

SECTION 1 *of* WHAT DEMOCRACY LOOKS LIKE

Holding Presidents Accountable

In recent years, the executive branch has grown more powerful and less accountable than ever before. This unprecedented shift in the balance distribution between the branches of government has suppressed the ability to check that power. In this section we identify specific areas of executive overreach, and provide suggestions for measures that would mitigate that overreach.

In many cases, the overreach represents a failure of self-restraint; before the Trump Administration, many norms—or behavioral expectations—had largely, if imperfectly, held executive power in check. But these same norms have spectacularly failed throughout the Trump Administration, exposing their weakness. Although it is neither possible nor desirable to convert every norm into law, we believe that key weaknesses must be addressed.

The issues we have identified fall within five main categories of failures to ensure presidential accountability: the system fails to prevent presidential financial conflicts of interest, it fails to prevent excessive presidential interference in impartial law enforcement, it fails to prevent nepotism, it fails to hold the president accountable for clear misconduct, and it fails to prevent the president from undermining the judicial system.

Our solutions will ensure the White House is staffed with well-suited professionals who protect our nation's interests; that personal financial interests are prevented from undermining the American people; and that presidential interference cannot unduly influence enforcement of law and the judicial process. These changes will improve both public confidence and internal mechanisms that hold presidents accountable for serious misconduct.

We acknowledge that these changes alone are not sufficient; other branches must have the capability to act as a check, and the reforms described here alone will not ensure that. Independent, smoothly-functioning courts and a capable, ethical Congress are also necessary steps towards this goal; we address additional checks on executive power in section 2 of this report.

Issue 1: Nondisclosure of financial interests and tax returns

Without a clear understanding of a person's financial interests, it is impossible to know what conflicts those interests might present. For this reason, presidential and vice-presidential candidates, like others seeking federal office, [are required](#) to file summary public financial disclosures. This is also one reason why [every major party presidential candidate](#) since President Richard Nixon has released at least some tax return information. President Donald Trump ended this tradition, refusing to release his tax return information; this proved to be the first in [a number of steps](#) he would take to fight the release of any financial records beyond his required [summary financial disclosure](#). This has left the public unable to know whether decisions he makes as president are in the public interest or in his own financial interest.

Investigative journalists have tried to fill in these gaps. In 2020, the New York Times [obtained](#) several decades' worth of Trump's tax information, including his personal returns and those of the businesses he owns. One example of the need for both the required summary financial disclosures and tax returns is clear from the Times's reporting: "[i]n 2018, for example, Mr. Trump announced in his disclosure that he had made at least \$434.9 million. The tax records deliver a very different portrait of his bottom line: \$47.4 million in losses." The Times's reporting also put a price tag on President Trump's income from foreign countries; in his first two years in office, he received \$73 million of his income from overseas. According to the Times, some of that money "came from licensing deals in countries with authoritarian-leaning leaders or thorny geopolitics—for example, \$3 million from the Philippines, \$2.3 million from India and \$1 million from Turkey." When Trump [tried to intervene](#) to prevent a Turkish bank from being charged by the Department of Justice for illegally lending to Iran, was he motivated by the country's national interest or his own financial interest? If we didn't know about his personal financial interest, we might not even know to ask.

Trump has demonstrated that financial interests are not just things one possesses, like stocks or business interests; owing money can also be a potential conflict of interest. A president's required summary financial disclosure does not necessarily tell the full story of debts and other financial obligations. Forbes, for example, identified [two loans](#) that did not appear on Trump's summary financial disclosure at all, and estimated their value at \$447 million. When he took office, Trump owed more than [\\$350 million dollars](#) to [Deutsche Bank](#), which holds the mortgages of several Trump properties, including his Trump International Hotel in Washington, DC. Deutsche Bank has failed to monitor and report suspicious financial activity in President Trump's and his son-in-law Jared Kushner's accounts, resulting in [federal investigations](#) of the bank. But Trump, as the president of the United States, has power over how his administration regulates a bank that he does business with. And in this case, Deutsche Bank has so far consistently refused to hand over documents about [President Trump's finances](#).

Solutions

- **Congress should require presidential and vice presidential candidates to release more comprehensive financial disclosures, including tax returns.** The public must be able to see a true picture of the candidate's financial situation; this should be done by requiring disclosure of tax returns and by modifying candidate financial disclosure forms. In addition to requiring greater specificity in amounts for information currently

disclosed, the financial disclosure forms must require beneficial ownership information for business partners and information about the actual holders of debt and terms of repayment.

- **Congress should require presidential and vice presidential candidates to disclose a detailed plan to address actual and potential financial conflicts of interest if elected.** The plan should include how they plan to divest from conflicting assets. If candidates intend to use a blind trust mechanism, they must be required to obtain preliminary approval from the Office of Government Ethics of the proposed trust instrument within 30 days of accepting their party's nomination.
- **Congress should close loopholes in disclosure requirements for elected candidates.** Once in office, the president and vice president must be required to demonstrate they have followed through on their plans. A loophole in current law could permit a president or vice president to wait more than a calendar year to file another financial disclosure form; although recent officeholders, including President Trump, have voluntarily filed sooner—that loophole should be closed.

Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 8011 et seq. (116th Congress, 2019).

Rep. Gallego's [CORRUPT Act](#), H.R.1524 (116th Congress, 2019).

Rep. Porter's [Transparency in Executive Branch Official Finances Act](#), H.R. 5433 (116th Congress, 2019).

Sen. Warren's [Presidential Conflicts of Interest Act of 2019](#), S. 882 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

[Testimony of Noah Bookbinder](#), *House Committee on Ways & Means: Oversight Subcommittee*, February 7, 2020.

Issue 2: Failures to divest financial interests that create conflicts of interest

The goal of federal conflict-of-interest laws and regulations is to prevent federal employees' personal financial interests from impacting their official duties. Most of these federal laws are applicable to all executive branch employees except the president and vice president. This exemption has recently come to a head as President Donald Trump is the first president in modern history to retain full ownership of businesses while in office. He has failed to align his personal financial interests with the public interest, and in doing so, has highlighted the urgency for reform and enforcement.

