald Trump’s ‘First Attempt.’”


Robert B. Shanks, deputy assistant attorney general, Office of Legal Counsel, “Appointment of Member of President’s Family to Presidential Advisory Committee on Private Sector Initiatives” (official memorandum, Washington, D.C.: Department of Justice, 1983).
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45 C.F.R. § 73.735–904. See Ex parte Curtis, 106 U.S. 371, 373 (1882) (“The evident purpose of Congress in all this class of enactments [regarding conduct of executive branch employees] has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end.”); United Public Workers of America v. Mitchell, 330 U.S. 75, 99 (1947) (“Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection. . . . To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system.”)

337 A useful frame put forth by the White House Transition Project (based on the National Commission to Reform the Federal Appointments Process) is that of the “critical position” — one which is required to maintain national security and important government functions. Critical positions include “all the leadership in government agencies,” to include national security, economic management, critical management positions, and positions that are key to the management agenda. “Appointments,” White House Transition Project.


341 See, e.g., Inspector General Act of 1978, 5 U.S.C. app. § 3(a) (1978) (“There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability . . . .”); 42 U.S.C. § 2000e-4(a) (2012) (mandating that the EEOC “be composed of five members, not more than three of whom shall be members of the same political party”); Brian D. Feinstein and Daniel J. Hemel, “Parisan Balance with Bite,” Columbia Law Review 118 (2018): 31 n. 83 (listing agencies with partisan balance requirements).


343 10 U.S.C. § 113(a).


In the previous three years, there was only one incident of similar overruling of security clearance determinations. Zack Ford and Ryan Koronowski, “Ex-White House Staffers Say Trump’s Decision to Overrule Security Clearance Denials Is Unprecedented,” ThinkProgress, Apr. 4, 2019, https://thinkprogress.org/white-house-decision-overrule-so-many-security-clearances-unprecedented-8a454fe059bc7/.


350 Ibid.

351 Sciutto et al., “Dozens of Trump Officials.”


353 Strickler et al., “Officials Rejected Jared Kushner.”

354 Ibid.

355 In Department of the Navy v. Egan, the Supreme Court stated in dicta that “[t]he president’s] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant.” 484 U.S. 518, 527 (1988) (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 890 (1961)). The Court further explained that the government has a compelling interest in withholding national security information from unauthorized persons and that “[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.” Ibid.


tor capacity).


50 U.S.C. § 3161(a). Except as permitted by the president, no employee can be given access to classified information unless a back-
ground investigation determines that access is consistent with na-
tional security. The procedures must establish uniform requirements regarding the scope and frequency of background investigations. Employees must allow an authorized investigative agency access to their relevant financial records, consumer reports, travel records, and computers used in government duties as a condition of access to classified information. Employees who require access to “particularly sensitive classified information,” as determined by the president, must permit access to information about their financial condition and foreign travel. And there must be uniform standards that provide reasons for denying or terminating a clearance and that give the employee an opportunity to respond before final action occurs. Ibid. The statute permits agencies to act through procedures that are inconsistent with the statutory standards “pursuant to other law or [e]xecutive order to deny or terminate access to classified in-
f ormation,” but only if the agency head determines that the statutory standards cannot be followed “in a manner that is consistent with the national security.” Ibid., § 3161(b).


Ibid., 2.

Kelly’s memorandum directed other senior staff to “carefully consider[] and implement[] as appropriate” the discontinuation of long-term interim clearances that had been pending for approximately eight months or more. Ibid., 4.


See, e.g., Counterintelligence and Security Enhancement Act of 1994, 50 U.S.C. § 3161(a) (directing the president to establish procedures governing access to classified material and requiring certain minimum due process standards); 1964 Amendments to the Internal Security Act of 1950, 50 U.S.C. § 831–835 (directing the secretary of defense to prescribe regulations regarding access to classification for NSA employees); Bond Amendment, 50 U.S.C. § 3343(c)(1) (prohibiting heads of agencies from granting security clearances for access to certain categories of information if the employee meets certain disqualifying criteria); Intelligence and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 3001, 118 Stat. 3638 (directing the president to select a single entity to oversee security clearance investigations and develop uniform policies); Securely Expediting Clearances Through Reporting Transparency (SECRET) Act of 2018, Pub. L. No. 115-173 (requiring submission of reports to Congress about backlog of security clearance investigations and process for security clearance investigations for personnel in the Executive Office of the President and the White House Office and recommendations to improve government-wide continuous evaluation programs, classified information requests, and process for investigating security clearances).

