Proposals for Reform

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The values that undergird American democracy are being tested. As has become increasingly clear, our republic has long relied not just on formal laws and the Constitution, but also on unwritten rules and norms that constrain the behavior of public officials. These guardrails, often invisible, curb abuses of power. They ensure that officials act for the public good, not for personal financial gain. They protect nonpartisan public servants in law enforcement and elsewhere from improper political influence. They protect businesspeople from corrupting favoritism and graft. And they protect citizens from arbitrary and unfair government action. These practices have long held the allegiance of public officials from all political parties. Without them, government becomes a chaotic grab for power and self-interest.

Lately, the nation has learned again just how important those protections are — and how flimsy they can prove to be. For years, many assumed that presidents had to release their tax returns. It turns out they don’t. We assumed presidents would refrain from interfering in criminal investigations. In fact, little prevents them from doing so. Respect for expertise, for the role of the free press, for the proper independent role of the judiciary, seemed firmly embedded practices. Until they weren’t.

Presidents have overreached before. When they did so, the system reacted. George Washington’s decision to limit himself to two terms was as solid a precedent as ever existed in American political life. Then Franklin D. Roosevelt ran for and won a third and then a fourth term. So, we amended the Constitution to formally enshrine the two-term norm. After John F. Kennedy appointed his brother to lead the Justice Department and other elected officials sought patronage positions for their family members, Congress passed an anti-nepotism law. Richard Nixon’s many abuses prompted a wide array of new laws, ranging from the special prosecutor law (now expired) to the Budget and Impoundment Control Act and the War Powers Act. Some of these were enacted after he left office. Others, such as the federal campaign finance law, were passed while he was still serving, with broad bipartisan support, over his veto. In the wake of Watergate, a full-fledged accountability system — often unspoken — constrained the executive branch from lawless activity. This held for nearly half a century.

In short, time and again abuse produced a response. Reform follows abuse — but not automatically, and not always. Today the country is living through another such moment. Once again, it is time to act. It is time to turn soft norms into hard law. A new wave of reform solutions is essential to restore public trust. And as in other eras, the task of advancing reform cannot be for one or another party alone.

Hence the National Task Force on Rule of Law and Democracy. The Task Force is a nonpartisan group of former public servants 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 have come together to develop solutions to repair and revitalize our democracy. Our focus is not on the current political moment but on the future. Our system of government has long depended on leaders following basic norms and ground rules designed to prevent abuse of power. Unless those guardrails are restored, they risk being destroyed permanently — or being replaced with new antidemocratic norms that future leaders can exploit.

We have examined norms and practices surrounding financial conflicts, political interference with law enforcement, the use of government data and science, the appointment of public officials, and many other related issues. We have consulted other experts and former officials from both parties. Despite our differences, we have identified concrete ways to fix what has been broken.
We begin with those norms. What are they? And why do they matter?

Checks and balances. The phrase appears nowhere in the Constitution, but it is central to blunt arbitrary power and the potential for tyranny. It’s more than the clockwork mechanism of three separate but coequal branches. Checks have evolved within each branch as well. Congressional ethics committees police improper conduct. Courts operate under a self-imposed code of conduct. Chief judges, circuit judicial councils, or the Judicial Conference investigate allegations of wrongdoing. The executive branch has standards of ethical conduct, as well as inspectors general, internal auditors, and the Justice Department’s special counsel regulations. These overlapping safeguards check the conduct of the powerful.

An evenhanded and unbiased administration of the law. The awesome power of prosecution must be wielded without consideration of individuals’ political or financial status, or their personal relationships. This precept has deep roots. It draws from British law. Its violation formed a chief complaint in the Declaration of Independence. And it was woven into America’s Constitution in the Fifth and Fourteenth Amendments, with their promise of “equal protection” and “due process of law.”

Public ethics. Officials are obliged to seek the public good, not private gain. The Constitution includes key anti-corruption provisions, such as the Emoluments Clauses that prevent a president from receiving funds from foreign governments or states. The Framers had a broad view of corruption. To them, it meant a public official serving some other master — whether pecuniary or political — rather than the public.

Respect for science and the free flow of information. In a modern economy, data — whether environmental, demographic, or financial — must be trustworthy. Beginning especially in the 1970s, an expectation of government transparency — and transparency of government data — became standard. And throughout the nation’s history, the accountability provided by a sometimes ferocious free press has been regarded as crucial.

We believe these values are more than fussy political etiquette. They are, in fact, vital to our democratic institutions and necessary to restore public trust. We hope that the reflexive partisanship of our age does not pose an insurmountable obstacle. At other times of reform, Americans from across the ideological spectrum, including members of both parties, have come together to restore and repair public institutions. Despite today’s intense partisan polarization, we believe that our great nation can and should similarly achieve consensus for reform. In fact, we believe these values still command deep allegiance from Americans across the political spectrum. Our nonpartisan work has reinforced this view. It is up to patriots from all parties to work together on behalf of what we believe to be core precepts of our democracy.

“We the People” gave our government its power. That notion made American democracy, imperfect as it was, truly revolutionary from the start. Restoring these principles is central to the task of revitalizing democracy itself.

With these values in mind, the Task Force examined some of the most significant current areas of concern where our democratic system is most under pressure from official overreach.

In this report, we put forward specific proposals in support of two basic principles — the rule of law and ethical conduct in government.

In future reports, we will turn to other areas, including issues related to money in politics, congressional reform, government-sponsored research and data, and the process for appointing qualified professionals to critical government positions. Most of our proposals reflect a decision to make previously longstanding practices legally required. They reflect, we believe, an existing consensus across both parties.

Ethical Conduct and Government Accountability

To ensure transparency in government officials’ financial dealings:

- Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for government officials, including closing the loophole for family businesses and privately held companies, and reducing the burdens of disclosure.

- Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.
Congress should require a confidential national security financial review for incoming presidents, vice presidents, and other senior officials.

To better ensure that government officials put the interests of the American people first:

- Congress should pass a law to enforce the safeguards in the Constitution’s Foreign and Domestic Emoluments Clauses, clearly articulating what payments and benefits are and are not prohibited and providing an enforcement scheme for violations.

- Congress should extend federal safeguards against conflicts of interest to the president and vice president, with specific exemptions that recognize the president’s unique role.

To ensure that public officials are held accountable for violations of ethics rules where appropriate:

- Congress should reform the Office of Government Ethics (OGE) so that it can better enforce federal ethics laws, including by:
  - granting OGE the power, under certain circumstances, to conduct confidential investigations of ethics violations in the executive branch,
  - creating a separate enforcement division within OGE,
  - allowing OGE to bring civil enforcement actions in federal court,
  - specifying that the OGE director may not be removed during his or her term except for good cause,
  - providing OGE an opportunity to review and object to conflict of interest waivers, and
  - confirming that White House staff must follow federal ethics rules.

**The Rule of Law and Evenhanded Administration of Justice**

To safeguard against inappropriate interference in law enforcement for political or personal aims:

- Congress should pass legislation requiring the executive branch to articulate clear standards for, and report on how, the White House interacts with law enforcement, including by:
  - requiring the White House and enforcement agencies to publish policies specifying who should and should not participate in discussions about specific law enforcement matters,
  - requiring law enforcement agencies to maintain a log of covered White House contacts and to provide summary reports to Congress and inspectors general.

- Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

To ensure that no one is above the law:

- Congress should require written justifications from the president for pardons involving close associates.

- Congress should pass a resolution expressly and categorically condemning self-pardons.

- Congress should pass legislation providing that special counsels may only be removed “for cause” and establishing judicial review for removals.
Ethical Conduct and Government Accountability

Our republic is rooted in the principle that government officials serve the people, not themselves — that government power derives from the people and is intended to be used for the people.4

The Framers recognized that political leaders, being human, will be tempted from time to time to put their own interests ahead of the public’s. To restrain abuses of power, they created a system of checks and balances. They also included several provisions in the Constitution to ensure that top public officials are not economically beholden to others. For example, Foreign Emoluments Clause prohibits federal officials from receiving payments or gifts from foreign governments.5 Its Domestic Emoluments Clause applies a similar rule to the president with respect to U.S. states, and also specifies that Congress may not award the president salary increases during his or her term.6 And the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit federal and state judges from presiding over cases in which they have a personal interest.7

These constitutional provisions provide the foundation and support for a broad range of other rules — written and unwritten — adopted over time to constrain top leaders. Most notably, a set of robust conflict of interest laws, put in place more than a century ago, prohibit many public officials from taking part in government matters involving their own personal financial interests or those of their immediate families. Nearly half a century ago, in the wake of Watergate, Congress strengthened these protections by passing the Ethics in Government Act of 1978. This law created a federal agency, the Office of Government Ethics, dedicated to monitoring government officials’ compliance with conflict of interest and other ethics rules. It also requires high-ranking government officials to disclose their financial interests and dealings to the public. (For a summary of ethics and disclosure requirements for elected and appointed officials, please see Appendix on page 28.)

These laws reflect the shared understanding that public officials should not be able to use their power to advance their own personal or financial interests, that transparency is needed to enable the public to identify improper influences, and that some measure of accountability is needed to deter misconduct.

Unfortunately, formal ethics laws exempt most senior government officials — specifically the president and vice president, and, with respect to some laws, members of Congress and federal judges. That the law does not bind these top officials does not mean, however, that they should not follow its principles.

Elected officeholders have long voluntarily adopted ethics practices to reinforce the public’s faith in the integrity of our government. For example, while conflict of interest laws do not apply to the president, vice president, or members of Congress, in recent decades many of these officials — including, until recently, every president and vice president in the last four decades — have voluntarily divested from assets that could potentially pose a conflict with their official duties or kept such investments in a blind trust whose contents were hidden from them.8 Similarly, although not required by law, all presidents since Richard Nixon, and all major party presidential nominees since Jimmy Carter, had, until recently, voluntarily disclosed their personal tax returns to the public to provide more information about their personal finances and to confirm that they were paying their fair share in taxes.9

These longstanding practices, or norms, have come to be understood as a critical component of accountable government for the people. Because our leaders have been committed to the tradition of ethics in public service, including financial transparency and independent oversight, the fact that they have been formally exempted from many ethics laws has not posed a major problem.

Unfortunately, that commitment is eroding. This phenomenon is not entirely new. President Bill Clinton, for instance, notoriously issued pardons during his last day in office to a fugitive investor whose ex-wife had made substantial donations to the Clinton Presidential Library and to Hillary Clinton’s Senate campaign,10 and to a businessman who had retained Mrs. Clinton’s brother to advocate for a clemency application.11 Mrs. Clinton herself was later faulted for her many dealings with individuals and entities who donated to the Clinton Foundation, which was still run by her husband and daughter, while she served as President Obama’s secretary of state.12 Recent decades have seen a number of scandals over congressional conflicts of interest and other alleged misconduct.13

What is different today is the pervasiveness of breaches in ethical norms, especially at the highest levels of government. These breaches threaten to undermine public trust not only in particular officials but also in the integrity of bedrock governmental institutions.

The starkest example is President Trump’s decision to keep ownership and control of his far-flung business
interests — a major departure from the expectations set by his predecessors.\(^{14}\) It has produced an ever-expanding list of situations where his decisions as president could directly or indirectly affect his personal financial affairs.\(^{15}\) That circumstance in turn can make it hard to discern where the public interest ends and the president’s self-interest begins.\(^{16}\)

Take, for example, the administration’s recent controversial decision to rescue the Chinese tech giant ZTE, which had been sanctioned for violating U.S. law.\(^{17}\) Critics have suggested that the decision was motivated by the president’s personal gratitude for a loan China made to a Trump project in Indonesia.\(^{18}\) But the move was also consistent with furthering a legitimate policy objective: building goodwill with the Chinese government ahead of the president’s summit with North Korean leader Kim Jong-un.\(^{19}\) If that was the case, the president’s personal dealings with China only served to obscure what his administration was trying to accomplish.

Doubts about presidents’ interests can sap their legitimacy and the legitimacy of their actions, even when they are not actually motivated by self-interest. That should concern any president’s political supporters as much as his or her opponents.\(^{20}\)

If the ethics precedents set by President Trump are not addressed now, they could also balloon in future administrations. For example, potential contenders for the Democratic nomination in 2020 include: the founder and chief executive of Facebook, a global social media company with more than 2 billion users around the world;\(^{21}\) the former CEO of Starbucks, which has locations in dozens of countries;\(^{22}\) and a former Massachusetts governor who now serves as a managing director at Bain Capital, a global hedge fund with offices in 10 countries.\(^{23}\)

Disregard for longstanding ethical guidelines is not limited to the presidency. The disregard has also affected other public officials in both the executive branch and Congress. Former Environmental Protection Agency Administrator Scott Pruitt, for instance, attracted bipartisan criticism for his many ethical lapses, like renting a luxury apartment at below-market rates from the wife of an energy lobbyist with business before his agency.\(^{24}\)

Most Americans would agree that this is not acceptable. Indeed, according to recent polling, more than three-quarters of voters rank corruption in government as a top issue for the 2018 election, with almost a third calling it the most important issue.\(^{25}\) The principle that government service should not be used to advance one’s personal financial interests is one of our political system’s bedrock values.\(^{26}\) To protect it, we must translate some of the traditions and ground rules to which many of our leaders have voluntarily adhered into legal requirements, while updating and revitalizing existing ethics and anticorruption laws.

**Ensure Transparency in Government Officials’ Financial Dealings**

Transparency rules are among the most fundamental ethical safeguards to help ensure that ultimate power remains with the people. Without meaningful disclosure of public officials’ financial and personal dealings, it is difficult for the public to detect potential sources of bias and to hold its representatives accountable. Disclosure also empowers journalists, legislators, and law enforcement officials to expose official self-dealing and deter corrupt acts. Of course, government officials do not forfeit their privacy completely, and they have legitimate reasons for maintaining privacy in some areas. But sunlight remains the best disinfectant.\(^{27}\)

**PROPOSAL 1**

**Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for public officials.**

The Ethics in Government Act of 1978, enacted in response to the Watergate scandal, requires high-ranking federal officials — including the president, vice president, members of Congress, and candidates for those offices — to publicly file a report detailing their financial holdings and personal dealings.\(^{28}\) These reports help ethics regulators and the voting public identify potential biases that could influence how they will govern.

While the Act’s disclosure rules are tremendously valuable, they are also sorely in need of an overhaul. In some cases, the Act allows critical information to remain undisclosed. For example, while the law requires candidates and officials to identify family businesses and other private companies in which they have substantial ownership interests, these provisions have not kept pace with changing financial structures. Unlike in the 1970s, today many wealthy individuals hold most of their assets indirectly through networks of limited liability companies (LLCs) and similar entities that were not common when the Ethics in Government Act was passed.\(^{29}\) Current law does not generally require candidates and officials to disclose critical information about those entities, including their sources of income, debts, or co-owners.\(^{30}\) Too often, that deprives the public of the information they need to determine potential conflicts of interest.
Take, for example, a family business that derives substantial income from contracts with foreign governments, owes money to a foreign country’s state-run bank, or is even co-owned by a foreign official. Under current ethics law, candidates and government officials would have no legal obligation to disclose any such ties.  