The main federal conflict-of-interest law, [18 U.S.C. § 208\(a\)](#), legally bars all other federal employees from participating in government work that may substantially and directly affect their financial interests—including those of their spouses. Federal employees and officers have complied with the law in one of three ways: (1) recusing themselves from a part of their government work, (2) obtaining a waiver to work on a conflicting matter from ethics officials within their agency, or (3) divesting the financial interest responsible for the conflict.

For obvious reasons, presidents and vice presidents are unable to recuse themselves from a part of their work or obtain a waiver from an ethics officer. But [modern presidents](#) of both parties have voluntarily adhered to ethical norms and traditions by selling or divesting their financial interests that presented risks of corruption, and then limiting their holdings to non-conflicting assets like U.S. Treasuries and diversified mutual funds.

President Trump's decision to not divest from his business interests created [thousands](#) of conflicts of interest. Some of these include the Trump Organization's lease with the federal government to [operate a hotel](#) in the Old Post Office building in Washington, DC, [business dealings](#) in Panama and other countries, [foreign trademarks](#), [debt obligations](#), and [temporary visas](#) for foreign persons to work at Trump-owned properties and companies. These conflicts create a twofold problem. One, the government that Trump heads can enact policies that can [benefit his own bottom line](#), and two, outsiders—including [foreign countries](#) and [special interests](#)—can use these conflicts to buy influence.

This outcome was made possible by a lack of legislation or oversight, and the absence of an ethics agency with enforcement capabilities. It is time to require presidents and vice presidents to divest from conflicting assets and to strengthen the Office of Government Ethics (OGE) so that it can inform Congress if a president or vice president fails to sufficiently avoid financial conflicts of interest.

Solutions

- **Congress should require presidents and vice presidents to divest all assets that might present a conflict of interest within 30 days of taking the oath of office, whether by placing the assets in a blind trust to be sold by an independent trustee, or by some other mechanism such as an arms length transaction.** Presidents and vice presidents must align their financial interests with those of the country. Funds that are independently managed, widely held, and either publicly traded or available, or

widely diversified, are appropriate investments, among other things like U.S. Treasuries and non-commercial real estate.

- **Congress should empower the Office of Government Ethics to oversee the divestment process.** The OGE, which is experienced in ensuring that other executive branch officials address financial conflicts of interest, including via divestiture, should oversee the process. All candidates for president and vice president are already required by law to publish a plan for how they will address their financial conflicts of interest; the OGE can help ensure that the plan is sufficient and properly implemented.
- **Congress should empower the Office of Government Ethics to ensure the president and vice president's compliance with divestiture.** Ultimately, our system of checks and balances requires that Congress play an active role in ensuring that presidents and vice presidents comply with this requirement. In the beginning of an administration, the OGE should report to Congress regarding whether the president and vice president have complied; similarly, when the president and vice president file annual financial disclosures during their terms, the OGE should report to Congress whether the president and vice president remain in compliance.

Resources

Sen. Warren and Rep. Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357 (115th Congress, 2018).

Sen. Warren's [Presidential Conflicts of Interest Act of 2019](#), S. 882 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

[Testimony of Walter M. Shaub, Jr.](#), *House Committee on Oversight and Reform*, February 6, 2019.

Issue 3: Inability to enforce the Emoluments Clauses

By continuing to own his businesses while in office and, through them, accepting payments from foreign and domestic governments, President Donald Trump has violated the Foreign and Domestic Emoluments Clauses. Particularly if presidents are not forced by law to divest these types of financial interests in the future (though we recommend they be), President Trump's continued violations of the Constitution have demonstrated a need for a more robust system to enforce these key [anti-corruption](#) provisions.

The Framers included the Emoluments Clauses in the Constitution to keep the president's loyalty with the American people by preventing him from being improperly influenced by foreign and domestic governments. The Foreign Emoluments Clause [prohibits](#) federal officers from accepting any benefit, gain, or advantage from any foreign power or official without congressional approval. The Domestic Emoluments Clause [prohibits](#) the president from accepting any benefit, gain, or advantage (other than the pre-set salary and benefits) from the federal or state governments. Both clauses are intended to foreclose improper efforts to influence the president (and, in the case of the Foreign Emoluments Clause, other federal officials).

President Trump's failure to divest from his businesses has resulted in his unconstitutional acceptance of foreign and domestic emoluments. For example, in the first three months of 2018, revenue from room rentals at the Trump International Hotel and Tower in New York City went up 13 percent [thanks to](#) "a last-minute visit to New York by the Crown Prince of Saudi Arabia," whose entourage stayed at the hotel. Their spending put the hotel in the black for the quarter, after two years of decline. Recent [reporting](#) from the Washington Post also reveals that Trump's properties, where he often chooses to host events, have billed taxpayers at least \$2.5 million.

Efforts to enforce the Foreign and Domestic Emoluments clauses via lawsuits—including two in which CREW represents the plaintiffs—have moved through the courts, but are unlikely to be resolved in time to prevent substantial harm from Trump's acceptance of unconstitutional emoluments. Congress needs to institute proactive measures to prevent violations of the Emoluments Clauses from occurring and to increase the likelihood of sanctions if they do.

Solutions

- **Congress should require presidents and vice presidents to divest all assets that might present a conflict of interest within 30 days of taking the oath of office, whether by placing the assets in a blind trust to be sold by an independent trustee, or by some other mechanism such as sale through an arms length transaction.** The best way to prevent unconstitutional emoluments is for the president to divest financial holdings that could be vehicles for the receipt of emoluments before entering office. Domestic and foreign governments seeking influence in American politics will inevitably try to patronize businesses from which the president and vice president continue to profit. Divestiture is the best form of protection against that dynamic.
- **Congress should create a cause of action that would permit entities who may have standing, such as the United States attorney general, state attorneys general, a**

house of Congress, and private citizens to enforce the divestiture requirement and Emoluments Clauses in federal court. An explicit cause of action available to a diverse set of prospective litigants can increase the potential for enforcement and will help deter unlawful action by the president or vice president, even in circumstances where Congress is controlled by the same party as the White House. An extended statute of limitations for such causes of action would also be useful.

