

SECTION 2 *of* WHAT DEMOCRACY LOOKS LIKE

Restoring Checks on Executive Power

One of the elementary features of our Constitution is its division of the federal government into three separate co-equal branches—executive, legislative, and judicial—each of which is designed to serve as a check on the others. But the fact that the basic powers of government are bestowed on the three branches does not mean that each has an exclusive, unencumbered right to that power. To the contrary, as the Supreme Court recognized in *United States v. Nixon*, “[i]n designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.” By giving the three branches overlapping and competing responsibilities, the Framers sought to ensure that they would limit and constrain each other.

In recent years, Congress’s ability to serve as a check on executive power has diminished. The executive branch has successfully stonewalled congressional requests and subpoenas and disregarded laws requiring advance notice of intelligence activities and covert action to members of Congress. President Donald Trump has disregarded his constitutional obligation to refrain from accepting any foreign emoluments without first obtaining congressional approval. To bypass the Senate’s role in providing advice and consent on executive branch appointments, President Trump has relied on an unprecedented number of acting executive branch officials. He has co-opted Congress’s power to control appropriation of funds by reappropriating money for new purposes or by abusing rules that are intended to allow the president flexibility in true emergencies.

At the same time that President Trump has adopted these strongman tactics, Congress has grown weaker. Congress’s rules and structures prevent it from conducting rigorous oversight and constrain its ability to legislate. Failures to increase member and staff pay have made Congress more susceptible to outside influence and less able to take on responsibilities that have been increasing for decades. Unless Congress ensures that it has the rules, structures,

The judiciary has also ceded power to the executive branch. In many cases, court proceedings are too protracted to serve as a sufficient check on the executive. Even if relief is obtained, it arrives too late—a dynamic that benefits administrations that test or bypass legal constraints. In other settings, courts have imposed such strict limits on what cases they will entertain that even clear violations of federal law are unenforceable. That dynamic also suits the executive, especially when Congress is either unwilling or unable to check executive overreach without assistance from the courts.

Finally, both Congress and the courts have institutional weaknesses that hamper their ability to compete with an executive that is asserting broad powers. If the executive is trying to maximize its authority vis-a-vis Congress and the courts, those branches have to ensure that they are better equipped to fight back.

Issue 1: Unenforceable congressional subpoenas and requests

The United States Constitution vests Congress with legislative and investigative prerogatives, including the ability to obtain information by issuing subpoenas and document requests. The Trump Administration has engaged in unprecedented stonewalling of Congress's constitutionally right to obtain information from the executive branch. For instance, Congress's impeachment inquiry of President Donald Trump and its investigation into potentially improper political motivations behind adding a citizenship question on the census were both met with outright refusals to cooperate. In the impeachment inquiry, key witnesses—including Mick Mulvaney, Rudy Giuliani, and Mike Pompeo—[defied](#) subpoenas to appear before Congress or provide documents. In the examination of the reasoning behind certain census questions, Commerce Secretary Wilbur Ross and Attorney General William Barr [refused](#) to surrender critical documents to Congress. As a result of this refusal, the House found both Ross and Barr to be in [criminal contempt of Congress](#).

Congress lacks adequate mechanisms to punish these forms of obstruction. For starters, Congress has no [authority](#) to prosecute criminal contempt of Congress. While Congress has enacted [criminal statutes](#) permitting prosecution of individuals for contempt of Congress by the Department of Justice (DOJ), the agency has resisted prosecuting congressional referrals, and categorically refused to enforce congressional subpoenas of executive branch offices. The DOJ has even [asserted](#) that it may exercise its own [prosecutorial judgment](#) in deciding whether to pursue such cases. In addition, the Office of Legal Counsel issued a [memorandum](#) asserting that Congress's oversight powers did not extend to individual members of Congress. In many cases, the executive branch justified its noncompliance with Congress with spurious and extreme theories of executive power.

Uncooperative witnesses have forced Congress to seek judicial enforcement of its [subpoenas](#), leading to significant delays in Congress obtaining the information it needs. For example, the House Judiciary Committee initially subpoenaed former White House Counsel [Don McGahn](#) in [April 2019](#) and filed a [lawsuit](#) in August 2019 to compel him to comply with that subpoena. But at the time of this report's publication—over a year later—the case was still [working](#) its way through the courts. A congressional subpoena of [Mazars USA](#), in an attempt to gain access to President Trump's tax returns, faced similar challenges. Congressional efforts to obtain those returns began in early 2019 as well, but the [case](#) is still in the courts. In these and other cases, Congress has been unable to obtain timely access to the information it needs.