In other ways, the ethics disclosure rules enacted four decades ago have become unduly burdensome for public officials. Most notably, they require disclosure of very minor sources of income and small assets unlikely to raise significant ethical questions. That is because the requirements are keyed to dollar values that have not changed since the 1970s. These and other outdated rules can make the filing experience onerous even for candidates and officials with relatively simple finances. This creates the opportunity for inadvertent errors and may even deter qualified people from pursuing public service.  

The federal ethics disclosure requirements should be updated to address such concerns. To achieve the best outcome, Congress should pass legislation directing the Office of Government Ethics to convene a task force of ethics experts to prepare a detailed proposal for a legislative overhaul of the relevant sections of the Ethics in Government Act. At a minimum, the legislation should require the task force to:

- **Address the disclosure loophole related to family businesses and other privately-held companies.** Specifically, the task force should propose a way to require filers with significant direct or indirect interests in such entities to provide relevant information, including disclosure of the entity’s assets, ultimate sources of income, liabilities (including creditors by name), and the identities of other owners.

- **Propose measures to streamline the filer experience and make it less burdensome** by, among other things, substantially raising the monetary thresholds at which particular income and assets need to be disclosed.

Fixing outdated disclosure rules is something on which policymakers on both sides of the aisle should be able to agree. Americans of all ideological stripes overwhelmingly support transparency in politics and governance. Reforming financial disclosure requirements to give the public more information will give the American people greater confidence that our leaders’ decisions are guided by the nation’s best interests rather than self-dealing or hidden interests. Congress can and should ensure that Americans have the information they need to hold public officials accountable, while reducing unnecessary requirements that burden public service.

**PROPOSAL 2**

**Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.**

A second important reform is to standardize and codify the longstanding practice of sitting presidents, vice presidents, and candidates for those offices disclosing their tax returns.

In 1973, in the wake of scandal and seeking vindication, President Nixon publicly released his personal tax returns because, as he put it, “People have got to know whether or not their president is a crook.” Since then, until 2016, every president, vice president, and major party nominee for those offices has publicly disclosed their personal tax information. Most other serious contenders
for the presidency have also done so. With few exceptions, the practice had until recently become routine and noncontroversial.

Presidential or vice presidential candidates’ tax returns provide a snapshot of their income and help to confirm that they are following the same rules that apply to everyone by paying their fair share of taxes. This a real concern. Nixon’s returns, which showed that he had paid very little in certain years thanks to dubious deductions, helped to undermine his credibility with the public near the height of the Watergate scandal. His first vice president, Spiro Agnew, resigned in the wake of an investigation into tax evasion, to which he pleaded no contest. Tax returns may also shed additional light on specific conflicts of interest and self-dealing, especially those related to tax policy.

For all of these reasons, codifying the longstanding practice of tax return disclosure would complement other public disclosure requirements in the Ethics in Government Act that assist voters and deter corruption. Congress should therefore pass legislation that:

- Requires the president, vice president, and candidates for those offices to disclose their personal tax returns and the tax returns of any privately held businesses in which they have a controlling interest at the same time as they make other mandatory ethics disclosures pursuant to the Ethics in Government Act.

- Requires disclosure of returns for the three years preceding a candidate’s declaration that they are running for president or vice president and returns for every year a sitting president or vice president is in office for any portion of the year.

Similar proposals have been advanced by public officials and advocates of all political stripes. A number of bills are currently pending before Congress, most notably the Presidential Tax Transparency Act, which has bipartisan support. A growing number of states are also considering legislation that would require candidates to disclose their tax returns prior to appearing on a ballot, although a uniform federal rule would be preferable.

Legislation along these lines is plainly within Congress’s constitutional powers. Presidents and vice presidents, like other public officials, have long been required to disclose significant financial information, with no suggestion that such requirements interfere with any constitutional rights or responsibilities. Requiring disclosure of tax returns would be no different.

PROPOSAL 3
Congress should require a national security financial review for incoming presidents, vice presidents, and other senior officials.

Disclosure of financial information is especially vital in the national security arena, where it can help identify potential sources of leverage foreign adversaries or entities might have over our political leaders. In his nuclear treaty negotiations with the Soviet Union, President Reagan famously advised that Americans should “trust, but verify.”

These concerns are particularly resonant in an era when foreign powers are openly seeking to meddle in U.S. elections. As the commander-in-chief of the U.S. military and the face of U.S. foreign policy, the president is a unique target for foreign adversaries. And those efforts are more likely to bear some fruit when a large number of high-ranking officials, including the president and other senior administration officials, have globe-spanning business interests. Indeed, there are already reports that foreign powers sought to use his family’s business arrangements around the world as a source of leverage over the president’s son-in-law and senior adviser, Jared Kushner. This issue is not unique to the current administration. Several potential future presidential contenders also have wide-ranging international business dealings.

When foreign companies seek to purchase American businesses, the Treasury Department coordinates a government-wide national security review process to examine what effect, if any, the proposed transaction has on U.S. national security. Our political system should have a similar process to evaluate national security vulnerabilities in the portfolios of senior officials, including incoming presidents, vice presidents, and other senior members of the administration who have responsibilities affecting national security.

To that end, Congress should pass legislation to require the following:

- For incoming presidents, vice presidents, and senior White House staff who work on national security-related matters, Congress should require the administration of a national security financial risk assessment led by the director of the Office of Government Ethics and the director of National Intelligence. The purpose of the review would be to identify whether an official’s financial holdings present potential national security vulnerabilities and...
to issue divestment recommendations beyond what may be already required by other laws.

- Officials subject to the review should be required to provide reviewers with their tax returns and ethics filings, as well as other information the reviewers request about their holdings (such as business transaction history and records of material holdings or transactions with foreign entities), with a requirement to update filings whenever there is material transaction but at least on a yearly basis. The reviewers should be required to keep any nonpublic information they receive strictly confidential.

- The reviewers should be empowered to obtain access to all relevant government information sources and follow-up information from the filers.

- The review should be undertaken on a confidential basis, with findings presented to the “Gang of Eight,” the bipartisan group of congressional leaders customarily briefed on classified intelligence matters as part of their oversight role.

- The official in question should be informed of vulnerabilities the review uncovers, unless doing so would imperil counterintelligence gathering.

There is broad bipartisan consensus on the need to combat foreign interference in our elections and in the workings of our government. A national security review for incoming leaders, building on an effective interagency program, would provide a way to help ensure that those leaders remain accountable to the American people rather than any foreign power. The process would also benefit the officials themselves, who may often be unaware of potential vulnerabilities.

Bolster Safeguards to Ensure Officials Put the Interests of the American People First

Transparency is important, but it is not enough to ensure that all public officials put the interests of the American people ahead of their own. We also need meaningful guardrails to prevent officials from crossing long-established lines meant to prevent abuse of power for personal gain. This is especially important at the highest levels of government because top officials set the tone for the people working under them. Our laws should embody the expectation that public service be treated as a public trust and not as an opportunity for personal enrichment. This means changing the law to ensure that those at the very top are subject to the same broad legal standards as those under them.

PROPOSAL 4
Congress should pass a law to enforce the safeguards in the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.

Two provisions in the Constitution are specifically meant to prevent public officials at all levels from being corrupted by conflicting financial incentives: the Foreign and Domestic Emoluments Clauses. Both of these provisions have been generally respected by every administration since the nation’s founding.

The Foreign Emoluments Clause seeks to curb foreign influence by prohibiting federal officials from accepting “any present, emolument, office, or title, of any kind whatsoever, from any king, prince, or foreign state” without the consent of Congress. The Department of Justice has frequently applied this provision, issuing legal opinions on everything from the president’s receipt of the Nobel Peace Prize to government workers performing research stints at foreign universities.

The Domestic Emoluments Clause seeks to prevent undue influence over the president by guaranteeing the payment of a salary “which shall neither be increased nor diminished during the Period for which he shall have been elected” and by prohibiting the president from receiving any other “emolument from the United States or any of them.” There does not appear to be any historical evidence of any president ever seeking compensation that would violate this prohibition.

As it does in many other contexts, Congress has passed laws over the years to codify and implement both clauses in certain circumstances. These range from the Foreign Gifts and Decorations Act (FGDA), governing when officials may or may not keep ceremonial gifts and honors from foreign governments under the Foreign Emoluments Clause to periodic legislation raising the president’s salary as provided by the Domestic Emoluments Clause.

To further reduce the possibility of conflicts and emoluments violations, from the 1970s until 2017, successive presidents and vice presidents voluntarily divested from problematic investments. They generally limited their direct financial holdings to “plain vanilla” assets, like cash and widely distributed mutual funds, and turned any remaining assets over to a blind trust to be sold and replaced by new investments unknown to the beneficiary.

Because public officials have generally adhered to these constitutional safeguards, little attention has been paid to the fact that the law does not specify how they should be
applied in many circumstances. For example, the Constitution says nothing about how either clause should be enforced in the event of a violation. Congress has also not addressed this question except in limited contexts like the FGDA’s rules on foreign gifts and decorations. Nor does the Constitution or any federal law specify just how broadly the word “emolument” should be interpreted. For example, does it cover regulatory benefits, as when a foreign government grants a patent to a federal official or a state government awards a tax subsidy to a business owned by the president? Does it cover profits from a business transaction between a federal official and a foreign state?57

Some of these questions have come up over the years (though not conclusively resolved) in various House and Senate Ethics Committee investigations of members of Congress for everything from renting property to a foreign diplomat to accepting travel and other gifts from foreign governments beyond what Congress itself has authorized by law.58 The global reach of President Trump’s business holdings (including U.S. hotels that cater to a global client base59) — and the prospect that future presidential contenders may have complex business arrangements of their own — has added extra urgency. President Trump has already been sued in three separate lawsuits for alleged violations of both the Foreign and Domestic Emoluments Clauses.60

While these lawsuits may set new legal precedent relating to the particulars of the president’s business dealings, they will leave many other questions unanswered. But Congress has the authority to implement constitutional safeguards through rules that are more detailed and comprehensive than the bare bones text that the Constitution provides.61

To ensure that future public officials adhere to the letter and spirit of the two Emoluments Clauses, Congress should enact legislation that specifies in detail what is and is not prohibited under each clause. The measure should also create a fair and comprehensive scheme for enforcing those expectations. At a minimum, the legislation should:

- Define which benefits constitute prohibited “emoluments.”

- Establish categories of foreign emoluments to which Congress expressly withholds consent (e.g., those worth over $10,000) beyond those covered by existing laws like the FGDA.

- Create a regulatory scheme for enforcement of both Emoluments Clauses, which should ideally rely on enforcement agencies like the Department of Justice and possibly the Office of Government Ethics (for civil violations of the law).

- Establish statutory remedies for violations, including disgorgement of illegal emoluments and criminal and civil penalties.

The Emoluments Clauses provide clear constitutional authority for these measures. These constitutional provisions reflect the Framers’ fundamental concern that public officials, especially the president, should put the interests of the American people first, which resonates just as strongly today. Codifying them more fully would also benefit current and future public officials, who need clear guidance to help them avoid running afoul of these key...
constitutional constraints. Congress should ensure that the protections both clauses afford are enforced in a clear, concrete and effective manner.

**PROPOSAL 5**

Congress should extend federal safeguards against conflicts of interest to the president and vice president.

Conflict of interest law bars officers and employees of the federal government from “participating personally and substantially” in specific government matters in which they or their immediate family members have a personal financial interest has existed for more than a century. But those laws do not apply to the president and vice president. They should.

Federal conflict of interest law establishes a minimum standard of conduct. The law applies only when government officials are involved in a decision relating to a specific set of persons or entities and only when the decision will have a “direct and predictable” effect on officials’ financial interests (or those of their close family members, business partners, or entities with which they are affiliated). The law does not apply to matters that involve broad policymaking. For instance, regulations issued by the Office of Government Ethics specify that government officials typically cannot award a contract to a company in which they have stock (other than through certain types of mutual funds). On the other hand, the officials usually would be able to work on major legislation, like a tax overhaul that would favorably impact their own bottom line, provided it would affect other Americans in the same way.

Few would say that the president and vice president should not follow the same basic rules. Congress exempted them from the formal conflict of interest law based on potential practical and legal concerns related to the presidency’s unique role in our system of separation of powers (which, as noted below, we do not ultimately find persuasive). Until recently, most also assumed that the public limelight and accountability of the presidency would be sufficient to ensure that its occupants adhere to the same ethics standards that govern other federal employees and officers. It turns out they are not.

The reason these exemptions from ethics law for the president and vice president have received scant attention is that presidents over the last four decades have voluntarily complied with most of their requirements. Especially in the wake of Watergate, it became common wisdom, as President Reagan’s transition team put it, that “even the possibility of an appearance of any conflict of interest in the performance of his duties” could undermine the president’s legitimacy.

And not just the president’s. When an official as powerful as the president has a personal financial interest in government decisions, there is a risk that officials who report up the chain will be tempted to govern with an eye toward the chief executive’s bottom line. Taken to extremes, it can be virtually impossible to discern which decisions have been infected by consideration of a leader’s self-interest. Such doubts undermine the basic integrity of democratic governance.

Now, of course, we have a president who has chosen to keep control of his far-flung businesses, raising the
This does not mean that we must subject the president and vice president, who occupy a unique constitutional role, to the same legal requirements as other officials. For example, conflict of interest rules can bar an official from working on comparatively narrow legislation, like a bill to regulate a particular industry or to give benefits to a small class of people. But the duties of the chief executive are unique. The Constitution gives the president sole authority to sign or veto legislation passed by Congress, and thousands of measures make their way each year to the president’s desk. Rather than impose the unwieldy requirement of an exhaustive conflicts check in each instance, it makes better sense to exempt the president and vice president’s participation in the legislative process from conflict of interest regulation. The law should also explicitly exempt any president or vice president who follows the longstanding practice of limiting his or her direct personal holdings to nonconflicting assets and placing remaining investments in a qualified blind trust.

Finally, the law should specify that the only remedy where the president or vice president has a conflict of interest is to sell off his interest in the asset that created the conflict. Typically, an official with a conflict of interest can address the conflict either through such divestiture or through recusal (meaning formally refraining from participation in the matter). But presidential recusal could be disruptive to executive branch operations. A divestiture requirement avoids that risk and is the best approach for addressing the relatively narrow circumstances where the president or vice president have conflicts of interest.

The need for reasonable exemptions does not negate the need for the president and vice president to be subject, broadly speaking, to the same laws as the millions of federal employees who work under them.

To that end, Congress should pass legislation that, at a minimum:

- **Eliminates the blanket exemption to existing federal conflict of interest law** for the president and vice president.