- **Congress should amend 18 U.S.C. § 431 to void contracts between federal agencies and the president, vice president, senior White House staff, and cabinet members as well as businesses they control.** Existing law already voids contracts between federal agencies and members of Congress. That law should be expanded to include senior executive branch officials and to include businesses that either members of Congress or executive branch officials control—another strong incentive for officials to divest.

Resources

Sen. Warren and Rep. Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357, § 112 et seq. (115th Congress, 2018).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 301 et seq. (116th Congress, 2020).

[Trump Proofing the Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

Norman L. Eisen, et al., [The Emoluments Clause: Its Text, Meaning, And Application to Donald J. Trump](#), *Governance Studies at Brookings*, December 16, 2016.

Richard Painter, [Good Governance Paper No. 15: Enforcing the Emoluments Clauses](#), *Just Security*, October 30, 2020.

Karl A. Racine and Elizabeth Wilkins, [Enforcing the Anti-Corruption Provisions of the Constitution](#), *Harvard Law & Policy Review*.

Issue 4: Corrupt attempts to influence federal law enforcement

Politicization—or, in extreme cases, personal control—of law enforcement is a hallmark of authoritarian regimes. Presidents of both parties have historically recognized that protecting even handed enforcement is critical to the rule of law and democracy. As a result, past presidents have exercised self-restraint while adopting procedural guard rails to reinforce their own restraint. In general, these guard rails have taken the form of “contacts policies” that (1) limit communications between the White House and law enforcement officials to certain approved topics; (2) route those communications generally through senior lawyers on both sides, to avoid improper influence or the appearance of a thumb on the scale; and (3) limit public comments about ongoing investigations or cases. The weakness in these policies is obvious: they rely largely on self-enforcement.

President Donald Trump’s conduct in office has demonstrated that he and his administration are not committed to these forms of self-restraint. For example, less than a month after taking office, then-White House Chief of Staff Reince Priebus reportedly [directly requested](#) that then-Federal Bureau of Investigation (FBI) Deputy Director Andrew McCabe and then-FBI Director James Comey publicly disavow reporting about Trump campaign officials’ contacts with Russia. When the FBI refused, the Trump Administration [persuaded officials from the intelligence community](#) to tell reporters off the record that previously reported contacts were not “frequent” but instead “sporadic.” These unprecedented efforts from the early days of the Trump Administration—three months before Special Counsel Robert Mueller was appointed—demonstrate how easily self-restraint fails in the absence of procedural guardrails.

President Trump has also consistently used his public platform, including White House press availabilities, media interviews, and social media, to make statements about pending investigations, cases, witnesses, judges and jurors, particularly when the matters involve him or his associates. For example, the Department of Justice (DOJ) recently sought an unprecedented [dismissal](#) of criminal charges against former National Security Advisor Michael Flynn, after he [pleaded guilty](#) to lying to federal investigators; this move comes after a [torrent](#) of public statements by Trump criticizing the investigators who worked on Flynn’s case. Trump also publicly [criticized](#) the recommendation of career DOJ prosecutors in the case of his associate Roger Stone; at the eleventh hour, Attorney General William Barr [overruled](#) this recommendation, leading the career prosecutors to withdraw from the case. Trump then [praised](#) Barr, closing the corrupt loop.

In some cases, Trump’s statements have merely been inappropriate given his position and authority; in other cases, they may have crossed the line into criminal witness tampering or other types of obstruction of justice.

The risk of politicization of law enforcement will not spontaneously evaporate without reform. Preventing this in our system can be challenging because the executive power vested in the president includes important law enforcement functions, including appointing senior law enforcement officers with the consent of the Senate. That dynamic, combined with President Trump’s actions, necessitates change now more than ever.

Solutions

- **The White House should set rules for who can discuss specific cases with agencies like the Department of Justice, and publish them.** While measures that would limit the exercise of the president's authority as head of the executive branch would be unwise, the public should know what steps the White House and executive branch agencies are taking to prevent improper political pressure.
- **Congress should require law enforcement agencies to log enforcement-related communications with any White House officials or members of Congress.** Each agency's inspector general should periodically review those logs and report potentially problematic interactions to Congress.
- **Presidents should speak with care and avoid public statements that appear to denigrate or interfere with the justice system.** Presidents should avail themselves of a communications team that can help them avoid unintentional issuance of such statements, and put in place internal policies to facilitate this practice.

Resources

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 601 et seq. (116th Congress, 2020).

Sen. Whitehouse and Rep. Jeffries' [Security from Political Interference in Justice Act of 2019](#), S. 1915 (116th Congress, 2019).

[The Security From Political Interference In Justice Act of 2007](#), S. Rept. 110-203 (110th Congress, 2007).

Justin Florence, [On the Importance of Limiting White House-DOJ Contacts: It's Not Just About Obstruction](#), *Lawfare*, May 22, 2017.

Barry H. Berke, et al., [Presidential Obstruction of Justice: The Case of Donald J. Trump: 2nd Edition](#), *Governance Studies at Brookings*, August 22, 2018.

Preet Bharara, et al., [Proposals for Reform](#), *Brennan Center for Justice: National Task Force on Rule of Law & Democracy*, October 2, 2018.

[In His Own Words: The President's Attacks on the Courts](#), *Brennan Center for Justice*, February 14, 2020.

James E. Baker, [Good Governance Paper No. 21: Obedience to Orders, Lawful Orders, and the Military's Constitutional Compact](#), *Just Security*, November 2, 2020.