The inability to enforce subpoenas and pursue contempt charges places Congress in an untenable position. Simply put, Congress cannot fulfill its constitutional duties. Congress is powerless to investigate executive branch misconduct, to pursue accountability for that misconduct, or to demonstrate to the public the extent of that misconduct. To restore the legislative branch as a balance and check on executive power, Congress must have access to enforcement mechanisms that are less reliant on the courts.

Solutions

- **The House and Senate should modify their rules to establish financial penalties for agency officials who refuse to comply with congressional subpoenas and information-sharing requirements.** Congress could impose fines for agency heads who personally or whose subordinates flout congressional subpoenas unless they properly assert a facially applicable executive privilege. Alternatively, Congress could provide that agencies that cooperate with congressional budget requests receive a bonus percentage of funding in a fiscal year or that pay for agency officials who do not comply with oversight requests can be withheld. In either case, the goal is to encourage compliance by using penalties or incentives that do not involve the resources and potential drama created by criminal or civil litigation.
- **The House and Senate should establish a new independent counsel office with narrow, limited authority to investigate and prosecute senior executive branch officials for criminal contempt or obstruction of Congress.** The DOJ has proven largely uninterested in pursuing congressional contempt or obstruction cases involving current officials for obvious reasons: those cases would almost always require the prosecution of DOJ leaders' political allies who serve or have served in the same administration. In other words, there is an inherent conflict of interest. The predicate for appointment of an independent counsel should be limited to cases in which a congressional committee is investigating potential criminal or impeachable conduct or some other gross abuses of power by the president, vice president, agency head, acting agency head, first assistant, or acting first assistant.
- **The president should issue an executive order instructing executive branch officers to accommodate all facially valid congressional requests for documents, including from individual members, as well as subpoenas for documents or testimony.** Part of the current crisis facing congressional oversight is that executive departments have adopted an aggressive, maximalist approach to inter-branch conflict, reducing opportunities for disputes with Congress to reach a negotiated conclusion. This does not have to be so. While it is important that Congress act to bolster mechanisms for enforcing subpoenas and other document requests, negotiation is more likely to lead to an efficient and responsible outcome. Indeed, if Congress has access to more enforcement mechanisms, a negotiated resolution seems more likely, because the executive branch is more likely to suffer real consequences for stonewalling a committee.

Resources

Rep. Lieu's [Congressional Inherent Contempt Resolution](#), H.Res. 1029 (116th Congress, 2020).

Rep. Dean's [Congressional Subpoena Compliance and Enforcement Act of 2020](#), H.R. 8335 (116th Congress, 2020).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 401 et seq. (116th Congress, 2020).

Josh Chafetz, [Executive Branch Contempt of Congress](#), 76 *The University of Chicago Law School Review* 1083, 2009.

Andrew McCause Wright, [Constitutional Conflict and Congressional Oversight](#), 98 *Marquette Law Review* 881, 2014.

[Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure](#), *Congressional Research Service*, May 12, 2017.

Mort Rosenberg, [Reasserting Congress' Investigative Authority](#), *R Street*, July, 2017.

Todd Garvey, [Congressional Subpoenas: Enforcing Executive Branch Compliance](#), *Congressional Research Service*, March 27, 2019.

Kia Rahnama, [Can Congress Fine Federal Officials Under Its Contempt Power?](#), *Lawfare*, June 11, 2019.

Dylan Hedtler-Gaudette, [The Purse Is Mightier than the Sword. Now Congress Needs to Use It.](#), *Project On Government Oversight*, April 16, 2020.

Emily Berman, [Good Governance Paper No. 2: The Congressional Subpoena Power](#), *Just Security*, October 14, 2020.

[Inherent Contempt Fines Rule](#), *Good Government Now*.

Issue 2: Slow judicial enforcement of congressional prerogatives

Congress is increasingly unable to effectively and expeditiously enforce its constitutional prerogatives, even in cases where its jurisdiction and the law are clear. In recent years, and particularly during the Trump Administration, the executive branch has rebuffed the implied powers of Congress to seek and obtain information towards its constitutional mandates. This stonewalling has been exemplified by the recent McGahn and Mazar subpoena cases.