- **Sets forth reasonable and appropriate exemptions**, including for conflicts arising from the president’s role in proposing, signing, or vetoing legislation, and the vice president’s role in presiding over and casting tie-breaking votes in the Senate.

- **Exempts any president or vice president whose holdings are limited to nonconflicting assets or are placed in a qualified blind trust.**

- **Specifies that divestment from the relevant asset is the only remedy** in cases where the president or vice president has a conflict of interest.

Several proposals to subject the president and vice president to conflict of interest law are currently pending before Congress. They follow a long tradition of bipartisanship on ethics law as well as a shared understanding that the president and vice president, despite their unique roles in our system of government, are not above the law.

While Congress in the past has taken the view that there are practical and constitutional hurdles to taking such a step, we do not find this view persuasive. The most common objection raised is that the president cannot be subject to conflict of interest law because it is impossible for him to recuse from any matter under his authority as the head of the executive branch. But even if that is true, the proposal here does not require recusal. Sale of assets is also a common means of managing conflicts of interest in the public sector. Already for decades, presidents have voluntarily divested from most of their assets that could give rise to even the appearance of conflicts. And they aren’t the only ones: Many other high-ranking federal officials are also required to divest from assets that would create insurmountable conflicts of interest relating to their core responsibilities. Similarly, it is not unreasonable to require the president to divest in situations where there is a clear risk that the unique powers of his office could be used for personal gain.

Such a requirement would not offend the Constitution, which permits Congress to place restrictions on the president where there is “an overriding need to promote objectives within the constitutional authority of Congress.” Guarding against official self-dealing, which the Supreme Court has called “an evil which endangers the very fabric of a democratic society,” is surely one such objective. Congress should prevent the use of the presidency for personal gain, just as it prohibits the chief executive from engaging in other kinds of official misconduct.

**Related Issues:** Presidential conflicts of interest are not the only area of ethics law in need of reform. Members of Congress are also exempt from federal conflict of interest
and congressional conflicts are also an enduring problem. Members of Congress are bound by certain ethics rules, but those have far fewer teeth than the laws governing most federal officers and employees. Many lawmakers take voluntary steps to limit their personal investments and avoid any appearance of bias, but others do not. In recent years, for instance, there have been many reports of members of Congress engaging in inappropriate stock trading involving industries under the jurisdiction of committees on which those members sit. Others have accepted questionable travel and other gifts from foreign governments. Some members have even gone to prison for bribery and other official misconduct spanning many years.

Such scandals suggest that stronger legal safeguards may be needed. That could include making members of Congress subject to conflict of interest law, requiring them to divest from certain assets, or simply providing for better enforcement of existing House and Senate rules.

Congress should also consider ways to lighten the regulatory burden on the many federal officers and employees who must comply with a much stricter regime of restrictions than elected officials. They must follow rules governing everything from who can take them to lunch to whether they can be paid for teaching a class at their local community center. Moreover, absent a waiver, they are subject to the full force of conflict of interest law even if the actual financial interest in question is negligible, like a single share of stock in a regulated industry. Scholars have criticized such heavy regulation as too strict, with real and substantial burdens on ordinary federal employees. A full ethics reform package should include measures to lighten these burdens for the millions of men and women in the rank-and-file federal workforce, where appropriate.

The Task Force expects to take up these and other related issues in its next report.

**Ensure that Officials Are Held Accountable Where Appropriate**

Along with changes to actual legal requirements, effective enforcement is necessary to prevent official self-dealing and abuse of power. No rule enacted by Congress will have any effect without meaningful action to ensure legal accountability. Any enforcement mechanism should be even-handed and effective. Enforcement actions must be proportional to the offense, and the rights of those alleged to have committed misconduct must be protected. Unfortunately, our current ethics regime is deficient on both counts: there is no independent body dedicated primarily to ethics enforcement, and those wrongly accused of violations outside of the formal process have no way to clear their names. Congress should rectify this.

**PROPOSAL 6**

**Congress should reform the Office of Government Ethics so that it can better enforce federal ethics laws.**

The Office of Government Ethics (OGE) is the only federal agency primarily devoted to government ethics, and the logical choice for an independent body to handle day-to-day enforcement of ethics rules. Created in the wake of Watergate to improve the uniform application of federal ethics rules across the executive branch, OGE’s primary function is to interpret and promote compliance with federal conflict of interest laws, gift restrictions, limits on outside employment, and related safeguards. While its director is a presidential appointee, the role has usually been filled by a nonpartisan expert, including under the current administration. No other federal agency similarly combines a tradition of nonpartisanship with comparable expertise in government ethics.

As currently configured, OGE is not equipped to serve as an effective, independent enforcement body. While it has developed an extensive body of regulations and other guidance, its role has been primarily advisory. The office has no authority to investigate alleged violations that come to its attention and very limited ability to compel a remedy for even the most obvious violations.

OGE also is not truly independent. Although its director serves for a fixed five-year term and is usually a nonpartisan expert, there appears to be no statutory safeguard against a president, upset by OGE’s pursuit of ethical issues in his or her administration, removing the director without cause. This is less protection than that accorded other important watchdog agencies, including the Securities Exchange Commission and Federal Election Commission, whose leaders the president may generally remove only for good cause (e.g., neglect of duty or misconduct in office). As a further guarantee of independence, such agencies also typically have the ability to communicate directly with Congress, including submitting their own budget requests, rather than going through the White House.

Finally, OGE also lacks the necessary resources to perform an expanded oversight role. With approximately 75 employees and a $12 million budget, OGE would not have the capacity to hire the qualified attorneys, investigators, and other staff needed to effectively enforce ethics rules across the sprawling executive branch.
These shortcomings have not received the attention they deserve. Until recently, voluntary adherence to OGE’s guidance has long been the expectation at the highest levels in both Democratic and Republican administrations. Every president since OGE was created has directed cabinet members and other close aides to follow the agency’s instructions to recuse, sell property, or take other steps to avoid conflicts of interest, and to direct their subordinates to do the same. Presidents and vice presidents have also sought OGE approval for their own voluntary asset plans, which set the tone for their administrations.

To be sure, there have always been cracks in this façade. At times, OGE has been unable or unwilling to hold officials who were determined to bend or break the rules accountable. But today, the administration does not even make a show of following OGE’s guidance in high-profile cases and has publicly questioned whether most federal ethics rules even apply to White House aides, citing an unpersuasive legal technicality.

This is not sustainable. Like any other set of rules, ethics standards will never be truly effective, especially at the highest levels, unless they have real teeth. That means enforcing them consistently and not just in the most egregious cases.

Currently, enforcement of conflict of interest law and ethics standards is left primarily to the president and thousands of other administration officials who have supervisory authority to reprimand or fire subordinates who break ethics rules. This decentralized system is prone to inconsistency and can break down entirely in an administration that simply does not view compliance with these rules as a priority.

Where a conflict of interest is serious enough to warrant criminal or civil penalties, the Department of Justice has the power to pursue enforcement in federal court (including on a referral from OGE). But the department has rarely made such cases a priority. In 2016, for example, it appears to have secured (according to data collected by OGE) only seven criminal convictions and one civil settlement under the federal conflict of interest statute and laws under OGE’s purview.

The existing framework for administering and enforcing federal ethics rules in the executive branch does not provide sufficient accountability. A politically sensitive issue like ethics needs a regulator with some independence who has the power to formulate broad policy through regulations and pursue civil enforcement actions in serious cases that do not rise to the level of criminal misconduct but still need to be addressed in the interest of deterrence.

OGE already has primary rulemaking authority for ethics matters in the executive branch. Its expertise is widely acknowledged. The agency’s director, while not protected against removal, customarily serves a term of five years, spanning multiple presidential terms, which helps to foster independence. There is also a tradition of professionalism at OGE, evidenced by the appointment of directors with significant ethics experience and nonpartisan credentials. It therefore makes sense for OGE to take on this critically important enforcement role.

To ensure proper accountability for ethical standards at all levels of the executive branch, Congress should pass legislation giving OGE a measure of formal independence from the president akin to that of other independent regulators. The agency should also have the full range of civil enforcement tools that are at the disposal of other watchdog bodies, along with sufficient safeguards to protect against the politicization of investigations and bureaucratic overreach. Finally, Congress should take other steps to ensure more uniform application of ethical standards across the executive branch.

To insulate rulemaking and civil enforcement processes on ethics matters from undue political interference, legislation passed by Congress should:

- Specify that the president cannot remove OGE’s director during his or her statutory term except for good cause, such as neglect of duty or misconduct in office. Such limitations on removal are the most important way to ensure agency independence. The process of nominating and confirming new directors and ongoing congressional oversight can be used to ensure that the director remains politically accountable to elected leaders.

- Empower OGE to communicate directly with Congress. Most agencies must go through the White House to submit budget requests or otherwise communicate with Congress, limiting their ability to pursue goals that do not align with the priorities of the administration. To ensure a measure of autonomy from the president, OGE should, like other independent agencies, be permitted to submit its own budget estimates, substantive reports, and legislative recommendations without White House approval.

To ensure effective enforcement of ethics rules, this legislation should also:

- Grant OGE power to initiate and conduct investigations of alleged ethics violations in the executive branch on referral from another government body or on
Protecting the Justice Department from Political Interference

**PRINCIPLE**
*The White House shouldn't interfere with investigative and law enforcement decisions made by the Justice Department and other enforcement agencies for personal, financial, or partisan purposes. No one is above the law.*

**PROBLEM 1**
President Richard Nixon’s tenure shone a light on the extreme dangers of political interference in law enforcement. In 1969, Nixon appointed his campaign manager, John Mitchell, as attorney general. Two years later, Nixon ordered Mitchell’s eventual successor as attorney general, Richard Kleindienst, not to pursue an antitrust suit against a company that had made large political donations to the upcoming Republican National Convention. And in 1973, Nixon ordered the firing of Special Prosecutor Archibald Cox to stop his investigation of the Watergate scandal. In what is known as the “Saturday Night Massacre,” Attorney General Elliot Richardson resigned, and Deputy Attorney General William Ruckelshaus was fired, after refusing to carry out the order. Solicitor General and then-Acting Attorney General Robert Bork carried out the order to fire Cox.

**RESPONSE**
In 1975, President Gerald Ford’s White House chief of staff issued the first “limited contacts” policy to reduce opportunities for actual or perceived political interference in DOJ matters, creating a precedent followed by all subsequent administrations. Three years later, Congress passed the Independent Counsel Act, which created a way to investigate high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest and insulated the independent counsel from improper firing. Congress also passed the Civil Service Reform Act of 1978, which codified the principle that members of the civil service should be insulated from administrations’ political whims.

**PROBLEM 2**
Three decades later, the pendulum swung back. In 2006, Attorney General Alberto Gonzales relaxed DOJ’s “limited contacts” policy, ballooning the number of officials eligible to communicate with the department about specific cases and investigations. The same year, President George W. Bush took the unprecedented step of dismissing nine U.S. attorneys in the middle of his term. Investigations later revealed evidence that the removals were improper and tied to decisions made in politically sensitive cases. Those moves prompted no significant new laws to combat political interference.

**PROBLEM 3**
In 2016, Attorney General Loretta Lynch had a brief private meeting with former president Bill Clinton on an airport tarmac in the midst of the FBI’s ongoing investigation into Hillary Clinton’s use of a private email server while serving as secretary of state. The same year, President Barack Obama stated that Hillary Clinton’s use of the email server never endangered national security, despite the FBI’s ongoing investigation into the issue.

**PROBLEM 4**
In 2017 and 2018, President Trump took numerous steps to undermine American law enforcement. He issued a stream of public comments seeking to influence the special counsel’s investigation into Russian election interference and suggested the investigation played a role in his decision to fire the FBI director. He urged the Justice Department to investigate his political opponents and lamented his attorney general’s perceived lack of personal loyalty. And he demanded that DOJ take action against two companies whose owners also control major media outlets whose reporting President Trump frequently criticizes. “I have the absolute right to do what I want to do with the Justice Department,” he declared.

**TASK FORCE PROPOSED RESPONSE**
Congress should require that the White House publish policies on who can participate in discussions with DOJ or other federal agencies with enforcement authority about specific civil or criminal enforcement matters and that it maintain a log of covered White House contacts. In addition, Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.
its own initiative. To prevent abuse in this politically sensitive area, the agency’s investigative power should be constrained through best practices used at other independent watchdog bodies. Among other things, the legislation should require the director to sign off on all subpoenas to compel testimony or the production of documents; require agency staff to keep pending investigations strictly confidential (with criminal penalties for violators); and specify that all decisions to investigate must be supported by a written determination approved by the director that there are reasonable grounds to believe a violation may have occurred.114

- **Grant the OGE director power to bring civil enforcement actions in federal court and seek other corrective action** where the director has determined in writing that there is probable cause to believe a violation occurred. Almost all independent watchdog agencies have authority to either impose penalties and other sanctions or seek them in court. For an agency to assess major fines or hand out other punishment itself requires the creation of elaborate internal procedures to protect the due process rights of alleged wrongdoers.115 It makes more sense for an agency of OGE’s size to instead bring enforcement actions for civil or injunctive relief in federal court. Cases where the only sanction sought is a personnel action like dismissal could be brought to the Merit Systems Protection Board, the body that adjudicates employment issues for federal workers.

- **Create an OGE Enforcement Division.** Enforcing rules is very different from writing them or providing informal guidance. These functions should not be entrusted to the same staffers. The best approach would be for OGE, like other watchdog agencies, to have a separate enforcement division staffed by lawyers and professional investigators with civil service protection. Given the sensitivity of their role, employees of the new Enforcement Division (and potentially all OGE staff) should be barred under civil service rules from participating in partisan politics.116 While enforcement staff would do the day-to-day work of investigating alleged violations and pursuing sanctions, major decisions — including whether to launch an investigation or bring an enforcement action once the investigation is done — would require the director’s approval.

- **Establish minimum qualifications for the OGE director,** in light of these expanded responsibilities, such as experience in ethics, compliance, law enforcement, or related fields; management experience; and reputation for integrity. This would help guard against abuse and ensure that future directors would meet the standards that have previously been met in practice. Detailed qualifications are not necessary because the director is subject to confirmation by the Senate, providing an additional check.

- **Direct OGE and DOJ to establish a process for confidential referrals of potential criminal violations.** As noted, OGE can refer potential criminal matters to the Department of Justice for investigation and potential prosecution, but the process is informal and possibly subject to leaks. DOJ has no obligation to respond. Congress should require that referrals be kept confidential and that DOJ respond to referrals within 120 days to allow OGE to determine whether to take other action on its own.