See Peter M. Shane, Madison’s Nightmare: How Executive Power Threatens American Democracy (Chicago: University of Chicago Press, 2009); 1–21.

The Federalist No. 51 (James Madison) (envisioning the three branches of government as “keeping each other in their proper places,” which is “essential to the preservation of liberty”).

The Federalist No. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”).


1 Annals of Cong. 1515 (1790) (Joseph Gales ed., 1834) (quoting Representative James Madison of Virginia on the House’s first referral to a select committee).

The Broken Branch.


See Ornstein and Mann, “The Broken Branch.”


See Ornstein and Mann, “The Broken Branch.”


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employment, workplace safety, and whistleblower laws from which Congress cannot be used to circumvent Congress; and presidents should be allowed to continue for more than five years; the statutory authorities invoked under a declared emergency must relate to the nature of, and may be used only to address, that emergency; emergency powers set forth in Presidential Emergency Action Documents); a connection between the nature of the emergency and the powers invoked, a prohibition on indefinite emergencies, and limitation of powers set forth in Presidential Emergency Action Documents). A hearing on the National Emergencies Act of 1976, Before the House Committee on the Judiciary, Subcommittee on the Constitution, 116th Cong. (2019) (testimony of Elizabeth Goitein, codirector, Liberty & National Security Policy Program, Brennan Center for Justice at New York University School of Law) (proposing that Congress specify that: the president may declare a national emergency only if there exists a significant change in factual circumstances that poses an imminent threat to public health, public safety, or other similarly pressing national interests; an emergency declared by the president should end after 30 days unless Congress votes to continue it; no state of emergency should be allowed to continue for more than five years; the statutory authorities invoked under a declared emergency must relate to the nature of, and may be used only to address, that emergency; emergency powers cannot be used to circumvent Congress; and presidents should be required to publicly detail expenses incurred, as well as activities and programs implemented).

393 Under the Article One Act, if a president declared a national emergency, Congress would be required to vote to approve it within 30 days, or it would automatically expire. Renewing an emergency declaration would also require congressional approval for every subsequent year. Lau, “Progress Toward Reforming.”


398 In 1946, Congress passed the Legislative Reorganization Act with large bipartisan majorities in both chambers. Ch. 753, 60 Stat. 812. This law reduced the number of standing committees and clarified their jurisdictions, upgraded staff support, strengthened congressional oversight of executive agencies, and required lobbyists to register with Congress and to file periodic reports of their activities. Ibid. In the 1960s and 1970s, members of Congress worked to change committee assignments and leadership, as well as for procedural reforms to allow legislation to pass more easily. Daniel


401 Ibid. For example, President Trump suggested that rulings halting the administration’s first “travel ban” executive order were politically motivated. Immediately after an October 2017 terrorist attack in New York City, the president described the judiciary as a “joke” and a “laughingstock.” In January 2018, after a district court judge had temporarily blocked the administration from ending the Deferred Action for Childhood Arrivals (DACA) program, the president tweeted a complaint about “how broken and unfair our Court system is.” See ibid.


403 In the first report issued by the National Task Force on the Rule of Law & Democracy, we recommend that Congress “require written justifications for pardons involving close associates and should pass a resolution expressly disapproving of self-pardons.” Bharara, Whitman et al., Proposals for Reform, 19.


405 Nelson and Uribe-McGuire, “Confidence in the US Supreme Court.”


408 U.S. Const. art. I, § 9, cl. 8 (“No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”); U.S. Const. art. II, § 1, cl. 7 (“The President shall, at stated times, receive for his service, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive anything other emolishment from the United States, or any of them.”).

409 U.S. Const. amends. V, XIV; Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (finding that a West Virginia state court judge should have recused, as a matter of due process, where defendant contributed $3 million to judge’s election campaign).