As discussed in issue 1 of this section, in April 2019, former White House Counsel Don McGahn was subpoenaed to testify before Congress. He refused, and Congress sued to compel him to appear. At the time of publication of this report, the case was [still](#) being litigated. Similarly, Mazars USA is a firm used by President Donald Trump for financial accounting of his personal assets. In April 2019, the House Committee on Oversight and Reform subpoenaed the organization while investigating possible conflicts of interest. Trump filed a civil case attempting to block the subpoena. At the time of publication of this report, this [case](#) was also still being litigated.

The delays Congress faces in enforcing its constitutional prerogative to gather information needed to legislate and hold the executive branch accountable are detrimental to democracy. They have the effect of making the executive branch immune from congressional scrutiny for the two-year term of a Congress. For these reasons, Congress should [ensure](#) that the judiciary can expeditiously resolve disputes concerning congressional prerogatives.

Solutions

- **Create a fast-track procedure and cause of action for Congress to enforce its constitutional prerogatives in federal court.** Congress should amend 28 U.S.C. § 1365 to provide a randomly selected three-judge panel of the United States District Court for the District of Columbia with original, exclusive jurisdiction to hear cases involving the enforcement of congressional prerogatives. That jurisdiction should include efforts by Congress to assert its investigative powers, authority to disapprove foreign emoluments, and control over the budget. Congress should also provide for direct appeal to the Supreme Court in such cases. Congress has employed this framework in other contexts, including civil rights and congressional redistricting laws, so it is not a novel procedure. By reducing the maximum number of judicial review levels from three to two, this process reduces the steps between the filing of a case and the entering of final judgment. Limiting jurisdiction to the United States District Court for the District of Columbia would also limit forum-shopping by parties hoping to stymie congressional enforcement.
- **Establish strict time limits for cases implicating Congressional powers.** Disputes regarding congressional prerogatives are profoundly important to our constitutional order and need to be resolved expeditiously. Congress should establish reasonable time limits, including during briefing and judgment in the district court, on appeal, in the Supreme Court. Extensions should be available in limited circumstances, such as by mutual agreement of the parties or in circumstances where statutory deadlines would impose an exceptional burden on judicial resources.

- **Make additional resources available to the House Office of General Counsel and Senate Legal Counsel to ensure that congressional committees are equipped to engage in litigation to enforce the House and Senate’s constitutional powers.** The House and Senate should be better prepared to litigate in cases involving conflict with the executive branch. To help fund these efforts, Congress could consider imposing fines or litigation costs on agencies whose officers fail to comply with subpoenas.

Resources

Rep. Dean’s [Congressional Subpoena Compliance and Enforcement Act of 2020](#), H.R. 8335 (116th Congress, 2020).

Nikhel Sus, [Congress Needs a “Rocket Docket” for Its Disputes With the President](#), *Just Security*, March 2, 2020.

Todd Garvey, [Congressional Subpoenas: Enforcing Executive Branch Compliance](#), *Congressional Research Service*, March 27, 2019.

Emily Berman, [Good Governance Paper No. 2: The Congressional Subpoena Power](#), *Just Security*, October 14, 2020.

Issue 3: Weak oversight procedures and institutions

Congress's ability to conduct effective oversight has deteriorated. Congressional oversight hearings [have continuously decreased](#) since their 1978 peak. Congress [spends](#) more time hearing one-sided opinions on issues, and less time learning about potential solutions to legislative problems and potential executive branch abuses.

The structure of oversight hearings is part of the problem: Large portions of hearings are spent on member statements and off-topic or leading questioning of witnesses. Rules that give many members short stretches of time to ask questions are [not conducive](#) to establishing basic facts or following up with a witness whose testimony is incomplete, evasive, or contradictory. As a result, oversight hearings fail to establish basic facts needed to highlight abuses of power or other misconduct.

Since its 1970 reorganization, Congress [has also failed to adapt](#) its oversight procedures to keep up with the expansion and reorganization of the executive branch—such as the [creation of the Department of Homeland Security](#). Despite efforts to ensure that congressional oversight was built into the economic relief package Congress passed in 2020 contained serious oversight [measures](#), the Trump Administration all too easily [circumvented](#) those controls.

Congress needs to bolster its ability to conduct oversight so that it can once again hold the executive branch accountable.