Finally, to ensure more uniform application of ethical standards across the executive branch, legislation passed by Congress should:

- **Give OGE authority to review and raise objections to individual conflict of interest exemptions.** Currently, federal law gives officials the power to exempt their subordinates from conflict of interest law in specific cases where they determine that the potential violation is not sufficiently important to justify recusal or other action.117 OGE not only should be notified of these waivers (as is already the practice)118 but also should have the ability to formally object within a reasonable period of time. The official who granted the waiver should, in turn, be obligated to respond to OGE’s concerns in writing, and the waiver, along with OGE’s objections and the official response, should be made public.

- **Confirm that White House staff must follow federal ethics rules.** White House staff are subject to the prohibition on conflicts of interest and most federal ethics laws, and they have also long followed the guidance OGE promulgated via regulation. As noted, however, administration officials recently questioned whether OGE rules actually bind them, based on a legal technicality.119 Congress should amend the law to remove this ambiguity and make clear that OGE has authority to promulgate rules for all executive branch officers, including White House staff.

The proposals here are modeled on other successful independent agencies. Many have been advanced for years by nonpartisan reform groups.120 They represent a balanced framework that will give ethics rules real teeth while also protecting alleged violators who may not have committed any wrongdoing. Congress should revamp our ethics enforcement system along these lines.
The Rule of Law and Evenhanded Administration of Justice

The Founders established “a government of laws and not of men.”121 As Thomas Jefferson wrote, “[t]he most sacred of the duties of government [is] to do equal and impartial justice to all its citizens.”122 But the rule of law does not enforce itself. Those in power will always be tempted to favor friends and allies over adversaries. That is why, over the course of American history, we have built up a robust set of laws, practices, and norms to promote the evenhanded application of the law, without bias or political favor.

Conflict of interest law bars officials from involvement in law enforcement matters where they have an actual or perceived bias. Detailed professional responsibility rules guide most career law enforcement officials and, when followed, ensure different cases and investigations proceed according to similar standards and guidelines. Mechanisms within agencies — internal review processes, inspectors general, and auditors — seek to enforce standards and hold officials accountable.

Informal policies matter even more. Every administration since that of President Ford has limited which officials in the White House may communicate with Department of Justice personnel about active investigations or cases and how they may do so.123 Another norm discourages senior political officials from making premature declarations about the guilt or innocence of a defendant or the outcome of a trial before it is complete.124 And yet another discourages law enforcement from issuing indictments or taking other public steps that could affect an election in the period directly before the vote.125 No law requires these policies, but they reduce the risk that politics distorts vital law enforcement processes.

It wasn’t always this way. When American government was far less formal, it was assumed that the attorney general would be a close legal adviser to the president. Theodore Roosevelt saw no problem in minutely directing antitrust prosecutions.126 Robert F. Kennedy was his brother’s chief political adviser and was preparing to resign as attorney general to serve as campaign manager in November 1963.127 When Richard Nixon appointed his campaign manager, John Mitchell, as attorney general in 1969, few eyebrows were raised.128

That all changed nearly five decades ago, when Watergate showed the costs of politicized justice — and spurred a national reckoning with the abuse and politicization of law enforcement.

From the outset, White House lawyers carefully monitored and molded the federal investigation of the break-in at the Democratic National Committee headquarters. Then, in the “Saturday Night Massacre,” Nixon famously ordered his subordinates to fire the special prosecutor. (His attorney general quit and his deputy attorney general was fired rather than carry out this improper order.129) In other abuses, Nixon interfered with an antitrust enforcement action on behalf of a large political donor, IT&T,130 and his White House counsel provided an “enemies list” to the IRS commissioner, asking that hundreds of people be targeted for investigation during the 1972 election (a request that the IRS did not follow).131

In the years afterward, Americans learned that the politicization of law enforcement had extended well beyond the Nixon administration. The 1976 Church Committee report documented decades of FBI abuses, especially under the Kennedy and Lyndon Johnson administrations, including the bureau’s blackmauling of high officials.132 Presidents were revealed to have wielded the FBI for political purposes, as when President Johnson had it spy on civil rights protestors at the 1964 Democratic convention.133

Nixon’s two immediate successors, Presidents Gerald Ford and Jimmy Carter, made rebuilding public confidence in the Department of Justice and other law enforcement institutions a central goal of their administrations.134 The White House, Justice Department, and others adopted formal and informal practices that aimed to ensure arm’s-length dealings — in public and private — between senior political officials and career law enforcement personnel. At the same time, the FBI was reined in by having its director report to the attorney general as well as directly to the White House.135 The CIA, too, was required to operate under the Foreign Intelligence Surveillance Act.136 To fill the gap, the White House counsel’s office grew in stature and size.137

These new rules had an important practical impact. But even more significant, they helped create a new set of expectations — mostly unspoken but nonetheless powerful — that largely constrained political interference in law enforcement.

This system served the country well. It is now under direct attack.

We are still early in the current administration, but already President Trump has taken numerous steps to...
undermine American law enforcement. He has issued a steady stream of public comments seeking to influence the special counsel’s investigation into Russian election interference.\textsuperscript{138} He has urged the Justice Department to investigate his political opponents.\textsuperscript{139} He has fired or prompted the resignations of top FBI officials and has lamented his attorney general’s perceived lack of personal loyalty.\textsuperscript{140} He has demanded that DOJ take action against two companies, Amazon and Time Warner, whose owners also control major media outlets whose reporting frequently angers him.\textsuperscript{141} (See, e.g., DOJ’s lawsuit to block Time Warner’s merger with AT&T, widely condemned as being at odds with decades of antitrust practice,\textsuperscript{142} which was rejected in federal court.)\textsuperscript{143} He has threatened to tax Harley Davidson “like never before” after the company announced the trade war is forcing some of its operations overseas and has targeted other companies for retribution in response to personal or policy slights.\textsuperscript{144} “I have the absolute right to do what I want to do with the Justice Department,” he has said.\textsuperscript{145}

Other recent administrations also have at times let political considerations influence law enforcement. During President George W. Bush’s tenure, the Justice Department inspector general found evidence that nine U.S. attorneys (including Capt. David Iglesias, a member of this Task Force) were removed for their prosecutorial decisions in politically sensitive cases rather than for “underperformance,” as DOJ had claimed in congressional testimony at first, and that officials used political affiliation as a factor in hiring, which is prohibited.\textsuperscript{146} The scandal resulted in the resignations of senior officials including Attorney General Alberto Gonzales.\textsuperscript{147}

During the Obama administration, Attorney General Loretta Lynch was widely criticized for an airport tarmac encounter with former President Bill Clinton, which came while the FBI was investigating the use of a private email server by Hillary Clinton while she was secretary of state.\textsuperscript{148} The episode, combined with President Obama’s premature statement that Secretary Clinton’s actions never endangered national security, raised fears that the administration was inappropriately seeking to influence the probe.\textsuperscript{149}

These departures from long-accepted practices have real and lasting consequences. They distort decision-making. They shield wrongdoing by high officials. They risk converting the fearsome power of the prosecutorial machine into a political weapon. They undermine the fundamental notion that the law applies to everyone equally. They corrode public trust. And ultimately, they cast doubt on a crucial premise of any healthy democracy: that the law not be used to favor or punish anyone based on politics.

In the past, the half-century-old system of de facto independence for much of law enforcement and respect for the role of independent courts was a norm largely — though not always — honored by those in power. But that norm has eroded, with the result that few explicit rules now constrain executive behavior. It is time to put in place more explicit and enforceable restrictions to ensure a return to the proper balance.

**Safeguard Against Inappropriate Interference in Law Enforcement for Political or Personal Aims**

First, we need to strengthen the guardrails preventing improper political interference in law enforcement by the White House. There is no question that it is appropriate for the president and his staff to set priorities for law enforcement and to weigh in on key decisions. At the same time, it is entirely inappropriate for them — as it is for all government officials — to interfere in specific law enforcement matters for personal, financial, or partisan political gain.

To prevent abuse, most public officials involved in law enforcement are subject to a range of checks on their powers — from detailed procedures that constrain their actions, to formal supervisory systems that can discipline them, to inspectors general who can investigate them, to designated congressional committees that provide regular oversight of them.\textsuperscript{150} The same is not true for the president and other White House officials. The White House is mainly checked by political processes. But those processes do not work unless the public and political actors know what is going on.

Our proposals do not seek to impose restrictions on the White House. They simply seek to reinforce longstanding practices designed to prevent abuse in the executive branch by enhancing transparency of political contacts with law enforcement and allowing for more meaningful oversight of potential problems.

**PROPOSAL 7**

*Congress should pass legislation requiring the executive branch to articulate clear standards for and report on how the White House interacts with law enforcement.*

To prevent both intentional and inadvertent political interference with law enforcement, the White House, Justice Department, and other law enforcement agencies have for decades voluntarily limited contact between senior political officials and career law enforcement personnel.
These curbs on White House contacts are not required by law. They are found only in written policies, voluntarily adopted by each administration, limiting who from the White House and who from the Department of Justice and other enforcement agencies can discuss ongoing investigations and cases. Typically, these policies restrict conversations to high-level officials on both sides, with the White House counsel’s office playing a central role in managing and monitoring White House contacts. They also include special protocols for cases affecting national security or where the Department of Justice is defending an administration policy.

These policies recognize that political actors are, at least in part, motivated by political concerns that should not affect the application of the law and that law enforcement personnel are better situated to make decisions about specific cases or investigations. They guard against overt direction from the White House, or the use of investigative agencies to punish political foes. They also protect against the inadvertent pressure or bias that may result from a call from a White House official about a specific matter. Even a question about a case can lead an official to presume an interest in its outcome; the official then may try to ensure the desired outcome. As former Attorney General Benjamin Civiletti put it, presidents and other top officials “unintentionally can exert pressure by the very nature of their positions.”

At the same time, the policies recognize that the president has a unique and personal role in executive branch policy determinations, including in how our laws are enforced. For example, presidents have, appropriately, told antitrust enforcers to step up enforcement without directing the prosecution of a specific firm. By contrast, White House influence in individual cases risks creating the perception — and potentially the reality — that law enforcement is being used as a political or personal tool.

Every administration since Ford has established such “limited contacts” policies between the White House and the Justice Department. Although less consistent, there have also been similar policies covering other agencies with law enforcement responsibilities, such as the Internal Revenue Service and the Department of Labor. Despite their importance, these policies have received scant public notice. Often, they have not been released until well after the end of a presidency. The Obama administration’s most recent internal White House policy still has not been released.

Unfortunately, it has become increasingly clear that these voluntary policies, without formal legal requirements or enforcement mechanisms, cannot prevent political interference in law enforcement activities. For example, President George W. Bush’s administration dramatically relaxed its own limited contacts policies, ballooning the number of political officials eligible to have contact with law enforcement personnel to more than 800. After the U.S. attorneys’ scandal, Attorney General Michael Mukasey reinvigorated the policy.

The current administration, too, has adopted a limited contacts policy. But reports suggest the policy has not always been followed. For example, the president’s then-Chief of Staff Reince Priebus reportedly asked a top FBI official to publicly disclose alleged facts pertaining to the bureau’s investigation of Russian interference in the 2016 election in order to refute a news report that senior members of the Trump campaign had frequent contacts with Russian agents.

Trump himself, on several occasions, directly contacted the U.S. attorney in the Southern District of New York, who had jurisdiction over a number of matters involving the president’s private and financial interests, ostensibly to develop a personal relationship, before ultimately firing him. (That former U.S. attorney is the co-chair of this Task Force.) Trump also drew criticism for taking the unusual step of personally interviewing candidates for the U.S. attorney’s successor. While there is no evidence that the president made inappropriate requests in these conversations, they make clear that it is possible for a president to put inappropriate pressure on prosecutors.

When longstanding norms governing contacts between the White House and law enforcement officials are violated, even for reasons that are not inappropriate, it creates a troubling precedent for future administrations and opens the door to inappropriate breaches.

While Congress should not itself regulate how the executive branch deals with law enforcement, it can take steps to increase transparency and bolster accountability, thereby deterring misconduct. Specifically, Congress should pass legislation to:

- Require the White House, the Department of Justice, and other law enforcement agencies to issue and publish a White House contacts policy. The legislation should require each administration to identify specific officials, in both the White House and the relevant enforcement agencies, who are authorized to communicate about individual law enforcement matters. This will send a strong message that Congress believes limitations on White House influence are critical to impartial law enforcement. The public disclosure requirement will enable the public to assess whether the policies are
adequate to ensure that law enforcement is not subject to undue political influence. Disclosure also makes it possible for Congress to use hearings and other oversight powers to address any deficiencies.

- **Require law enforcement agencies to maintain a log of contacts** with the White House pertaining to specific civil or criminal enforcement matters undertaken by the Justice Department or other federal agencies with enforcement authority. The log should be limited to communications about individual cases or investigations, including communications about the litigants, subjects, targets, and witnesses, spelling out the people involved in the communication and the matter discussed. It should not include routine (and necessary) contacts where the White House seeks legal

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**PRINCIPLE**
Presidents should follow established procedures when using the pardon power and should use it to right clear miscarriages of justice, not to reward political allies.

**PROBLEM 1**
In 1981, President Ronald Reagan pardoned two FBI officials who had authorized illegal surveillance of the homes of friends of the militant radical organization the Weather Underground. No pardon applications were submitted prior to issuance of the pardons, and the pardons did not go through the pardon attorney’s office.

**PROBLEM 2**
In 1992, President George H.W. Bush pardoned six former government officials, including former Defense Secretary Caspar W. Weinberger, who were prosecuted in the Iran-Contra affair. The pardon request was sent directly to the White House, rather than to the pardon attorney’s office.

**PROBLEM 3**
In 2001, President Bill Clinton issued pardons on his last day in office to a fugitive investor whose ex-wife made substantial donations to the Clinton Presidential Library and to Hillary Clinton’s Senate campaign, as well as to a Florida businessman who had retained Hillary Clinton’s brother to advocate for his clemency application.

**PROBLEM 4**
President George W. Bush commuted the prison sentence of Lewis “Scooter” Libby, a former top aide in the Bush White House. Libby had been convicted of lying to federal investigators probing the leak of the name of a CIA operative.

**PROBLEM 5**
In 2017, President Donald Trump pardoned Joe Arpaio, a former Arizona sheriff and Trump supporter who had been convicted for disobeying a federal judge’s order to stop racial profiling in detaining suspected undocumented immigrants. The next year, Trump pardoned Dinesh D’Souza, a conservative pundit who had been convicted of violating campaign finance laws by using a straw donor to contribute to a Republican Senate campaign. Not long afterward, Trump became the first president to publicly declare an absolute right to pardon himself.

**TASK FORCE PROPOSED RESPONSE**
Congress should require written justifications for pardons involving close associates and should pass a resolution expressly disapproving of self-pardons.
Require relevant agencies to submit reports based on the above logs to relevant House and Senate committees, the Department of Justice’s Inspector General, and covered agencies’ inspectors general. Those reports should omit information that could jeopardize confidential witnesses, undercover operations, or the rights of those under scrutiny. Congress and inspectors general could pose follow-up questions about the propriety of particular White House contacts.