Issue 5: Department of Justice participation in the president's personal legal cases

The rule of law is threatened when a president injects personal or political imperatives into the Department of Justice's (DOJ) neutral enforcement of the law. Even more, the rule of law is threatened when the DOJ is drawn into a president's personal legal issues; the DOJ risks becoming more the president's personal law firm than the American people's legal representatives. Not every instance of DOJ involvement in a case involving the president's personal conduct is necessarily problematic; the DOJ has traditionally had a role in some of these legal proceedings when a case also involves the president's official conduct or when it genuinely threatens the president's ability to fulfill his constitutional responsibilities.

The extent of the involvement and the relationship of the involvement to the president's official duties are key factors. Recent cases are instructive: in [two cases](#) involving subpoenas to outside parties seeking information regarding President Donald Trump's personal financial and business dealings, President Trump was represented by personal attorneys, but the DOJ participated as an "amicus," filing briefs in the cases expressing the views of the DOJ. In one of these two cases, in fact, the court [requested](#) the DOJ's participation. Contrast this with the DOJ's approach in another case, a civil suit filed by E. Jean Carroll alleging defamation by President Trump. In that case, the DOJ attempted to intervene to take over the case from the private attorneys representing President Trump. Federal law permits the DOJ to defend federal officials when they are sued for actions taken in the scope of their employment; however, in the Carroll case the judge [rejected](#) the DOJ's [assertion](#) that the statement in question (denying a rape that allegedly occurred decades before he took office) is in fact within the scope of President Trump's employment. Also troubling is the [timing](#) of the DOJ's decision to intervene (only after the judge in the case had ordered discovery to begin, and in the runup to the 2020 presidential election).

Solutions

- **If the Department of Justice is considering voluntarily intervening in a civil suit on behalf of the president or vice president, it should appoint a special counsel to make that determination.** The special counsel process allows for increased oversight of decisions that could be improperly influenced by political considerations.
- **The Department of Justice should retain all records of contact with the White House and the president or vice president's outside counsel in such matters, if any.** Effective oversight of decisions that could be improperly influenced by political considerations requires scrupulous recordkeeping, and the DOJ should ensure that its policies are sufficient to permit oversight in these types of cases.

Resources

Carlos Manuel Vázquez and Stephen I. Vladeck, [State Law, the Westfall Act, and the Nature of the Bivens Question](#), *Georgetown University Law Center*, 2013.

Daphna Renan, [Mazars, Vance and the President's Two Bodies](#), *Lawfare*, July 22, 2020.

Chiméne Keitner and Steve Vladeck, [All the President's Lawsuits: Fraud, Defamation, and the Westfall Act](#), *Just Security*, September 25, 2020.

Issue 6: Nepotism in the White House

Congress's enactment of the federal anti-nepotism statute, [5 U.S.C. § 3110](#), represented an effort to eliminate executive branch members' ability to hire close relatives in official positions. Presidents John Adams, Woodrow Wilson, Ulysses Grant, and others had hired [relatives](#) in their administrations, which led to ethics and accountability problems. Notably, President Grant hired more than 40 relatives, many of whom directly profited from their positions, yet remained in office due to the protection of Grant.

The appointment of family members in an administration is problematic for [several reasons](#): they may not be held to the standards of other employees because they will be seen as unfireable, they may be unqualified for the job or given responsibilities outside of their qualifications or authority, and they can undermine management structures because they have a special relationship with the president.

Since its enactment, the anti-nepotism statute has rarely been defied [until Donald Trump's presidency](#). President Trump explicitly ignored the anti-nepotism law by appointing his daughter Ivanka Trump and his son-in-law Jared Kushner as White House advisers. Although the anti-nepotism statute explicitly uses the president as an example of a public official and specifically defines "son-in-law" and "daughter" as relatives, the Department of Justice's (DOJ) Office of Legal Counsel (OLC) nevertheless [concluded](#) that President Trump could hire both of them. OLC contradicted its own prior opinions and determined that the President has constitutional authority to fill White House positions "without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

President Trump's circumvention of the anti-nepotism statute has proven to be an ethics nightmare. Ivanka Trump and Jared Kushner have had free reign to ignore rules and restraints that ordinary executive branch employees would have to follow—the precise outcome that anti-nepotism laws are [intended](#) to prevent. For example, although ethics officials [concluded](#) that it was necessary for Kushner to divest a financial interest in order to do his job at the White House, he does not [appear](#) to have done so. Ivanka Trump [participated](#) in the implementation of a new tax law that directly benefited her and Kushner financially.

Kushner is also a prime example of the risk that nepotism hiring gives jobs to unqualified people who, predictably, do not succeed. In 2020, Kushner [reportedly](#) set up a "shadow task force" to address aspects of the federal government's response to the COVID-19 pandemic. However, the efforts were reportedly undermined by [inexperience](#), [partisan political concerns](#), and [incompetence](#), leaving the country's pandemic response to the largely uncoordinated efforts of state and local officials.

To protect against corruption and the other implications of nepotism in democracy, it has become evident that the anti-nepotism statute must be updated in order to remove the ambiguity entirely.

Solutions

- **Congress should amend nepotism laws to make clear that they apply to the**

president and vice president. Qualifications, not family connections, should determine who serves in important government roles. Presidents and vice presidents should be held to the same standards as all other executive branch officials—they should not be able to hire close family members. Until the statute is clarified, presidents and vice presidents should choose not to violate it, and the DOJ should rescind its contrary legal opinion.

- **Federal procurement law should be amended to ensure that immediate family members of the president or vice president cannot hold or benefit from any government contract.** This is an important backstop against the president or vice president profiting from their office, as it can be implemented and enforced even if the president and vice president and their families refuse to distance themselves from government business.

Resources

Rep. Speier's [RIGHT Act of 2019](#), H.R. 1028 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan For Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

[Nepotism and Conflicts of Interest — Jared Kushner and Ivanka Trump](#), *CREW*, April 25, 2017.

Daniel L. Koffsky, [Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office](#), *Department of Justice: Office of Legal Counsel*, January 20, 2017.

Issue 7: Security vulnerabilities of incoming officials

The circumstances of a presidential transition place unique strains on the vetting process. The handling of sensitive matters addressed at the highest levels of the executive branch need to be handed off to an entirely new set of senior advisors and other officials without delay. And yet, we need to ensure that those who are given access to the nation's most sensitive information do not pose national security risks.