410 Indeed, as the Task Force has documented in its reports, presidents have typically divested their assets as a gesture that they mean to serve the people, not themselves, despite no legal obligation to do so, and presidents and other White House officials have refrained from directing enforcement actions in a manner that would enrich them or their close associates, although no legally enforceable barriers between the White House and enforcement agencies exist.

411 From presidents doling out plum appointments to campaign donors. From presidents doling out plum appointments to campaign donors.

412 See Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Act), Pub. L. No. 107-155, 116 Stat. 81 (2002). The earliest campaign finance regulation, the Tillman Act of 1907, was originally suggested by Theodore Roosevelt, a Republican, and was named after its Democratic Senate sponsor. An Act to Prohibit Corporations and corporations owned or controlled by a foreign government or government official from ownership or control of more than 5 percent of the voting shares of a corporation wishing to spend in U.S. elections. H.R. 1, 116th Cong. §§ 4100–4122 (2019). See also Ellen Ravel, “Disclosure and Public Confidence,” Yale Law and Policy Review 34 (2016): 495. But many worthwhile policies remain constitutional. Indeed, some of the worst effects of the Court’s decisions result as much from legislative and regulatory inaction in response to those rulings as they do from the rulings themselves.


Appendix Endnotes


422 The inspector general’s office found that the public affairs office added uncertainty to scientific findings, changed report titles to obscure findings, eliminated controversial terms such as “global
warming,” and altered quotations from scientists. For example, the first sentence of a news release drafted by a scientist was, “The ‘ozone hole’ that develops over Antarctica was larger this year than in 2004 and was the fifth largest on record.” The public affairs office changed that sentence to read, “NASA researchers[,] … determined the seasonal ozone hole that developed over Antarctica this year is smaller than in previous years.” NASA Office of the Inspector General, Investigative Summary (italics added). See also Andrew C. Revkin, “Climate Expert Says NASA Tried to Silence Him,” New York Times, Jan. 29, 2006, https://www.nytimes.com/2006/01/29/science/earth/clim ate-expert-says-nasa-tried-to-silence-him.html. George Deutsch, a politically appointed public affairs officer at NASA, rejected a request from a producer at NPR to interview James E. Hansen, then director of NASA’s Goddard Institute for Space Studies, reportedly calling NPR “the most liberal” media outlet in the country and that his job was “to make the president look good.”


456 Elizabeth Shogren, “Scientist Who Resisted Censorship of


461 Ibid.


470 Ibid.


472 Ibid.


474 Mark Hand, “Government Watchdog to Investigate Scott Pruitt’s Suspension of EPA Advisory Boards,” ThinkProgress, Mar. 7, 2018, https://thinkprogress.org/epo-investigating-epa-advisory-boards-b615407c3644/.” (“Normally, when candidates are nominated to serve on advisory committees, EPA’s career scientists and lawyers provide input to the administrator regarding which nominees have the right scientific expertise and which have conflicts [sic] of interests. And normally, the administrator follows the career staff’s recommendations. But under Pruitt, political appointees are playing key roles in selecting committee members.”).

475 Reed et al., Abandoning Science Advice.


486 Ibid.


Ibid.


Rogers, “The Secretive White House Office.”


Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid. These workers using power-driven patient lift devices, “Centers for Disease Control and Prevention.”


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ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges the Carnegie Corporation of New York, Change Happens Foundation, Craig Newmark Philanthropies, Ford Foundation, the William and Flora Hewlett Foundation, the JPB Foundation, the Kohlberg Foundation, Open Society Foundations, Rockefeller Family Fund, and the Bernard and Anne Spitzer Charitable Trust for their generous support of this work. The Task Force members and its staff would like to thank Zachary Roth for his substantial writing assistance, as well as Daniel Weiner, Sidni Frederick, and Natalie Giotta for their critical research and deliberations in support of our report. We would also like to thank Michael Waldman, Alicia Bannon, Andrew Boyle, Victoria Bassetti, Gareth Fowler, Hazel Millard, Peter Dunphy, Derek Tisler, Lisa Benenson, Alden Wallace, Alexandra Ringe, Rebecca Autrey, Josh Bell, Zachary Laub, and Jeanne Park of the Brennan Center for their contributions. Finally, thank you to Joanna Loomis, Monica Finke, Jacob Apkon, and Catherine Larsen for their research assistance.