Solutions

- **Increase the budget of the Government Accountability Office and give it expanded investigatory and subpoena authority.** Require agencies to respond to requests for information from the Government Accountability Office and authorize the Comptroller General to litigate those requests in the United States District Court for the District of Columbia.
- **Create a Senate whistleblower ombudsman office to establish best practices and provide training for Senate staff on handling whistleblowers.** The House of Representatives established a whistleblower ombudsman officer in 2019 to help House staff handle whistleblowers, but the Senate has no equivalent. Best practices and training help to ensure that Congress protects whistleblowers.
- **Establish and employ committee rules that make investigatory hearings more effective.** During the 116th Congress, the House Intelligence Committee and House Judiciary Committee established rules permitting the chair and ranking member to designate a member or staffer to conduct longer rounds of questioning. Congressional committees should ensure that this option is available when the committee is using a hearing to gather evidence or information from a witness.

- **Require the heads of federal agencies to publish congressionally mandated reports on their website in an open format, along with supporting documentation, data, and other materials.** Congress requires agencies to report all kinds of information to Congress, but it is not always easily accessible. Congress should establish minimum requirements for reports and data and require that they be made available by each agency in a single, searchable database.

Resources

Sen. Portman and Rep. Quigley's [Access to Congressionally Mandated Reports Act](#), S. 195 (116th Congress, 2019).

Kevin R. Kosar, [How to Strengthen Congress](#), *National Affairs*, Fall, 2015.

G. Edward DeSeve, et al., [Oversight Matters: What's Next for Inspectors General](#), *Bipartisan Policy Center Task Force on Oversight and Inspectors General*, July, 2018.

Peter Tyler, [House of Representatives Adopts Whistleblower and Ethics Reforms for Itself](#), *Project on Government Oversight*, January 11, 2019.

Andrew Cohen, [Real Congressional Oversight Means Sacrificing Egos for Answers](#), *Brennan Center for Justice*, February 21, 2019.

Molly E. Reynolds, [Improving congressional capacity to address problems and oversee the executive branch](#), *Brookings Institution*, December 4, 2019.

Jim Townsend and Elise Bean, [Good Governance Paper No. 8: How to Strengthen Oversight by Congress](#), *Just Security*, October 23, 2020.

[Roadmap for Renewal: Strengthen Congress's Capacity to Fulfill its Constitutional Role, Protect Democracy.](#)

Issue 4: Unique oversight challenges involving the intelligence community

Congress is responsible for the oversight of the intelligence and national security apparatuses of the executive branch, but oversight of notoriously secretive executive agencies is rife with difficulty. Congress's power to legislate, appropriate, and conduct related oversight is at times in conflict with the president's constitutional powers as commander-in-chief, the president's statutory power to classify records, and the need for secrecy. Although these issues have been the subject of scrutiny before—including in the wake of the 9/11 terrorist attacks—they merit renewed attention in light of efforts by the Trump Administration to avoid congressional scrutiny of intelligence and covert activities.

Congressional oversight was [very informal and ineffective](#) until the 1970s when congressional intelligence committees came into existence. Unfortunately, these new intelligence committees have often been limited in terms of effectiveness and [continue to be "dysfunctional."](#) There are countless atrocities that effective congressional oversight could have prevented. For example, the war on terror and the Senate investigation of the Central Intelligence Agency's (CIA) clandestine torture operation exposed [severe shortcomings](#) in Congress's oversight capabilities. While this juncture could have been a pivotal moment for [rethinking congressional oversight](#), the "Torture Report" was anything but. Instead of attempting to discuss broader issues of corrupt leadership and crucial policy reforms within the CIA, it focused on the effectiveness of enhanced interrogation techniques and CIA deception.

Lapses in congressional oversight of the intelligence community were even more pronounced during the Trump Administration. President Donald Trump breached protocol by failing to inform members of Congress in advance of a planned [military strike](#) on Iran Quds Force commander Qasem Soleimani. Similarly, a few months prior, congressional leadership was not informed when ISIS leader [Abu Bakr al-Baghdadi was killed](#). In both situations, President Trump held [after-the-fact briefings](#) that many members of Congress found unsatisfactory.

During his time as chair of the House Permanent Select Committee on Intelligence, [Congressman Devin Nunes](#) utilized his position—with support from other Republicans—to issue misleading findings of political value to the White House, including by selectively releasing documents without context, rather than engaging in serious oversight of the intelligence community. Representative [Nunes pushed President Trump's agenda](#) by releasing a [memo](#) claiming a conspiracy against Trump by the Democrats, the Federal Bureau of Investigation, the Department of Justice, and the intelligence community. Representative Nunes' abuses of power are tremendously dangerous to national security and highlight some of the most difficult issues within congressional oversight of the intelligence community. The need for congressional oversight of the intelligence community must be balanced with protections against abuse of oversight power by members of Congress.