The beginning of the Trump Administration demonstrated some of these challenges. For example, a year after President Donald Trump was elected, "[more than 130 political appointees working in the Executive Office of the President did not have permanent security clearances](#)," and were instead still operating under "interim" clearances based on only minimal investigations. Of those political appointees, 34 had been working at the White House since day one. The group included very senior officials, such as then-White House Counsel Don McGahn, and 10 of the 24 individuals who worked on the National Security Council.

Even more troubling is the case of Michael Flynn, President Trump's first national security adviser. Less than a month after President Trump took office, Flynn [resigned](#) after it was reported that he lied about a phone conversation he had in December 2016 with Russia's ambassador to the United States. Ultimately, he [pleaded guilty](#) to lying to the Federal Bureau of Investigation about this call, although the Department of Justice (DOJ) is now seeking to [dismiss](#) the case before he is sentenced (the dismissal appears to be politically motivated and implicates political interference in the DOJ). In that same case, he also [pleaded guilty](#) to falsifying disclosures to the DOJ to cover up the fact that he was doing work on behalf of the Turkish government in the fall of 2016, including publishing an op-ed under his own name that was in fact directed by the Turkish government.

While a new president needs to be able to quickly put together a staff to advise him, particularly in the national security realm, basic security protocols to protect classified information are a minimum guardrail.

Solutions

- **Congress should require the White House to provide concrete updates about the status of interim security clearances and about the frequency with which the president overrules career staff recommendations to grant a security clearance.** Interim security clearances cannot be an effective substitute for permanent security clearances for White House officials. The White House should regularly report to appropriate congressional committees on the status of security clearances for those who need them so that Congress can ensure the interim status is not being abused. Similarly, career staff determine that a White House official should not receive a security clearance, and the president overrules this decision, the White House should notify Congress.
- **Congress should preclude special treatment of the president's family; security clearance determinations should not be affected by nepotism.** The law defining security clearances, 50 U.S.C. § 3341, should clarify that immediate family members

of the president should not gain interim or full security clearance if not otherwise qualified.

Resources

Rep. Lieu's [CLEARANCES Act](#), H.R. 538 (116th Congress, 2019).

Rep. Espaillat's [JARED Security Clearance Act of 2019](#), H.R. 1187 (116th Congress, 2019).

Sen. Warren and Rep Cummings's [Transition Team Ethics Improvement Act](#), S. 338 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

Samantha Vinograd, [Why the White House "System" for Security Clearances is an Intelligence Emergency](#), *Just Security*, February 12, 2018.

Dakota S. Rudesill and Rolf Mowatt-Larsen, [Good Governance Paper No. 22: Preventing Politicization of the Security Clearance System](#), *Just Security*, November 2, 2020.

Issue 8: Weakness of the Department of Justice’s special counsel regulations

After President Donald Trump fired Federal Bureau of Investigation Director James Comey in May 2017, Special Counsel Robert Mueller was [appointed](#) to lead the investigation into potential Russian coordination with the Trump campaign, foreign interference in the 2016 election, and obstruction of justice.

In the ensuing months, the investigation was dogged by [repeated presidential](#) interference attempts. On multiple occasions, President Trump pressured Attorney General Jeff Sessions to revoke his recusal from the investigation or asked his subordinates to fire or curtail Special Counsel Mueller’s authority. President Trump ultimately fired Sessions and later appointed William Barr, who had penned a detailed [memorandum](#) arguing that the obstruction of justice case against President Trump was flawed and shared it with Trump’s personal lawyers and White House Counsel as well as Department of Justice (DOJ) officials.

After his appointment, Barr assumed responsibility for overseeing Special Counsel Mueller’s investigation despite previously expressing views about the case. When Special Counsel Mueller submitted a report detailing his prosecution and declination decisions, Attorney General Barr subverted that work by issuing a four-page [letter](#) purporting to disclose Mueller’s principal findings. However, Special Counsel Mueller [wrote](#) three days later that Barr’s letter “did not fully capture the context, nature, and substance” of the report and led to “public confusion about critical aspects of the results” of the investigation, which “threaten[ed] to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome of the investigations.” Attorney General Barr eventually released a redacted version of the report that contained [damning evidence](#) that President Trump had obstructed justice and [likely would have been indicted](#) were he not protected by a DOJ opinion that sitting presidents cannot be indicted.

Special counsel regulations must be strengthened to eliminate opportunities for interference in investigations like the kind of habitual obstruction of justice carried out by the Trump Administration. The American public deserves to receive unaltered, thorough information from an independent special counsel.

Solutions

- **Congress should codify the special counsel’s authority so that it cannot be changed mid-course by an attorney general.** The legal authority governing the special counsel, 28 C.F.R. § 600.1 et seq., is a DOJ regulation that could be altered or withdrawn by the attorney general. Congress should enshrine the special counsel’s authority in statute to protect that authority from being withdrawn or changed during an investigation.
- **Congress should require that credible allegations of criminal conduct involving the president, vice president, and their campaigns be investigated by a special counsel.** Section 600.1 of the existing special counsel regulation lays out vague grounds for appointing a special counsel: when a criminal investigation of a person or matter is warranted and that investigation “would present a conflict of interest

for the Department or other extraordinary circumstances” and “[t]hat under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.” Because those circumstances exist whenever the DOJ investigates potential criminal conduct by presidents, vice presidents, and their campaigns, the new statute should require appointment of a special counsel to handle those investigations. If the attorney general receives a referral from Congress alleging criminal conduct by the president, vice president, their campaign, cabinet members, or senior White House officials, but does not appoint a special counsel (for example, because he decides no criminal investigation is warranted), he should be required to explain the basis for this decision in writing to the referring member or members and to the judiciary committees of the House and the Senate.