These measures, by allowing for oversight of improper communications, will help deter inappropriate White House conduct. If someone knows there will be a record of their contact, they will likely take care to ensure it is appropriate. White House staffers are already accustomed to making similar judgments because White House emails that would otherwise remain confidential risk being publicly released under the Freedom of Information Act if they are sent to agencies.

Based on our experience serving in government, we do not believe a logging and reporting requirement would be overly burdensome. In fact, we expect that reportable White House contacts about a specific pending case or investigation outside of the interagency coordination process would be rare. The White House and Department of Justice already maintain records of similar types of information; indeed, the Department of Justice electronically tracks all of its communications, including with outside parties.

Nor are these measures likely to raise legitimate constitutional concerns. Congress currently regulates White House contacts with the Internal Revenue Service, preventing officials, including the president, from requesting that IRS employees start or stop an audit. It would be on strong constitutional footing to also require the White House and executive branch enforcement agencies to adopt and publish policies to regulate White House-agency contacts, codifying longstanding practice. Congress has passed other laws that require executive branch documents and records of activities to be retained and disclosed in order to further Congress’ oversight functions and the public’s interest in transparency and accountability. For instance, most White House documents are publicly released after an administration has concluded, pursuant to the Presidential Records Act. The president does not have an absolute right to protect personal or White House contacts from disclosure.

**PROPOSAL 8**

**Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.**

Congress should establish a clear mechanism within the executive branch for investigating instances of inappropriate interference with law enforcement for political or personal ends.

We recommend that Congress utilize an oversight mechanism that already exists: agency inspectors general.

In 1978, Congress established inspectors general as independent, nonpartisan watchdogs housed within the executive branch. Their traditional areas of authority relate to financial integrity, with a mandate to eradicate fraud, waste, and abuse. They are empowered to conduct investigations and issue reports relating to the administration of their agencies’ programs and operations, and they have a staff of investigators. Some inspectors general are nominated by the president and confirmed by the Senate “without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations,” while others are appointed by agency heads. All inspectors general report to and submit operating budget requests to agency heads. Inspectors general are subject to removal by the president, with the president required to communicate in writing the reasons for the removal to both houses of Congress within 30 days of that action.

Congress should expand the jurisdiction of agency inspectors general to expressly include investigations into improper interference in law enforcement functions. Inspectors general arguably already have that authority under existing law, which empowers them to investigate “abuse” and violations of agency policies. But a clear mandate, subject to clear standards, is needed for such an important and sensitive function.

Under this proposal the inspectors general would investigate whether improper White House contacts influenced a specific law enforcement matter at their agency; it would not install an inspector general in the White House or empower an inspector general to go on open-ended, and potentially partisan, witch hunts. Inspector general investigations are also constrained by DOJ guidelines.
professional standards published by the Council of Inspectors General for Integrity and Efficiency,185 and other controls in the Inspector General Act.186 Congress should also direct the attorney general to issue guidelines outlining the standards and procedures by which inspectors general are to investigate improper interference.

This proposal also has the benefit of efficiency. It does not reinvent the wheel. Inspectors general are already familiar with the roles and missions of their own agencies. They already have investigators. They know their way around the building. Therefore, we can add this important feature of democratic accountability without creating — and paying for — a whole new bureaucracy.187

**Ensure No One Is Above the Law**

Political leaders and their powerful allies present a special challenge to impartial enforcement of the law. When those in charge of law enforcement are the subject of law enforcement, there is a risk of abuse. Abuse sends a message that there are two sets of rules: a lenient one for the politically well-connected and a far more unforgiving one for everyone else. That is why our system has built-in safeguards to ensure that no one is above the law, from recusal rules to special prosecutor laws. But when the president is involved, the system has two vulnerabilities that merit attention: the possibility of abuse of the pardon power and the possibility of political interference into investigations of the president, senior political aides, and close personal associates. The following recommendations would help protect against such abuse.

**PROPOSAL 9**

**Congress should require written justifications from the president for pardons involving close associates.**

The Constitution endows the president with the “power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.”188 This power allows a president to ensure that “inflexible adherence” to the law does not itself become a source of injustice.189 Presidents have also used pardons to heal national wounds, as George Washington did with the first pardons granted to Whiskey Rebellion participants convicted of treason and as Gerald Ford and Jimmy Carter did by issuing amnesties to draft law violators from the Vietnam era.190

By giving the president exclusive authority to exercise the pardon power, the Founders believed it would “naturally inspire scrupulousness and caution.”191 To ensure such “scrupulousness and caution,” and to prevent abuse, for over a century, presidents have voluntarily adhered to an established process for considering prospective pardons, overseen by the Department of Justice’s Office of the Pardon Attorney.192 Under this process, the pardon attorney reviews pardon applications and makes written recommendations to the president based on published pardon guidelines.193 The guidelines reflect the values of mercy and justice, and require consideration of factors including the applicant’s post-conviction conduct, the extent to which the applicant accepted responsibility for their crime, how long ago the crime took place, and the seriousness of the offense.194 Although the president remains free to ignore the pardon attorney’s recommendations, this process ensures that all pardon applications are assessed in the same way without regard for the president’s personal or partisan political interests.

Controversy has arisen primarily when presidents have deviated from this standard process.195 There are, unfortunately, several recent examples of such controversial pardons. Some pardons were criticized as inappropriate favors to donors or benefactors, like President Clinton’s pardon of financier Marc Rich196 or President George W. Bush’s pardon of real estate developer Isaac Tousie.197 In fact, President Bush immediately rescinded the pardon following press reports that Tousie’s father had donated tens of thousands of dollars to Republicans.198 Other pardons were criticized as favors for former colleagues, like President George W. Bush’s commutation of the prison sentence of Scooter Libby (former chief of staff to his vice president, Dick Cheney),199 or President George H.W. Bush’s pardon of former officials involved in the Iran-Contra affair.200

Reports that President Trump has considered pardons for two former members of his campaign, Michael Flynn and Paul Manafort, have also drawn criticism, not only because these are his former associates.201 Flynn and Manafort are potential witnesses in an investigation that may implicate the president, and the floating of pardons is seen by some as an attempt to lure positive testimony, thereby obstructing justice.202

While it is certainly an abuse of the pardon power to use it to advance one’s self-interest, that does not mean that Congress can or should try to limit the president’s power to make pardon determinations. Nor do we think it wise for Congress to try to restore longstanding safeguards by requiring the president to consult with the pardon attorney before making pardons. Instead, we propose a much more limited measure designed to increase transparency around the exercise of the pardon power in cases raising legitimate questions.
Specifically, Congress should pass legislation requiring the president, in a small subset of cases, to explain his or her decision for pardons or grants of clemency in a written report to the House and Senate Judiciary Committees. To minimize any burden on the president, the reporting requirement should apply only in cases where the individual seeking a pardon has a close personal, professional, or financial relationship to the president — a family member, business partner, current or former employee or professional colleague, or political contributor — or to the president’s spouse, close family member, or business associate. In courts, similar relationships typically warrant recusal by a judge. The report should address whether and how the president considered the factors historically used by the pardon attorney in evaluating requests.

This legislation would provide the public with some confidence that the pardon power is being used to further justice, rather than to favor presidential allies or to reduce the president’s own criminal liability. At the same time, it would create an avenue for political accountability for abuse of an otherwise unchecked authority. And it would provide Congress with an opportunity to respond to abuse if the president flouts the reporting requirement.

There is ample support and precedent for greater transparency in the pardon process. From 1885 to 1932, presidents submitted detailed reports to Congress about pardons and clemencies they had granted, which included, in many instances, some explanation for the grants. These reports even noted if there were disagreements between the president and the pardon attorney or the attorney general and whether the applications did not go through “normal channels.” Even without a mandatory reporting requirement, some recent presidents have felt compelled to explain their use of the pardon power. Reporting requirements are also in place in at least 14 states, which require governors to provide reasons for each use of their pardon authority. There are currently at least three bills pending in Congress that aim to increase the transparency and prevent abuse of the pardon power.

We do not believe that this limited reporting requirement would unduly burden the executive branch. There have been an average only 193 acts of clemency a year going back to 1900. Only a minute number of these would be subject to the reporting requirement. Indeed, at least one former U.S. pardon attorney has called for a return to the pre-1933 policy of reporting to Congress on all grants of clemency, though we do not believe we need to go that far. In short, the risk of added burden is far outweighed by the accountability that further transparency would bring.
Finally, analogizing from other reporting requirements Congress has imposed on the president, such as reporting to Congress the reasons for removing inspectors general (in the Inspector General Act) or making White House documents available to Congress (in the Presidential Records Act), we believe that such a reporting requirement is within Congress's constitutional authority. Requiring a president to state the reasons for granting pardons in limited instances does not control or limit the president's ability to grant a pardon. And it helps Congress enforce other constitutional provisions and better exercise its powers.

**PROPOSAL 10**

**Congress should pass a resolution expressly and categorically condemning self-pardons.**

In recent months, the president has raised the possibility of using the pardon power to absolve himself of criminal liability — an idea that has gone from politically unthinkable to a presidentially asserted “absolute right.” For a country born in revolt against a king, it is hard to imagine an act more damaging to the principle that no one is above the law than a self-pardon by the president.

No president has ever pardoned himself, but two have now considered it. In 1974, President Nixon explored the possibility of a “self-pardon” before resigning, prompting the Department of Justice's Office of Legal Counsel (OLC) to opine that the president cannot pardon himself, based on the “fundamental rule that no one may be a judge in his own case.”

Rather than waiting to criticize such an act after the fact, Congress should try to prevent this offense to the rule of law by passing a resolution making clear it opposes so-called “self-pardons” and believes they are an unconstitutional exercise of the pardon power. The resolution should also make clear that Congress will initiate impeachment proceedings if the president uses the pardon power to try to pardon himself and could express concern about, and potential responses to, other abuses of the pardon power that suggest public corruption or lack of regard for rule of law and separation of powers principles.

There is precedent for this kind of congressional resolution. At least 33 “sense of” Congress resolutions have been introduced in Congress to disapprove, censure, or condemn a president’s actions, with a 1912 resolution condemning President Taft being the latest that was adopted. Some members of Congress have recently argued for a more significant response — like amending the Constitution to expressly limit the president’s pardon power — with three bills pending in the current Congress aiming to do so. In fact, Rep. Karen Bass (D-Calif.) proposed a similar resolution in 2017 disapproving of a self-pardon or a pardon for any member of the president's family, but the resolution has not attracted bipartisan support.

A strong bipartisan resolution would send an important message that Congress will hold the president accountable for any attempt at self-pardon.

**PROPOSAL 11**

**Congress should pass legislation to protect special counsels from improper removal.**

There is also risk of abuse when a law enforcement investigation implicates high level government officials — especially the president. At minimum, investigators must be secure in the knowledge that their pursuit of justice will not result in their termination. And the American public must be confident that even our highest-ranking officials are subject to the rule of law.

For at least the last several decades, the American public and Congress have consistently supported efforts to insulate prosecutorial decisions from improper partisan or personal considerations. For instance, in the immediate aftermath of the Watergate special prosecutor’s firing during the Saturday Night Massacre, public opinion shifted in support of impeaching President Richard Nixon. Members of Congress introduced impeachment resolutions, and a federal district court judge ruled that the firing of the special prosecutor was unlawful. A few years later, Congress enacted the now-expired Independent Counsel Law, along with the Civil Service Reform Act of 1978, which codified the principle that federal employees (specifically, members of the civil service) should be insulated from administrations’ political whims.

In 1999, after Congress declined to renew the independent counsel statute, the Department of Justice adopted regulations laying out a process for appointing a special counsel to pursue investigations of White House officials or other senior political appointees. The special counsel is appointed by the attorney general and may only be removed for “misconduct, dereliction of duty, incapacity, conflict of interest, or for good cause.” These provisions are meant to protect the special counsel from actual or perceived threats that could otherwise influence or impede his or her investigation, while providing a mechanism to hold the special counsel accountable in the event of misconduct.
To be sure, tenure protections have not kept presidents from bristling at investigations by independent or special counsels. President Clinton, for example, famously sparred with Independent Counsel Kenneth Starr during his investigation. Nevertheless, recent statements and actions by President Trump suggest a far more serious threat to Special Counsel Robert Mueller’s investigation, reinforcing the importance of the department’s protections against removal, while simultaneously demonstrating why Congress should pass a law to protect the special counsel from removal without cause, rather than relying on executive branch regulations that can be amended or rescinded.

To give a partial review: After President Trump fired FBI Director James Comey, at least in part because of “this Russia thing,” Deputy Attorney General Rod Rosenstein appointed Special Counsel Robert Mueller to continue the investigation. Since then, President Trump has repeatedly accused Mueller and his team of having “conflicts of interest” and has regularly referred to the investigation as a “witch hunt.” He reportedly ordered Mueller’s firing in June of 2017 but walked back the order after White House Counsel Donald F. McGahn threatened to resign. He has also made statements that appear intended to limit the scope of the investigation, stating that if the investigation veers into a review of his personal finances that would cross a “red line.” President Trump has also publicly berated those he holds responsible for appointing the special counsel, including threatening to fire Attorney General Jeff Sessions because of Sessions’s decision to follow Department of Justice rules and recuse himself from the investigation and publicly attacking Rosenstein over the Mueller appointment.

Notably, of course, the president has not yet removed the special counsel. The critical Department of Justice regulations forbid him from doing so, but they are hardly a guarantee that he will not eventually do so. Because the current protections are merely regulations created by the Department of Justice rather than law, the executive branch can repeal or modify them without involving Congress.

President Trump’s aggressive actions and statements against the Russia investigation, as well as Special Counsel Mueller and his team, have left many to fear that his administration will eventually repeal or modify the current DOJ regulations, or that a future president facing a special counsel he or she deems hostile may be emboldened to do so. It is increasingly clear that special counsel protections need to be enshrined in a statute.

For these reasons:

- Congress should pass legislation to shield special counsel investigations from improper political interference. The legislation should require that the special counsel may only be removed for cause, and it should establish judicial review of any for-cause determination.

The Task Force recommends supporting the bipartisan Special Counsel Independence and Integrity Act (S. 2644), introduced by Sens. Lindsay Graham (R-S.C.), Thom Tillis (R-N.C.), Chris Coons (D-Del.), and Cory Booker (D-N.J.) amid concerns that Special Counsel Mueller would be fired. The bill, which was voted favorably out of the Senate Judiciary Committee, would only allow the special counsel to be removed for cause, and it limits the removal power to the attorney general or the

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**PROPOSAL**

**Making Tax Returns Public**

**PRINCIPLE**

Presidents should release their tax returns — as every president since Nixon has done (Ford released a detailed summary of them) — to ensure that they can be fully vetted by the public and the media.