Solutions

- **Restructure congressional oversight of the intelligence community.** Congress should adopt the 9/11 commission proposal to create a depoliticized Joint Permanent Select Committee on Intelligence that is endowed with subpoena and appropriations power or, alternatively, restructure the House Permanent Select Committee on Intelligence. The Joint Permanent Select Committee on Intelligence should have a code of conduct that forbids members from undermining the committee's independence and purpose, including by coordinating with the executive branch on oversight matters. The code of conduct should also encourage bipartisan action by the committee.
- **Congress should equip all members with the information and staff they need to conduct oversight of the intelligence and national security community.** Every member of Congress should have funds available to hire at least one staff member who has a security clearance that permits him or her to work on classified matters.
- **The Department of Justice should withdraw from the 1988 Office of Legal Counsel Opinion claiming that the Government Accountability Office's investigations of intelligence community matters violate executive privileges.** Lack of transparency about intelligence community activities has not produced better outcomes. The executive branch should welcome appropriate congressional scrutiny of covert and intelligence matters rather than falling back on a blanket refusal to cooperate with the Government Accountability Office.
- **Congress and the House and Senate intelligence committees should amend their rules to require an arms-length relationship with the executive branch on intelligence matters.** Specifically, Congress should require that members who receive classified intelligence materials directly from the White House disclose those materials to both majority and minority members of the relevant intelligence committees and the Joint Permanent Select Committee.

Resources

Sen. Feingold's [A resolution to improve congressional oversight of the intelligence activities](#), S.Res. 164 (111th Congress, 2009).

Rep. Thompson's [Intelligence Oversight and Accountability Act of 2013](#), H.R. 3103 (113th Congress, 2013).

Sen. Wyden's [Intelligence Oversight and Surveillance Reform Act](#), S. 1551 (113th Congress, 2013).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 711 et seq. (116th Congress, 2020).

Michael German, [Strengthening Intelligence Oversight](#), *Brennan Center for Justice*, January 27, 2015.

[Strengthening Congressional Oversight of the Intelligence Community](#), *Demand Progress, R Street Institute, Electronic Frontier Foundation, and Freedom Works*, September 13, 2016.

Mandy Smithberger, [Congress Must Strengthen National Security Oversight](#), *Project on Government Oversight*, April 2, 2019.

Michael E. DeVine, [Covert Action and Clandestine Activities of the Intelligence Community: Selected Congressional Notification Requirements in Brief](#), *Congressional Research Service*, July 2, 2019.

Katrina Mulligan, [Good Governance Paper No. 4: Oversight of the Intelligence Community](#), *Just Security*, October 16, 2020.

Issue 5: Legislative gridlock in the Senate

It is not easy to enact a law under the U.S. Constitution. Legislation requires concurrence from the House, Senate, and president, or a congressional supermajority to override a veto from the president. Legislation also faces an additional senatorial hurdle: under [Senate Rule XXII](#), [three-fifths](#) of senators must vote affirmatively on a cloture motion to end debate of a bill and proceed to a floor vote. The rule was originally intended to set outer boundaries on the longtime senatorial norm of debating an issue before voting. It has recently evolved into a supermajority requirement that hampers the legislative ability of Congress.

The practice of protracting debate on an issue has morphed the Senate from a chamber where legislation is carefully considered to a place where debate is stifled and ideas go to die. The filibuster has not only affected what bills are passed into law, but also what bills are even discussed or considered. As legislative discussion—and lawmaking itself—have become more difficult, presidents and agencies have increasingly resorted to executive actions in lieu of legislative remedies. And because Congress rarely revisits old statutes, judicial interpretations have tremendous staying power. These changes together severely weaken Congress's power relative to that of the executive and the judiciary.

Data show this to be true. Between 1970 and 2000, [the Senate averaged](#) 17 cloture votes per year. Between 2000 and 2018, that same figure grew to 53 per year. In the 2013-2014 legislative session, the Senate reached a record 218 clotures. As the use of the filibuster has sharply risen, the passing rate of congressional legislation has correspondingly decreased. Between the 109th Congress and the 113th Congress there was a [66 percent decrease](#) in the percent of bills passed in the chamber. And between George W. Bush's presidency and Donald Trump's presidency, motions to invoke cloture have [more than doubled](#). This culminated in the labeling of the 2018-2019 Senate as [more dysfunctional than ever](#). The stonewalling of the majority party's legislative agenda has become a problematic norm.