- **Congress should establish a process for expedited judicial review of any firing of the special counsel by the president or a political appointee and provide for the continuity of the special counsel office while that review is pending.** A president and his political appointees should not be permitted to terminate the special counsel for reasons other than those laid out in 28 C.F.R. § 600.7: “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.” The United States District Court for the District of Columbia should be given jurisdiction to hear an expedited legal challenge to a special counsel’s termination, and the United States Supreme Court should be given jurisdiction to hear a direct appeal.
- **Congress should provide the special counsel with authority to disclose to Congress a report on the prosecution and declination decisions without the prior approval of the attorney general, including the results of any investigation into persons that the Department of Justice has determined cannot be indicted while they are in office.** In cases where the DOJ has determined an individual cannot be indicted while in office, impeachment by Congress is the only available check on that person’s abuse of power. For those reasons, the special counsel should be entitled to disclose the results of an investigation of presidential misconduct to Congress without the prior approval of the attorney general.
- **Congress should ensure that it has access to the special counsel’s investigative findings.** Congress must be able to use the work of the special counsel in its oversight of the executive branch. Notwithstanding any DOJ policy, the special counsel statute should explicitly authorize the special counsel to brief House and Senate Judiciary committees in closed session about any pending matter. It also should require the special counsel to testify before Congress in closed or open session with respect to any matter in which the special counsel has reached a prosecution or non-prosecution decision.

Resources

Sen. Graham and Rep. Nadler’s [Special Counsel Independence and Integrity Act](#), S. 2644 (115th Congress, 2018).

Sen. Blumenthal and Rep. Doggett’s [Special Counsel Transparency Act](#), S. 236 (116th Congress, 2019).

Andrew Weissmann, [Good Governance Paper No. 3: Investigating a President, *Just Security*](#), October 15, 2020.

Issue 9: A sitting president's immunity from prosecution under Department of Justice policy

The Department of Justice (DOJ) has a longstanding [policy](#) that presidents may not be indicted while in office. The DOJ believes that prosecuting a president would impermissibly interfere with the president's ability to execute official duties. While there are constitutional and prudential grounds to question such an assertion, the DOJ would still be unlikely to indict a sitting president even without a written policy. Such a prosecution might be perceived by a president's supporters as an effort to supplant voters' preferences. Accordingly, it is important to examine the consequences of such a policy—whether written or unwritten—and to mitigate its negative consequences as much as possible.

Special Counsel Robert Mueller's investigation of Russian interference in the 2016 election and of President Donald Trump's obstruction of the matter demonstrates the substantial effects of such a policy on investigations themselves. For example, while Special Counsel Mueller asked [written questions](#) of President Trump during his investigation, he did not follow up on the answers that were not fully responsive or even those that appeared to have contained misstatements. In no other circumstance would an investigator simply accept statements like this from the subject of a criminal investigation.

When it came time to issue a report, Special Counsel Mueller was unable to present the investigation's findings in a way that made clear to the public what happened—because to do so would mean stating that President Trump likely obstructed justice, which Mueller felt he could not say because he could not indict the President while in office.

Additionally, if a president may not be indicted while in office because it would interfere with his or her duties, that reasoning would not extend to prohibit indictment after he or she leaves office. However, if the statute of limitations on the offenses continue to run while the president is in office, the DOJ's policy could mean that a prosecution afterwards would be too late.

Solutions

- **In circumstances where the rule against indicting a president plays a role in any prosecutorial or investigative decision, all relevant information must be available to Congress.** While considerations such as grand jury secrecy and potential harm to other ongoing investigations may necessitate limits on public access to this information, they should pose no bar to congressional access in these situations. The need for Congress to have this information in its role as the exclusive holder of impeachment authority outweighs the need for secrecy, and the law must say so clearly.
- **If called as a witness in an impeachment inquiry or an impeachment trial, a special counsel who investigated a relevant matter must be permitted to opine publicly on whether the person being impeached committed a crime.** While there are good reasons for the DOJ's strict policy against making these kinds of public statements when it is not bringing charges in ordinary cases, the circumstances of an impeachment are unique. Due to the nature of an impeachment, the matter will be significant, the person being impeached will have an opportunity to respond formally

and the matter will be resolved in a timely way. In these circumstances, Congress and the public must have access to the considered views of the special counsel, whatever they may be.

- **Congress should provide that statutes of limitations stop running while a president is in office, as the current Department of Justice policy allows presidents to run out the clock on criminal liability.** Regardless of whether the conduct occurred before or during a president's term in office, the president should not be able to avoid prosecution entirely simply because the statute of limitations expires while in office. Similar to a situation in which a person skips out on bail, the statute of limitations should stop running (be "tolled") for the duration of the president's term in office.

Resources

Sen. Blumenthal and Rep. Nadler's [No President is Above the Law Act](#), S. 1756 (116th Congress, 2019).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 202 et seq. (116th Congress, 2020).

Amanda Lineberry and Chuck Rosenberg, [Equitable Tolling and the Prosecution of a President](#), *Lawfare*, April 17, 2019.

Joshua A. Geltzer, [How Do We Keep a Criminal President From Running Out the Clock? One Possible Solution.](#), *Slate*, May 14, 2019.

Andrew Weissmann, [Good Governance Paper No. 3: Investigating a President](#), *Just Security*, October 15, 2020.

Issue 10: Successful obstruction of criminal investigations

In 1974, the Supreme Court [required](#) President Richard Nixon to turn over tapes and documents in Congress's impeachment investigation. In 1998, the Supreme Court [required](#) President Bill Clinton to testify in a civil case; in so doing, the Court emphasized that sitting presidents have often responded to court orders for information back to the early 1800s. In that same year, Independent Counsel Kenneth Starr issued a subpoena to President Clinton in the Whitewater investigation, which led to President Clinton [agreeing](#) to an interview; that interview was ultimately a critical part of his impeachment.