**PROBLEM**

In 2017, Trump became the first president not to release his tax returns since Lyndon Johnson.

**TASK FORCE PROPOSED RESPONSE**

Congress should require the president and vice president, and candidates for those offices, to publicly release their personal and business tax returns.
most senior Senate-confirmed Department of Justice official who is not recused from the matter. The bill also allows the special counsel to challenge his or her removal in court, requiring that any such challenge be considered on an expedited basis and that any appeals be directed to the Supreme Court, and provides for the preservation of the special counsel’s materials in the event of dismissal. This legislation would not prevent a future president from publicly railing against or even threatening those involved in a special counsel investigation, but it would provide greater assurance that the president cannot unilaterally end an investigation.

Legislation to protect the special counsel from improper removal is within Congress’s constitutional authority, as evidenced by similar exercises of its authority in the past that have been found to be constitutional. Congress previously established an independent counsel with jurisdiction to investigate criminal misconduct by high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest. Congress insulated the independent counsel from improper removal by superiors. Congress has also enacted legislation protecting numerous other federal officers from arbitrary removal.

### 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 healthcare 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, Mr. 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.

**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 the 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.

**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. Currently a partner at 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. At DLA Piper, he works on financial issues, international trade, legislative affairs, and healthcare. He is the Board Chair for Research!America. He received his B.A. from Hamilton College and his J.D. from Georgetown University.

**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 for 23 years and co-founded the Harvard Civil Rights Project. Prof. Edley co-chaired the congressionally chartered National Commission on Education Equity and Excellence. He served in 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; and is a National Associate of the National Research Council.

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 Senate 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, American Security Project Board, and is a Senior Advisor to Gallup. He is a graduate of the University of Nebraska at Omaha.

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, Professor 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. Professor 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. He received his bachelor's from Wheaton College and his J.D. from the University of New Mexico School of Law.

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 from Bard College and J.D. from the University of Michigan.

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.
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About the Brennan Center for Justice

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center’s work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving Constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

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## Appendix: Ethics and Disclosure Requirements

<table>
<thead>
<tr>
<th>Is the official required to:</th>
<th>President and Vice President</th>
<th>Cabinet members and other senior executive branch officials</th>
<th>Members of Congress</th>
<th>Federal judges</th>
<th>Candidates for federal office</th>
</tr>
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<tr>
<td>Make annual financial disclosures* using OGE Form 278?</td>
<td>Yes</td>
<td>Yes (including nominees)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Follow federal conflict of interest law and regulations, and related rules?</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Abide by the insider trading rules and transaction reporting requirements of the STOCK Act?**</td>
<td>Reporting requirements only</td>
<td>Reporting requirements only</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Follow other rules to prevent conflicts of interest?</td>
<td>No</td>
<td>Some, depending on the agency</td>
<td>Yes (House and Senate ethics rules)</td>
<td>Yes (Code of Judicial Conduct)</td>
<td>No</td>
</tr>
</tbody>
</table>

* Form 278 requires disclosure of the filer's compensation, investments, assets, gifts, liabilities, certain employment agreements or arrangements, and similar information regarding their spouse and dependent children.

** The STOCK Act forbids members of Congress and their staffs from engaging in insider trading on the basis of information derived from their position. It also requires certain officials to report securities transactions valued above $1,000.
Endnotes

1 The Federalist No. 51 (James Madison) (“In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.”).


4 “Governments are instituted among Men, deriving their just powers from the consent of the governed.” Declaration of Independence para. 2 (U.S. 1776); “We the People of the United States, . . . do ordain and establish this Constitution for the United States of America.” U.S. Const. preamble.; “…Government of the people, by the people, for the people, shall not perish from the earth.” Abraham Lincoln, the Gettysburg Address (Gettysburg, PA, Nov. 19, 1863).

5 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.”).

6 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 within that period any other emolument from the United States, or any of them.”).

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

8 See infra at 8 (discussing divestment by past presidents and vice presidents).

9 See infra at 6–7 (discussing public disclosure of tax returns by past presidents and presidential candidates).


16 Id. at 3.


20 As David Frum, formerly a top aide to President George W. Bush, has noted, “legitimacy is important precisely because it shapes the behavior and beliefs of non-supporters,” who will only accept policies with which they disagree if they perceive them as a legitimate exercise of authority. David Frum, “Trump’s Crisis of Legitimacy,” The Atlantic, July 17, 2018, https://www.theatlantic.com/politics/archive/2018/07/is-trumps-presidency-legitimate/565451/.


28 Specifically, the OGE 278 requires that officials disclose their personal sources of income, assets, debts, and other financial information, and employment arrangements and agreements, as well as information for spouses and dependent children. 5 C.F.R. § 2634; Office of Government Ethics, Form 278-e, Public Financial Disclosure (2018); see also Table 1.


31 See Ethics in Government Act, 5 U.S.C. App. § 102 (listing disclosure requirements, which do not include reporting for family businesses). In the case of President Trump, for instance, most of his holdings are tied up in a web of approximately 500 LLCs and other closely-held entities, which makes it likely his disclosure reports omit critical information about the president’s finances. See Ben Popken, “What Trump’s Disclosure of His 500 LLCs Can and Can’t Tell Us,” *NBC News*, May 16, 2018, https://www.nbcnews.com/business/taxes/what-trump-s-disclosure-his-500-llcs-can-can-t-n874391.

32 Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining Paperwork for Executive Nominations* (Washington, D.C.: Executive Office of the President of the United States, 2012), 4, 48, https://www2.oge.gov/Web/OGEdfs/0/2CE9B19C0F0E82A85257EA6006558188FILE243F5C6D38460B89728A57E65552F3.pdf (finding that the “two areas particularly ripe for reform are: (1) eliminating the requirement to report investment income… and (2) raising and rationalizing minimum reporting thresholds across reporting categories to exclude the disclosure of financial items too insignificant to raise a concern over conflict of interest” and that implementing these


39 Under current law, candidates are required to file a statement of candidacy once their campaign raises $5,000, see 5 U.S.C. App. § 101(c); 11 CFR § 101.3; this proposal would add tax returns to the list of required disclosures at that point.

40 While disclosure of business tax returns has not been part of the longstanding practice, for the reasons stated above, it makes sense to update our disclosure requirements to include them.


The Committee on Foreign Investment in the United States (CFIUS) reviews certain transactions involving foreign investments (“covered transactions”) in order to determine the effect of such transactions on the national security of the United States. See Defense Production Act of 1950, 50 U.S.C. § 2170.


U.S. Const. art. I, § 9, cl. 8.

See Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1 (2009), available at https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace_0.pdf (finding that President Obama’s receipt of Nobel Peace Prize did not implicate the Foreign Emoluments Clause because Nobel Committee was not an instrumentality of a foreign government); Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13 (1994), available at https://www.justice.gov/file/20391/download (concluding that two scientists on leave from the National Aeronautics and Space Administration could be employed by a public university in Canada without violating the Foreign Emoluments Clause because the public university did not constitute an instrumentality of a foreign government).

U.S. Const. art. II, § 1, cl. 7.

For example, the Voting Rights Act codifies and implements the protections for voting rights in the Fourteenth and Fifteenth Amendments. See Katzenbach v. Morgan, 384 U.S. 641 (1966). Similarly, the Religious Freedom Restoration Act (RFRA) was passed to codify and expand upon the First Amendment’s protections for religious liberty. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2767 (2014).

5 U.S.C. § 7342 (defining statutory terms “gift,” “decoration,” and “minimal value,” and establishing categories of gifts and decorations to federal employees, the receipt of which Congress consents).


For the first time this year, a federal court interpreted the definition of “emolument” and held that the term “extends to any profit, gain, or advantage, of more than de minimis value, received by [the president], directly or indirectly, from foreign, the federal, or domestic governments.” D.C. v. Trump, No. 17-1596, 2018 WL 3559027, at 23 (D. Md. July 25, 2018).

For instance, foreign diplomats now frequently stay at the president’s Washington, D.C., hotel, raising questions about whether they are hoping to curry influence or favor with the president. Jonathan O’Connell and Mary Jordan, “For Foreign Diplomats, Trump Hotel Is Place to Be,” Washington Post, Nov. 18, 2016, http://wapo.st/2fNSW6E.


Hobby Lobby, 134 S. Ct. at 2760 (“Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty.”); Cf. Nevada Dep’t of Human Resources v. Hibbs, 538 U.S. 721, 728 (2003) (recognizing that Congress can go beyond the narrow requirements of the 14th Amendment to enforce that amendment).

See 18 U.S.C. § 208(a) (barring most “officers” and “employees” of the federal government from participating “personally and substantially” in specific matters in which they, their spouse or minor child, business partners, or organizations with which they are affiliated have a “financial interest”); see also 18 USC § 208: Acts affecting a personal financial interest,” Office of Government Ethics, accessed Nov. 16, 2017, https://www.oge.gov/Resolution/18+U.S.C.+%C2%A7+208%5B4%5D#Acts+affecting+a+personal+financial+interest (explaining that, under Section 208, an employee has “a disqualifying financial interest . . . if there is a close causal link between a particular Government matter . . . and any effect on the asset or other interest (direct effect) and if there is a real possibility of gain or loss as a result of . . . that matter (predictable effect)”).

See 18 U.S.C. § 202(c) (exempting the president, vice president, members of Congress and federal judges from the definition of “officer” or “employee” in the conflict of interest statute). Members of Congress and federal judges are also exempt, although they have their own ethics codes that prohibit some of the same conduct. See, e.g., “Code of Conduct for Judicial Employees,” at 6–9 (defining conflicts of interest); “Rule XXIII – Code of Official Conduct,” included in Rules of the House of Representatives, H.R. Doc. No. 114-192 (2017) (regulating, inter alia, receipt of gifts and honoraria); “Rule XXXVII – Conflict of Interest,” included in The Standing Rules of the Senate, S. Doc. No. 113-18 (2013) (defining conflicts of interest and regulating, inter alia, outside compensation).

See 5 C.F.R. § 2635.402(b) note (“If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect[,] . . . on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock.”); Jack Maskell, Financial Assets and Conflict of Interest Regulation in the Executive Branch, CRS Report No. R43365 (Washington, D.C.: Congressional Research Service, 2014), 6–7 (discussing recusal process and waivers).

5 C.F.R. § 2635.402(b)(3).

See 5 C.F.R. § 2635.402(b)(3) example 1 (“The Internal Revenue Service’s amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration’s consideration of changes to its appeal procedures for disability claimants.”).
For example, then future Supreme Court Justice Antonin Scalia, during his time at the Department of Justice, wrote in a memo on the applicability of an Executive Order on conflicts of interest, that “it would obviously be undesirable as a matter of policy for the President or Vice President to engage in conduct proscribed by” conflict of interest rules even if they did not technically apply. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, “Applicability of 3 C.F.R. Part 100 to the President and Vice President” (official memorandum, Washington, D.C.: Department of Justice, 1974), https://fas.org/irp/agency/doi/olc/121674.pdf. See also Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017) (requiring presidents and vice presidents, as well as their spouses and minor children, to put any potentially conflicting assets into a blind trust).

The Department of Justice opined in 1974 that such concerns weighed against finding that Congress had intended to include the president and vice president in the most recent version of the conflict of interest statute, which dates back to 1962. See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (Sept. 20, 1974), available at https://fas.org/irp/agency/doi/olc/092074.pdf (“[T]he conflict of interest problems of the President and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch.” (quoting Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, Association of the Bar of the City of New York (1960): 16–17)). Congress formally codified the exemption in 1989. 18 U.S.C. § 202(c) (amending 18 U.S.C. § 202 (1989)).

Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (remarks, Brookings Institution, Washington, D.C., Jan. 11, 2017), available at https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge shaub Remarks.pdf (“[E]very President in modern times has taken the strong medicine of divestiture. This means OGE Directors could always point to the President as a model. They could also rely on the President’s implicit assurance of support if anyone balked at doing what OGE asked them to do.”).


For instance, 66 percent of respondents to a Quinnipiac poll said that Donald Trump should place all of his business holdings into a blind trust. Tim Malloy et al., U.S. Voters Approve of Obama, Disapprove of Trump, Quinnipiac University National Poll Finds; Trump Should Stop Tweeting, Voters Say 2-1, Quinnipiac University, Jan. 10, 2017, 12, available at https://poll.qu.edu/images/polling/poll/us/us01102017_Urb35mky.pdf/.


Typically, recusal is documented in a memo or other communication to an agency’s Designated Agency Ethics Official (DAEO) or, for White House staff, a memo to the White House counsel.
See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing view that applying conflict of interest statute to the president would “disable him from performing some of the functions prescribed by the Constitution”).

As a practical matter, one way for the president or vice president to avoid having to divest would be to refrain from involvement in matters where they have a financial interest. Under this proposal, the decision as to whether to do so would remain up to them. In the event a president chooses to avoid participation in a matter that raises a possible conflict, divestiture would remain an option if his participation later proved necessary.


See Letter from Laurence H. Silberman, Acting Attorney General to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing the view that applying conflict of interest statute to the president would “disable him from performing some of the functions prescribed by the Constitution”). The other objection that is sometimes raised is that making the president and vice president subject to conflict of interest law would amount to an unconstitutional qualification on their offices. See id. The Constitution sets forth specific qualifications for these offices (natural born citizens at least 35 years old), U.S. Const. art. II, § 1, cl. 5, as it does for Congress, U.S. Const. art. I, § 2, cl. 2 (House of Representatives); U.S. Const. art. I, § 3, cl. 3 (Senate); other qualifications are disallowed absent a separate constitutional amendment. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that state constitutional prohibition of the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot, if that candidate has already served three terms in the House of Representatives or two terms in the Senate, violates the Qualifications Clause of the Constitution for members of the House of Representatives). But making the president and vice president subject to the same ethical rules as other officials does not amount to imposition of an additional “qualification” on either office any more than subjecting him or her to other laws barring egregious official misconduct like bribery or obstruction of justice does.


See, e.g., 5 C.F.R § 7501.104(a) (detailing certain prohibited assets and transactions for even high-ranking Department of Housing and Urban Development employees). See also 5 C.F.R § 3501.103(b) (detailing certain prohibited land or natural resource interests and transactions for high-ranking officials in the Department of the Interior).


88 18 U.S.C. § 202(c)


91 Id. (reporting that 28 House members and six senators each traded more than 100 stocks in the past two years).


98 The Ethics in Government Act does give OGE the power to “order corrective action” when it discovers an ethical violation but does not explain what that might look like or how OGE can enforce its own orders. 5 U.S.C. App. § 402(b)(9). There is no record of the agency exercising this authority. See Alex Guillén, “Ethics Office Weighs ‘Corrective Action’ for Pruitt,” Politico, June 15, 2018, https://www.politico.com/story/2018/06/15/ethics-office-investigation-scott-pruitt-scandals-1425413.