Amending the legislative filibuster will undoubtedly have costs. When a single party controls the White House and both chambers of Congress, the filibuster has been an important tool for the minority party to stand in the way of legislation that is particularly controversial. It is possible that the filibuster has brought stability to our system by preventing one Congress from taking action that would have been reversed two or more years later. Rules that encourage Congress to strive for enduring change are from that perspective a feature—not a bug.

On balance, though, the costs of eliminating the filibuster are warranted if doing so is necessary to restore functioning government. And there is good reason to suspect it will be. Many of the reforms discussed in this report may not garner 60 votes in the Senate. If the Senate faces a choice between preserving the filibuster and reestablishing ethical, responsible, and accountable government, then the filibuster must go.

Solutions

- **Amend Senate Rule XXII to eliminate the legislative filibuster.** The Senate is too easily taken hostage by 41 members, who can halt consideration of a bill by voting against cloture (ending debate). In practice, this stops many bills from being considered by the full Senate because the credible threat of a filibuster is sufficient to kill a bill. The Senate should restore its ability to consider, debate, and vote on legislation by requiring only a simple majority to limit further debate on legislation.
- **Alternatively, amend Senate Rule XXII to require in-person filibusters from a larger number of senators to continue debate on legislation.** Instead of eliminating the legislative filibuster entirely, the Senate could consider rule changes to make its use much more rare by requiring more senators to support continuing debate (for example 45 members instead of 41), and imposing greater costs on members who filibuster by requiring them to vote in person to continue debate. Such a change would preserve the power of the minority party to delay action on extremely divisive matters but would likely curtail excessive use of the filibuster.

Resources

Sen. Udall's [A resolution to improve the debate and consideration of legislative matters and nominations in the Senate](#), S.Res. 10 (112th Congress, 2011).

Sen. Merkley's [A resolution modifying extended debate in the Senate to improve the legislative process](#), S.Res. 725 (115th Congress, 2018).

Sen. Merkley's [A resolution amending rule XV of the Standing Rules of the Senate to provide for consideration of a minimum number of amendments](#), S.Res. 729 (115th Congress, 2018).

Catherine Fisk and Erwin Chemerinsky, [The Filibuster](#), 49 *Stanford Law Review* 181, January, 1997.

Martin B. Gold and Dimple Gupta, [The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster](#), 28 *Harvard Journal of Law and Public Policy* 205, 2004.

Sen. Tom Udall, [The Constitutional Option: Reforming the Rules of the Senate to Restore Accountability and Reduce Gridlock](#), 5 *Harvard Law and Policy Review* 115, 2011.

Mimi Marziani, et al., [Curbing Filibuster Abuse](#), *Brennan Center For Justice at New York University School of Law*, November 16, 2012.

Sen. Jeanne Shaheen, [Gridlock Rules: Why We Need Filibuster Reform in the U.S. Senate](#), 50 *Harvard Journal on Legislation* 1, September 17, 2013.

Alex Tausanovitch and Sam Berger, [The Impact of the Filibuster on Federal Policymaking](#), *Center for American Progress*, December 5, 2019.

Norm Ornstein, [The Smart Way to Fix the Filibuster](#), *The Atlantic*, September 3, 2020.

Issue 6: Congress's failure to control the purse

The Congressional Budget and Impoundment Control Act of 1974 (ICA) was enacted after President Richard Nixon withheld billions of dollars appropriated by Congress to programs he disliked. The ICA requires the president to spend as Congress directs unless the president notifies Congress about the deferral or rescission of certain discretionary appropriations. While Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton used the [ICA rescission process](#) with relative frequency, neither Presidents George W. Bush nor Barack Obama [initiated](#) a single formal rescission through the ICA.