Special Counsel Robert Mueller's team took a different approach to seeking information from President Donald Trump in its investigation. After a reportedly long period of negotiations, Special Counsel Mueller submitted written questions to President Trump's legal team, and President Trump [responded in writing](#). However, Special Counsel Mueller's team, citing "[the inadequacy of the written format](#)" and the lack of specificity in Trump's answers, asked for a follow up interview. A brief review of the questions and answers, which are reproduced in Special Counsel Mueller's report, makes the inadequacy of these answers abundantly clear. For example, the last question:

Prior to January 20, 2017, did you talk to Steve Bannon, Jared Kushner, or any other individual associated with the transition regarding establishing an unofficial line of communication with Russia? If yes, describe who you spoke with, when, the substance of the discussion(s), and what you understood was the purpose of such an unofficial line of communication.

TRUMP:

(No answer provided.)

Notwithstanding this, Special Counsel Mueller did not issue a subpoena to President Trump. Andrew Weissmann, one member of the Special Counsel's team, [said](#) this was because "Mr. Mueller was determined to avoid 'any public disagreements' with [Deputy Attorney General Rod Rosenstein, who was overseeing the case within the Department of Justice (DOJ)]." Under the current special counsel regulations, any time Special Counsel Mueller was overruled by DOJ, he would have to report that decision to Congress—so, Weissmann [says](#), Special Counsel Mueller "never actually proposed subpoenaing Mr. Trump, instead coyly asking what Mr. Rosenstein's reaction would be. Mr. Rosenstein just kept demurring." Ultimately, President Trump avoided true questioning by Special Counsel's Mueller altogether.

Solutions

- **Congress should provide the special counsel with authority to disclose to the House and Senate Judiciary committees a report on the prosecution and declination decisions, including the results of any investigation into persons that the Department of Justice has determined cannot be indicted while they are in office.** In cases where the DOJ has determined an individual cannot be indicted while in office, impeachment by Congress is the only available check on that person's abuse of

power. For those reasons, the special counsel should be entitled to disclose the results of an investigation of presidential misconduct to Congress without the prior approval of the attorney general.

- **Congress should provide the special counsel with separate authority to disclose to Congress any behavior by the president that obstructs the investigation even before the investigation is complete.** While there are good reasons for the special counsel to decline invitations from Congress to provide information prior to the completion of an investigation, the special counsel should have the authority to disclose evidence of obstruction. That option would raise the stakes for acts of presidential obstruction and make possible more timely action by Congress to hold the president accountable for such acts.

Resources

Steve Vladeck and Benjamin Wittes, [Can the Presidency Trump a Special Counsel Subpoena?](#), *Just Security*, May 2, 2018.

Andrew Weissmann, [Good Governance Paper No. 3: Investigating a President](#), *Just Security*, October 15, 2020.

Issue 11: Abuses of the pardon power

Article II, Section 2 of the U.S. Constitution provides that the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Presidential pardons have often been controversial, particularly when the recipients are connected to the president.

In the last four years, President Donald Trump has engaged in an unprecedented use and [dangling of pardons](#) to relieve some of his personal and political allies from judicial accountability. His public statements about pardons appeared to influence the actions of several associates who were under investigation: Roger Stone, Paul Manafort, Michael Flynn, and Michael Cohen. Each was convicted of or admitted to federal crimes, and in each case, the possibility of a pardon appears to have influenced the person’s willingness to cooperate with investigators.

More broadly, a Washington Post [analysis](#) from February of 2020 concluded that “[m]ost” pardons issued by President Trump “have gone to well-connected offenders who had not filed petitions with the [Department of Justice’s (DOJ)] pardon office or did not meet its requirements.” Instead, “[m]oney and access have proved to be far more valuable under Trump.” Exercising the pardon power in this way dramatically increases the odds that it will be abused; this abuse is compounded by the frequency of issuance at the end of presidential terms, where review is all but impossible.

There is a clear and distinct difference between a legitimate use of the pardon power and abusing it to interfere with ongoing investigations. The former is rooted in a legitimate need for a safety valve where the interests of justice are served by relief from punishment. The latter is a perversion of law enforcement and democracy.

No president has ever issued a self pardon, so there is no definitive answer about what would happen if a president tried to do so. President Trump has [expressed the view](#) that he possesses the authority to pardon himself, but the only known DOJ opinion on this issue, from 1974, takes the opposite view. The memo [states](#) that “[u]nder the fundamental rule that no one may be a judge in his own case, it would seem that the question [of whether a president may pardon himself] should be answered in the negative.” However, because the DOJ’s Office of Legal Counsel does not release all opinions publicly, we do not know whether a subsequent opinion has taken a different view.

Solutions

- **Congress should require that all pardons be transparent.** The name, date, and full text of any and all pardons should be made public.
- **Pardons given to close relatives of the president should automatically receive close scrutiny by Congress and the Department of Justice.** If the pardon is granted to a close relative of the president, the DOJ should share its investigative files with Congress so it can conduct proper oversight.

- **Pardons for offenses involving contempt of court or of Congress should also receive close scrutiny by Congress.** Because contempt of court is one way the judicial branch ensures it can function independently, the DOJ should also share its records in such cases with Congress.
- **Congress should pass legislation or a constitutional amendment prohibiting self pardons.** A president who can pardon himself is functionally above the law. Neither the courts nor Congress can permit this power to be used in a manner that is fundamentally corrupt.

Resources

Rep. Krishnamoorthi's [Presidential Pardon Transparency Act of 2019](#), H.R.1348 (116th Congress, 2019).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 101 et seq. (116th Congress, 2020).

Noah Bookbinder, et al., [Why President Trump Can't Pardon His Way Out of the Special Counsel and Cohen Investigations](#), *American Constitution Society and CREW*, May 10, 2018.

Barry H. Berke, et al., [Presidential Obstruction of Justice: The Case of Donald J. Trump](#), *Governance Studies at Brookings*, August 22, 2018.

Issue 12: Misuse of legal expense funds

All types of government officials may at some point need legal representation due to their position; for example, individuals who are interviewed by investigators or law enforcement often need their own representation to protect themselves, even if they are not a target of the investigation. Legal expense funds exist to allow others to pay all or part of the legal fees that are necessary for such circumstances. However, these funds can create problematic conflicts of interest: individuals who are paying the legal expenses of officials might exert influence over the person's behavior, including skewing their response to an investigation.