99 5 U.S.C. App. § 401 (containing appointment procedure and term length for director, but no for-cause removal provision).

100 See Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) (“The parties agree that the Commissioners cannot themselves be removed by the President except [for] . . . ‘inefficiency, neglect of duty, or malfeasance in office,’ . . . and we decide the case with that understanding.”) (internal citations omitted); Federal Election Comm’n v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (“The [Federal Election] Commission suggests that the President can remove the commissioners only for good cause, which limitation is implied by the Commission’s structure and mission as well as the commissioners’ terms. We think the Commission is likely correct[ . . . ].”)


102 Supra n. 69.

103 Id.


106 See Letter from Stefan Passantino, Deputy Counsel to the President, Compliance and Ethics, to Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (Feb. 28, 2017), 1, available at https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Oversight%20Response%20to%20Shaub%20Re%20KAC.PDF. The Passantino letter notes the OGE is statutorily authorized to issue regulations and other guidance with respect to “agency” employees, and that the Executive Office of the President is not technically an agency.


110 See Nuno Garoupa and Fernando Gomez-Pomar, “Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties,” American Law and Economics Review 6 (2004): 415 (civil enforcement is often more effective than criminal enforcement given the lower burden of proof and greater likelihood of a sanction); see also Celena Vinson and Julie Countiss, “The Power of Civil Enforcement,” American Journal of Criminal Law 43 (2015) (discussing the utility of civil injunctions and other enforcement mechanisms to prevent gang activity, prostitution, and the illegal sale of alcohol); V.S. Khanna, “Corporate Criminal Liability: What Purpose Does It Serve?” Harvard Law Review 109 (1996): 1532 – 33 (finding that there are very limited circumstances in which corporate criminal liability is more socially desirable than civil liability). Even with OGE as the primary civil enforcer of ethics laws, the Department of Justice would continue to have sole jurisdiction over criminal matters. Overlapping responsibilities of this sort are common in the federal government. Agencies will typically resolve any conflicts (such as between ongoing criminal and civil investigations) through informal communications or by drafting a formal cooperation agreement, either of which could be used here.


112 Supra n. 97.


114 Similar requirements are contained in the statute authorizing the Federal Election Commission to investigate potential violations of campaign finance law. See 52 U.S.C. §§ 30107(a)(3), 30109(a)(2), 30109(a)(12). Of course, the FEC is an evenly-divided commission that is prone to gridlock. These safeguards would be far more important at a watchdog agency headed by a single director.

115 See 5 U.S.C. § 556(d) (outlining the procedural protections in place for those facing sanction in an agency adjudication); see also Richardson v. Perales, 402 U.S. 389, 401 (1971) (“[P]rocedural due process is applicable to the adjudicative administrate proceeding involving ‘the differing rules of fair play, which through the years, have become associated with different types of proceedings.’”); Muset v. Ishimaru, 783 F. Supp. 2d 360 (E.D.N.Y. 2011) (holding that due process requires that an agency adjudicator give those being punished notice and an opportunity to be heard before enforcing the punishment).

116 See 5 U.S.C. § 7323(B)(1) (preventing employees of certain agencies from taking an active part in political management or political campaigns).
117 18 U.S.C. § 208(b)(1). One recent waiver, for example, allowed a senior White House economic adviser to work on matters affecting companies whose stock was still in his portfolio (the White House claims he has since divested). See Peter Overby, “Ethics Documents Suggest Conflict of Interest by Trump Adviser,” NPR, March 14, 2017, https://www.npr.org/sections/thetwo-way/2017/03/14/520121822/ethics-documents-suggest-conflict-of-interest-by-trump-adviser. However, the waiver problem is not new. In one notorious example from the George W. Bush administration, the administration’s Medicare chief, Thomas A. Scully, was granted a waiver to seek employment representing private healthcare clients even as he was helping to craft the administration’s proposal to expand Medicare coverage to prescription drugs. See Amy Goldstein, “Administration Alters Rules on Ethics Waivers,” Washington Post, Jan. 14, 2004, https://www.washingtonpost.com/archive/politics/2004/01/14/administration-alters-rules-on-ethics-waivers/b92bb516-b3a0-483f-8e11-58f989318999/?utm_term=.25f4a0a9616f.


119 See supra n. 106.


123 See infra n. 151.

124 See infra 17-21, A generally; see also Andrew McCanse Wright, “Justice Department Independence and White House Control” (Feb. 18, 2018): 51 available at http://dx.doi.org/10.2139/ssrn.3125848 (“The White House has traditionally avoided comment on pending criminal investigations because of the perception of presidential control.”); Luke M. Milligan, “The ‘Ongoing Criminal Investigation’ Constraint: Getting away with Silence,” William & Mary Bill of Rights Journal (2008): 756, available at https://scholarship.law.wm.edu/wmborj/vol16/iss3/4/ (“The White House has historically behaved as though it were constrained from commenting on the merits, progress, or information gathered during ongoing federal criminal investigations or prosecutions of which the President is perceived to be at least nominally in control.”).

125 In its examination of conduct at the FBI during the 2016 Presidential election, the Department of Justice’s Office of the Inspector General conducted interviews with several current and former law enforcement officials who described the existence of an unwritten “Sixty Day Rule,” under which prosecutors avoid public disclosure of investigative steps related to electoral matters or the return of indictments against a candidate for office within 60 days of a primary or general election. See Department of Justice Office of the Inspector General, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election (Washington, D.C.: U.S. Department of Justice, 2018), 17–18, https://www.oversight.gov/sites/default/files/oig-reports/2016_election_final_report_06-14-18_0.pdf.

126 Roosevelt directed his attorney general to produce a memo analyzing the legality of J.P. Morgan’s Northern Securities Trust and had a hand in choosing the venue for bringing the government’s suit to enjoin the combination. Later, he


130 While the Justice Department evaluated its merger case against IT&T, the corporation donated hundreds of thousands of dollars to the Republican National Convention. White House tapes recorded President Nixon ordering Attorney General Richard Kleindienst to tell the Department’s lead antitrust lawyer to “stay the hell out” of “the IT&T thing” or risk being fired. See Impeachment Inquiry Staff for the House Judiciary Committee, 93d Cong., Transcript of a Recording of a Meeting Among the President, John Ehrlichman and George Shultz on April 19, 1971 from 3:30 to 3:34 P.M. (1974), available at https://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/watergate/wspf/482-017_482-018.pdf; see also J. Anthony Lukas, Nightmare: The Underside of the Nixon Years (New York: Viking Press, 1976): 132–34.


See, e.g., Donald J. Trump (@realDonaldTrump), “Attorney General Jeff Sessions should stop this Rigged Witch Hunt right now, before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!” Twitter, Aug. 1, 2018, 9:24 a.m., https://twitter.com/realDonaldTrump/status/1024640945640525826; Donald J. Trump (@realDonaldTrump), “Looking back on history, who was treated worse, Alfonse Capone, legendary mob boss, killer and ‘Public Enemy Number One,’ or Paul Manafort, political operative & Reagan/Dole darling, now serving solitary confinement - although convicted of nothing?” Twitter, Aug. 1, 2018, 8:35 a.m., https://twitter.com/realDonaldTrump/status/1024680095343108097.

See, e.g., Donald J. Trump (@realDonaldTrump), “Everybody is asking why the Justice Department (and the FBI) isn’t looking into all of the dishonesty going on with Crooked Hillary & the Dems.[sic]” Twitter, Nov. 3, 2017, 3:57 a.m., https://twitter.com/realDonaldTrump/status/926403023861141504.


United States v. AT&T, Inc., No. 17-2511 (D.D.C. June 12, 2018) (denying Department of Justice’s request to enjoin the merger), appeal pending.


150 Such checks on prosecutors’ power are critical because, as Attorney General Robert H. Jackson explained, “The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent force in our society, when he acts from malice or other base motives, he is one of the worst.” Attorney General Robert H. Jackson, “The Federal Prosecutor: Address to the Second Annual Conference of the United States Attorneys,” Journal of the American Judicature Society 24 (1940): 18, https://www.roberthjackson.org/wp-content/uploads/2015/01/The_Federal_Prosecutor.pdf.

151 See, e.g., Jack Quinn, Counsel to the President, “Contacts with Agencies” (official memorandum, Washington, D.C.: The White House, Jan. 16, 1996), 1 (“Unless you are certain that a particular contact is permissible, you should take care before making the contact to consult with the Counsel’s Office.”); Donald F. McGahn II, Counsel to the President, “Communications Restrictions with Personnel at the Department of Justice” (official memorandum, Washington, D.C.: The White House, Jan. 27, 2017), 1 (“Communications with DOJ about individual cases or investigations should be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General, unless the Counsel’s Office approves different procedures for the specific case at issue.”).

152 See, e.g., Eric Holder, Attorney General, “Communications with the White House and Congress” (official memorandum, Washington, D.C.: Department of Justice, May 11, 2009), 2, https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download (exempting communications relating to national security from limited contacts policies because “[i]t is critically important to have frequent and expeditious communications relating to national security matters”).

153 See, e.g., Benjamin Civiletti, Attorney General, “Communication from the White House and Congress” (official memorandum, Washington, D.C.: Department of Justice, Oct. 18, 1979), 2 (“White House or Congressional inquiries concerning policy decisions or legislation are different from those directed at specific investigations and cases. The positions of the Administration on those kinds of matters often must be coordinated. Additionally, there is less chance for improper influences in this area. Consequently, different considerations for communication result.”); Quinn, “Contacts with Agencies,” 2; Holder, “Communications with the White House and Congress,” 3 (allowing for “distinctive arrangements” for “[m]atters in which the Solicitor General’s Office is involved” because those “often raise questions about which contact with the Office of the Counsel to the President is appropriate”).
Civiletti, “Communication from the White House and Congress,” 1 (outlining Department of Justice policy limiting contacts with the White House).

For instance, in 2009, Christine Varney, head of the Antitrust Division at the Department of Justice, stated publicly, “The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected.” Cecilia Kang, “U.S. Clears the Way for Antitrust Crackdown,” Washington Post, May 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051101189.html. The White House could also direct the Department of Justice to crack down on white collar crime, even on bankers, but it is generally frowned upon for the White House to direct the prosecution of an individual controversial CEO. A recent example of the White House setting enforcement policy is when the Obama administration announced a policy to no longer initiate the deportation of young undocumented immigrants meeting certain qualifications. In response, Homeland Security Secretary Janet Napolitano instructed immigration enforcement agents to “immediately exercise their discretion, on an individual basis, in order to prevent low-priority individuals from being placed into removal proceedings.” Julia Preston and John H. Cushman, Jr., “Obama to Permit Young Migrants to Remain in U.S.,” New York Times, June 15, 2012, https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html.

See, e.g., Renan, “Presidential Norms and Article II,” 2207 (discussing “the norm of investigatory independence” for the presidency, which “prohibits presidential direction in individual investigatory matters”), 2236–39 (discussing the president’s political control over policymaking through the administrative process).


See, e.g., Quinn, “Contacts with Agencies” (Clinton Administration); Kathryn Ruemmler, Counsel to the President, “Prohibited Contacts with Agencies and Departments” (official memorandum, Washington, D.C.: The White House, Mar. 23, 2012).


Mukasey committed to reinstating a more stringent limited contacts policy at his nomination hearing, and upon confirmation, he restricted allowable contacts about pending criminal and civil cases to the attorney general and his deputy and to the White House counsel and deputy counsel, with a provision that civil enforcement matters could also be discussed with the associate attorney general. Jeannie Shawl, “Mukasey Memo Limits DOJ Case Discussions with White House,” Jurist, Dec. 20, 2007, http://www.jurist.org/paperchase/2007/12/mukasey-memo-limits-doj-case.php; Mukasey, “Communications with the White House.”


165 While all administrations since the 1970s have enacted policies, many of them have not been released until long after they were issued, and some have yet to be publicly released. For example, a White House contacts policy memorandum issued by President Obama’s White House counsel has not been released publicly as of the publication of this report. Ruemmler, “Prohibited Contacts with Agencies and Departments.”

166 The story of the changes to the limited contact policy during George W. Bush’s administration provides an illustration of how congressional scrutiny of contacts policies can make a difference. See supra, nn. 159–60.


168 To reduce duplication (or any perceived burden), Congress could make clear that once the log indicates the subject and individuals involved in communications about a particular matter, subsequent log entries for each communication on the same matter are not required.


172 See supra n. 157.

The Presidential Records Act, 44 U.S.C. §§ 2201–2207. Presidents have consistently conformed to the Presidential Records Act (PRA) without questioning its constitutionality. See Jonathan Turley, “Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records,” Cornell Law Review 88 (2003): 666–72. While the PRA has not faced a significant constitutional challenge, the Supreme Court upheld the constitutionality of a PRA predecessor, the Presidential Recordings and Materials Preservation Act, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (holding that requiring the publication of presidential records in no way “prevents the Executive Branch from accomplishing its constitutionally assigned functions,” and discussing the “abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch”). See also Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991) (noting that, when enacting the Presidential Records Act, “Congress was . . . keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President’s daily operations”).


Inspectors general are subject to removal by the president, with the president required to communicate in writing the reasons for the removal to both houses of Congress within 30 days of that action. Id. § 3(b).


Agency heads transmit the budget proposals to the president, who submits them to Congress. Id. §§ 6(f)(2) – (3).

Inspectors general do not currently have express statutory authority to investigate political interference. When the Department of Justice Inspector General and Office of Professional Responsibility investigated political interference during the Bush administration’s U.S. Attorney firing scandal, the report the Offices co-authored explained that each of the two Offices had jurisdiction to investigate certain aspects of U.S. Attorney and Department of Justice misconduct, and did not reference improper White House interference in law enforcement. An Investigation into the Removal of Nine U.S. Attorneys in 2006, 10 n. 12 ("OPR has jurisdiction to investigate allegations against U.S. Attorneys that involve the exercise of their authority ‘to investigate, litigate, or provide legal advice.’ The OIG has jurisdiction to investigate all other allegations against U.S. Attorneys. See 5 U.S.C. App. 3 § 8E."). The report also noted that, in the midst of congressional and media scrutiny of the U.S. Attorney firings, Deputy Attorney General Paul McNulty recommended to Attorney General Alberto Gonzales that he direct OPR to conduct an investigation into the removals of the U.S. Attorneys. Id. at 92–93.

5 U.S.C. App. 6 § 6(e)(4) (“[t]he Attorney General shall promulgate, and revise as appropriate, guidelines which shall govern the exercise of [inspectors general’s] law enforcement powers”); John Ashcroft, Attorney General, “Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority” (official memorandum, Washington, D.C.: Department of Justice, 2003) (requiring, inter alia, adherence to attorney general guidelines applicable to criminal investigative practices and completion of law enforcement training program, and establishing special procedures for investigations involving senior executive branch officials and other sensitive targets).
The Council of Inspectors General for Integrity and Efficiency publishes professional standards pursuant to the Inspector General Reform Act of 2008, 5 U.S.C. App. § 11(c)(2)(A) (2008), which require that investigations be conducted ethically, with impartiality and objectivity, and in accordance with all applicable laws, rules, and regulations, guidelines from the Department of Justice and other prosecuting authorities, and internal agency policies and procedures, with due respect for the rights and privacy of those involved. Quality Standards for Investigations, Council of the Inspectors General for Integrity and Efficiency, 2011, available at https://www.ignet.gov/sites/default/files/files/invprg1211appi.pdf.

See, e.g., 5 U.S.C. App. 6 § 4(b) (requiring reviews to ensure compliance with standards established by the comptroller general of the United States for audits and that internal quality controls are in place and operating); Id. § 6(e)(7) (requiring establishment of external review process, in consultation with the attorney general, to ensure that adequate internal safeguards and management procedures exist for exercise of law enforcement powers).

See Kathleen Clark, “Toward More Ethical Government: An Inspector General for the White House,” Mercer Law Review 49 (1998): 553, 555–56, 564 (discussing downsides of independent counsel investigations, which included expense, increased political use of ethics allegations, and decreased public trust in government, and arguing that inspector general mechanism helps promote ethical environment); Letter from Walter M. Shaub, Senior Director for Ethics, Campaign Legal Center, to Trey Gowdy, Chairman, and Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform, United States House of Representatives (Nov. 9, 2017): 13–15, available at https://www.politico.com/@id=0000015f-a141-de5e-abff-bfd5436b0001 (advocating for establishment of inspector general with regular jurisdiction over small agencies and limited special jurisdiction to conduct ethics investigations throughout executive branch).

U.S. Const. art. II, § 2, cl. 1.

Margaret Colgate Love, “Reinventing the President’s Pardon Power,” Federal Sentencing Reporter 20 (2007): 6, available at http://pardonlaw.com/wp-content/uploads/pardonlawimport/FSR.Pardon.2007.final.pdf (quoting Alexander Hamilton in Federalist No. 74 (“the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel”) and James Iredell, Address in the North Carolina Ratifying Convention (“It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.”)).

Margaret Colgate Love, “Reinventing the President’s Pardon Power,” 6, n. 6; Proclamation 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977) (President Carter granting pardon for violations of the Selective Service Act, August 4, 1964 to March 28, 1973); Proclamation 4313, 39 Fed. Reg. 34511 (Sept. 16, 1974) (President Ford creating “amnesty discharge,” 32 C.F.R. § 724.112); see also The Federalist No. 74 (Alexander Hamilton) (“in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall”).

The Federalist No. 74 (Alexander Hamilton) (“The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution.”). James Madison believed that the threat of impeachment would serve as a check on abuse of the pardon power: “There is one security in this case [a misuse of the pardon power by the president] to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President.” Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Philadelphia: J.B. Lippincott & co.; Washington, D.C.: Taylor & Maury, 1836–1859), 3:498, available at https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/led003.db&recNum=509&itemLink=r/amem/hlaw:@field(DOClD+@lit(ed00318))%25230030509&linkText=1.

Presidents began to rely on the attorney general for advice on pardons in 1854, though it was not until 1865 that the Office of the Clerk of Pardons was established in the Office of the Attorney General. See Margaret Colgate Love, “Reinventing the President’s Pardon Power,” 6; see also “Department of Justice, Office of the Pardon Attorney.”
The Pardon Attorney submits recommendations to the president through the deputy attorney general. 28 C.F.R Part 1.6 (procedure for reviewing petitions and submitting recommendations to the president); 28 C.F.R. Part 0, Subpart G (delegating authority to the Pardon Attorney and specifying that pardon recommendations to the president are submitted through the deputy attorney general).


See Margaret Colgate Love, “Reinventing the President’s Pardon Power,” 6 (citing only three occasions between 1953 and 1999 where the Department of Justice’s process was not followed: President Ford’s pardon of President Nixon in 1974, President Reagan’s 1981 pardon of President Nixon in 1974, President Bush’s 1992 pardon of six Iran-Contra defendants.); Samuel T. Morison, “The Politics of Grace: On the Moral Justification of Executive Clemency,” Buffalo Criminal Law Review 9 (2005): 45 n. 85 (citing pardons of President Nixon, FBI officials, and Iran-Contra defendants as among those constituting “roughly one percent of th[e] total” cases granted between March 1945 and January 2001 for which there was no prior Justice Department review).


Isaac Toussie pleaded guilty in 2001 to using false documents to have mortgages insured by the Department of Housing and Urban Development, and in 2002 to mail fraud. Ken Belson and Eric Lichtblau, “A Father, A Son, and a Short-Lived Presidential Pardon,” New York Times, Dec. 25, 2008, https://www.nytimes.com/2008/12/26/us/26par-don.html. The White House maintained that when President Bush granted the pardon, neither he nor his advisers were aware that Toussie’s father had recently donated a total of $30,800 to Republicans. Id.

Id.


Flynn and Manafort are potential witnesses in the special counsel investigation into whether Russia interfered in the 2016 election, contributing to the condemnation of the reports. Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman, and Adam Goldman, “Trump’s Lawyer Raised Prospect of Pardons for Flynn and Manafort,” New


203 Model Code of Judicial Conduct R. 2.11.

204 The factors considered by the Pardon Attorney include: (1) the perspectives of the prosecutors and sentencing judge; (2) the gravity of the offense; (3) the recipient’s acceptance of responsibility; (4) the petitioner’s criminal rehabilitation record; and (5) the need for relief. See U.S. Attorneys’ Manual § 9-140.000.


206 Ruckman, “Preparing the Pardon Power for the 21st Century,” 475–76. It is unclear why this process was abandoned. According to one reporter, the process was initially stopped as part of a broader cost-cutting measure to eliminate printing during the Great Depression, and it was not resumed to prevent embarrassment to those whose crimes were being pardoned. Koerner, “It’s Time to Make the Clemency System Less Opaque.”


209 See Presidential Pardon Transparency Act of 2017, H.R. 3489, 115th Cong. (2017) (requiring that the name of the person pardoned, the full text of the reprieve, and the date of issue is published in the Federal Register); Abuse of the Pardon Prevention Act, H.R. 5551 & S.2770, 115th Cong. (2018) (directing the attorney general to produce investigatory materials to Congress in the event of certain pardons granted by the president).

210 We calculated this average from the yearly figures provided by the Pardon Attorney. “Clemency Statistics,” U.S. Department of Justice, Office of the Pardon Attorney, accessed Aug. 23, 2018, https://www.justice.gov/pardon/clemency-statistics. In 2014, President Obama announced an initiative for federal inmates to have their sentences commuted or reduced if they met certain factors. The initiative resulted in 583 and 1,043 commutations in 2015 and 2016, respectively. Without these two years, the average drops further.

211 Former Pardon Attorney Margaret Colgate Love argues that President Roosevelt’s 1933 “decision to stop publishing reasons for grants deprived the public of the factual predicate necessary to hold pardon decision-makers accountable and reinforced the impression that pardoning was mysterious, capricious, and possibly corrupt. It also encouraged both the president and the Justice Department to think that they did not need to be accountable to the public for pardoning.” Margaret Colgate Love, Reinvigorating the Federal Pardon Process: What the President Can Learn from the States, American Constitution Society, 2013, 9–10, available at https://www.acslaw.org/wp-content/uploads/2018/04/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf.

212 5 U.S.C. App. 3 § 3(b).


214 Congress also requires disclosure of foreign intelligence information to congressional intelligence committees despite the president bearing “primary responsibility for the scope and conduct of foreign intelligence activities” and acting as “the sole organ of the nation in foreign relations.” Philip A. Lacovara, “Presidential Power to Gather Intelligence: The Tension between Article II and Amendment IV,” Law & Contemporary Problems 40, no. 3 (1976): 107. See National Security Act of 1947, 50 U.S.C. §§ 3001, 3043(a)(1), 3091(a)(1), 3093(c) (requiring the president to transmit to Congress an annual report on the national security strategy of the United States; to keep congressional intelligence committees fully and currently informed of intelligence activities; to provide congressional intelligence committees written findings that covert actions are necessary, and, in instances when such findings are not reported to the committees, to provide a statement of the reasons for not giving prior notice, with an obligation to disclose the finding or provide an explanation for its continued withholding within 180 days); Intelligence Authorization Act for Fiscal Year 2015, Pub. L. No. 113-293, 128 Stat. 3990–4008.

215 The Supreme Court has held that, in some circumstances, the president can be required to disclose information without violating the separation of powers doctrine. United States v. Nixon, 418 U.S. 683, 706–07 (1974); see also Reynolds, “Congressional Control of Presidential Pardons,” 33–34 (“Although Congress cannot tie the president’s hands, it seems likely that it could take substantial steps to ensure that, under certain circumstances, those hands perform their actions in the open—and if not open to the entire public, then at least behind closed doors to Congress. Rules providing for such transparency would very likely withstand constitutional scrutiny given that a pardon is, by its nature, a public act.”).

216 For instance, transparency can help Congress hold the president accountable, where appropriate, pursuant to its impeachment power. The Supreme Court has also recognized that the pardon power is appropriately limited by other constitutional provisions, such as the Spending Clause, Hart v. United States, 118 U.S. 62, 67 (1886) (explaining that pardons cannot have the effect of authorizing a governmental payment not authorized by Congress), the Fifth Amendment privilege against self-incrimination, Burdick v. United States, 236 U.S. 79, 93–94 (1915) (“[T]he power of the President under the Constitution to grant pardons and the right of a witness [against self-incrimination] must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both, to leave to each its proper place.”), and the Fifth Amendment’s Due Process Clause, Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (J. O’Connor, concurring) (“some minimal procedural safeguards apply to clemency proceedings”).
Donald J. Trump (@realDonaldTrump), “As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending [sic] Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!” Twitter, June 4, 2018, 5:35 a.m., https://twitter.com/realdonaldtrump/status/1003616210922147841.


Those potential abuses include pardons of family members or political supporters that would undermine the public’s confidence in equal justice, or pardons of public officials who have violated the public’s trust or their fundamental rights, signaling to other officials that they may do the same with impunity. Such a resolution would also respond to the recent pardon of former Arizona sheriff Joe Arpaio, who was convicted of criminal contempt for ignoring a court order to stop unconstitutional conduct, and recent speculation that President Trump could issue pardons to his son and son-in-law. See, e.g., Carol Leonnig, Ashley Parker, Rosalind Helderman, and Tom Hamburger, “Trump Team Seeks to Control, Block Mueller’s Russia Investigation,” *Washington Post*, July 21, 2017, http://wapo.st/2uH7sqO (reporting that Trump has asked his advisers about his power to pardon aides, family members, and even himself). President Trump is also considering pardoning former Illinois Governor Rod Blagojevich, who is serving a prison sentence following convictions for public corruption. Jason Meisne, “Trump Says He’s Considering Commuting Sentence of Imprisoned Former Gov. Rod Blagojevich,” *Chicago Tribune*, May 31, 2018, http://www.chicagotribune.com/news/local/breaking/ct-met-illinois-governor-blagoevich-trump-20180531-story.html.


Representatives Al Green and Steve Cohen have proposed amendments to the Constitution to expressly prohibit self-pardons. H.J. Res. 115, 115th Cong. (2017) (“The President shall have no power to grant to himself a reprieve or pardon for an offense against the United States”); H.J. Res. 120, 115th Cong. (2017) (prohibiting self-pardons and pardons for the president’s family members, current or former members of the president’s administration, or staff from the president’s campaigns).

Members of Congress have introduced several other proposals to amend the pardon power over the years, including a 1974 proposal to give a two-thirds majority of Congress the power to reject pardons, resolutions in the 1990s to prohibit pre-conviction pardons, a 2001 proposal to prohibit pardons during lame-duck presidencies, and a 2009 resolution disapproving of pardons during the final 90 days of a president’s term. Kristen H. Fowler, “Limiting the Federal Pardon Power,” *Indiana Law Journal* 83 (2008): 1660–61; H Res. 9, 111th Cong. (2009).


See *infra* at 16 (discussing the Saturday Night Massacre).


Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973) (“[I]n the absence of a finding of extraordinary impropriety[,] [the firing] was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.”).

5 U.S.C. § 2301(b)(2) (mandating that employees and applicants for employment receive fair and equitable treatment without regard to political affiliation); 5 U.S.C. § 2301(b)(8)(A) (protecting employees from coercion for partisan political purposes).

28 C.F.R. § 600.1. Special counsel regulations were implemented after the expiration of the independent counsel statute that same year. The Office of Independent Counsel was created pursuant to the Ethics in Government Act of 1978. The statute empowered the attorney general to petition a special three-judge panel of the U.S. Court of Appeals for the District of Columbia to name an independent counsel upon the receipt of credible allegations of criminal misconduct by certain high-level executive branch personnel whose prosecution by the administration might give rise to an appearance of a conflict of interest. The attorney general could remove the independent counsel for “good cause, physical or mental disability.”


Though it is not clear whether the regulations are subject to the Administrative Procedure Act’s “notice-and-comment” rulemaking process (indeed, the regulations were promulgated by former Attorney General Reno without going through that process), legal scholars agree there is an avenue for the executive to rescind the regulations, either through the APA’s rulemaking procedure or more expeditiously. See, e.g., Katyal, “Trump or Congress Can Still Block Mueller” (“Trump could order the special counsel regulations repealed. . . .”); Josh Blackman, “Can the Special Counsel Regulations Be Unilaterally Revoked?” Lawfare, July 5, 2018, https://www.lawfareblog.com/can-special-counsel-regulations-be-unilaterally-revoked (though the regulations could be revoked, the special counsel may have standing to challenge a rescission that is “arbitrary and capricious”). Cf. Nader, 366 F. Supp. at 108 (“An agency's power to revoke its regulations is not unlimited—such action must be neither arbitrary nor unreasonable.”) citing Kelly v. U.S. Dep't of Interior, 339 F. Supp. 1095 (E.D. Cal 1972).


Nicholas Fandos, “In Warning to Trump, Senators Advance Bill to Protect Mueller,” New York Times, Apr. 26, 2018, https://www.nytimes.com/2018/04/26/us/politics/senate-mueller-protection-bill.html. The bill would not open the door for Congress to politicize investigations by imposing real-time reporting requirements on the special counsel, as one contemplated amendment to the bill while it was considered in committee would have done. Mary Clare Jalonick, “As Trump Fumes, Senators Bid to Protect the Special Counsel,” Associated Press, Apr. 11, 2018, https://www.apnews.com/9a5a0ba245814a9b8259c6290b698f5 (reporting that Senator Charles Grassley was preparing an amendment requiring new reports to Congress if the scope of the special counsel’s investigation changed and a final report on the investigation with a detailed explanation of any charges).


28 U.S.C. § 596 (requiring “good cause, physical or mental disability” for removal).