Such funds for executive branch officials are at least partially regulated by the Office of Government Ethics (OGE), which handles most potential financial conflicts of interest for the executive branch. However, many of the limits on previous legal expense funds have been voluntarily adopted. In 2018, allies of President Donald Trump and his legal team [established an unprecedented legal expense fund](#), called the Patriot Legal Expense Fund Trust, LLC, [designed](#) to pay the legal bills of campaign aides and executive branch personnel related to the investigation of Russian interference in the 2016 elections. In a radical departure from past practice in the executive branch, the Patriot Fund was established not as a trust but as a limited liability company that is structured to qualify for tax treatment as a political organization. Whereas a trustee has a fiduciary obligation to the beneficiary of a trust, the officer of an LLC has no such obligation to individuals whom a fund assists—a change that makes possible the use of funds as a form of leverage over those who receive assistance.

It is clear that concerns over legal expense funds such as the Patriot Fund are not unfounded. John Dowd, former legal advisor to President Trump, reportedly sought to give money for legal expenses to Rick Gates, who was cooperating with the Special Counsel's investigation of Russian interference in the 2016 campaign, because he [“believed such a fund would help prevent Messrs. Manafort and Gates ... from pleading guilty and potentially cooperating against the president.”](#) While this use of funds was ultimately stopped, it is an indication that stronger controls must be established to ensure legal expense funds are not used for improper purposes.

Solutions

- **Legal expense funds should have strict limits.** Congress should impose a contribution limit of \$5,000 per donor per year, excluding immediate family members; require that donations only come from individuals, not corporations, unions or other organizational entities; and prohibit donations from lobbyists, foreign agents, and persons who have business pending before the official or the official's agency. The funds should be structured as trusts for the benefit of one and only one government employee.
- **Legal expense funds should be fully disclosed.** Congress should require full disclosure to the OGE of the sources and expenditures of funds on a quarterly basis, to be filed electronically and posted on the Internet in a searchable, sortable and downloadable database. Employees who file public financial disclosures should be required to disclose the true source of any funds from a legal expense fund.
- **Employees should be required to recuse from any matters involving a donor to**

a fund from which they receive money. Congress and the OGE should establish a recusal requirement for recipient officers from participating in particular matters involving specific parties in which a donor to the legal defense fund is a party or represents a party for a period of four years.

Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 8015 (116th Congress, 2019).

Rep. Speier's [RIGHT Act of 2019](#), H.R. 1028 (116th Congress, 2019).

Noah Bookbinder, [Comment of Citizens for Responsibility and Ethics in Washington in on Legal Expense Fund Regulation](#), *CREW*, May 15, 2019.

Craig Holman and Lisa Gilbert, [Comment of Public Citizen on Proposed "Legal Expense Fund Regulation"](#), *Public Citizen*, June 14, 2019.

Issue 13: Gift loopholes for inaugural committees and presidential libraries

“Celebrations” of presidents—in the form of inaugurations on their way into office and presidential libraries on their way out of office—have the potential to become vectors for buying favors with an administration. While fundraising has long been a part of each of these traditions, the current framework permits their use to circumvent existing limits on a president’s ability to receive gifts while in office.

Corporations and individuals have often contributed checks of six or seven figures to [inaugural committees](#) in thinly veiled attempts to ingratiate themselves to the incoming administration. While [President Barack Obama](#) set a \$50,000 cap on individual donations for his first inauguration and released information about donors, his second inauguration collected unlimited corporate cash and disclosed less about donors. President Donald Trump’s inauguration, fueled by [secretive donors](#), spent more than both of [President Obama’s inaugurations combined](#). Rick Gates, a high-level Trump inauguration official, admitted that he siphoned off some of the committee’s money for personal use. Lobbyist Samuel Patten admitted to arranging for a prominent Ukrainian to purchase \$50,000 in tickets to Trump inaugural events through his own straw company.

Laws surrounding [presidential library donations](#) are much more flexible and grant presidents the ability to raise unlimited amounts of money from all sources—including foreign governments. During the last three years of his presidency, President Bill Clinton [received \\$450,000 from the former wife of fugitive Marc Rich](#) for his library fund. President Clinton [pardoned](#) Rich in the final moments of his presidency. In the final year of George W. Bush’s presidency, a U.S. lobbyist and major Republican fundraiser [offered](#) a Kazakh politician meetings with Vice President Dick Cheney, Secretary of State Condoleezza Rice, and other senior Bush Administration officials in exchange for a \$250,000 contribution towards the Bush presidential library.

These examples demonstrate the risk of corruption inherent to fundraising opportunities and projects that “celebrate” presidents anytime in their career. Such donations must be strictly controlled to prevent their becoming loopholes in the executive branch ethics regime.

Solutions

- **Congress should set limits on outside fundraising for official inaugural events.** Contribution limits for inaugural committees should be in line with those covering individual contributions to federal candidates. Inaugural committees should be required to either return unspent money on a pro-rata basis to contributors or donate it to charities that have no connection to the president, president-elect, or individuals affiliated with the inaugural committee.
- **Congress should preclude fundraising for presidential libraries until the president leaves office.** The National Archives and Records Administration should be sufficiently funded to play its role in preserving presidential records, and any other functions that a library might serve can wait until after a president leaves office.

Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 4701 et seq. (116th Congress, 2019).

Rep. Schrader's [Presidential Inaugural Committee Oversight Act](#), H.R. 210 (116th Congress, 2019).

Rep. Speier's [RIGHT Act of 2019](#), H.R. 1028 (116th Congress, 2019).

Rep. Cummings's [Presidential Library Donation Reform Act of 2019](#), H.R. 1063 (116th Congress, 2019).

Rep. Scanlon's [Inaugural Fund Integrity Act](#), H.R. 1382 (116th Congress, 2019).

Sen. Cortez Masto's [Inaugural Committee Transparency Act of 2019](#), S. 484 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018