The Trump Administration has taken a Nixonian approach to congressional appropriations in contravention of the Constitution and the ICA. In August 2018, the Trump Administration attempted to cut \$3.5 billion in foreign aid and \$15 billion in domestic spending just weeks prior to the end of the fiscal year. This attempt failed but [put Congress on notice that the ICA was under threat](#). Then during the summer of 2019, the Office of Management and Budget (OMB), at the behest of President Donald Trump, [delayed on nine separate occasions the disbursement of approximately \\$214 million](#) in aid that Congress explicitly authorized in the [John S. McCain National Defense Authorization Act for Fiscal Year 2019](#) to be designated for urgent military aid to Ukraine. President Trump [saw](#) this congressionally approved aid as a bargaining chip to extract political favors from the Ukrainian government. In an apparent attempt to hide the aid deferrals from congressional view, Trump's OMB avoided obligating the Ukraine funds through a series of [vague footnotes](#) in apportionment schedules stating that the aid was paused "to allow for an interagency process to determine the best use of such funds."

The Government Accountability Office (GAO) investigated the withholding of aid to Ukraine and issued a scathing [report](#) in January 2020 concluding that the OMB had unequivocally violated the ICA. The GAO found the OMB's justification completely insufficient, concluding that "the ICA does not permit deferrals for policy reasons" and that delaying the Ukraine funding on policy grounds was unlawful under the ICA.

The ICA is largely reliant on a presumption of adherence to democratic norms and enforcement through the application of political pressure—mechanisms that have proven insufficient. President Trump's exploitation of the ICA to serve his personal political purposes has made one thing quite clear: ICA loopholes must be addressed. Congress must take back its power to control the purse.

Solutions

- **Require the Office of Management and Budget to release authorized funding to agencies for obligation at least 90 days before funding expires.** Congress should eliminate the rescission-by-omission loophole by requiring the OMB to release funding sufficiently far ahead of the statutory deadline to allow agencies to spend funds Congress has appropriated. The additional time also gives Congress more of a chance to intervene if the OMB does not release funds on schedule.

- **Require the Office of Management and Budget and the Office of Legal Counsel to disclose to Congress apportionment schedules and related legal advice intended to effectuate any delay in funding.** The executive branch should be made to be more transparent when it delays the release of appropriated funds to agencies so that Congress and the American people can understand how and why the executive branch is proposing to use those funds.
- **Ensure that the comptroller general has sufficient resources and staffing to bring enforcement actions under 2 U.S.C. § 687 against federal agencies to make budget authority available for obligation.** Congress should ensure that it can check executive usurpation of the spending power. Existing law permits the comptroller general to file a lawsuit in the United States District Court of the District of Columbia to enforce Congress's power of the purse; however, this provision has only been used [once](#) since its enactment in 1975. Congress should ensure that the GAO's appropriations law division is fully funded and staffed so that it can monitor compliance with congressional appropriations.

Resources

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 501 et seq. (116th Congress, 2020).

Sen. Leahy and Rep. Yarmuth's [Congressional Power of the Purse Act](#), S. 3889 (116th Congress, 2020).

[Rescission Actions Since 1974: Review and Assessment of the Record](#), *Congressional Research Service*, May 26, 2010.

[The Impoundment Control Act of 1974: What Is it? Why Does It Matter?](#), *House Committee on the Budget*, October 23, 2019.

[Office of Management and Budget—Withholding of Ukraine Security Assistance](#), *U.S. Government Accountability Office*, January 16, 2020.

[Van Hollen, Leahy Introduce Legislation to Defend Congress's Power of the Purse](#), *Office of Senator Van Hollen*, June 3, 2020.

Sean M. Stiff, [Congress's Power Over Appropriations: Constitutional and Statutory Provisions](#), *Congressional Research Service*, June 16, 2020.

Issue 7: Expansive emergency powers

Presidents since Abraham Lincoln have exercised the power to unilaterally declare national emergencies in response to wars, natural disasters, public health crises, and severe economic turbulence. Over the century following [President Lincoln's emergency declaration](#) during the Civil War, declarations ran the gamut from the 1933 banking crisis to a 1970 postal workers strike. As the 20th century progressed, presidential emergency authority steadily grew as powers were transferred from Congress to the president. In the wake of President Richard Nixon's brazen abuses of executive power, and the [two](#) national emergencies he declared in 1970 and 1971, Congress became concerned with both the scope of emergency powers [potentially available for the president](#) and the number of national emergencies that seemed to linger for decades without explicit termination, such as President Harry Truman's emergency declaration regarding the Korean War.

The result of this congressional concern was the [National Emergencies Act](#) (NEA) of 1976. The NEA empowered presidents to deploy additional powers during crises but codified certain procedural invocation formalities and established explicit congressional termination authority. There are [136 statutory powers](#) available to the president related to national emergencies. Congress also enacted the 1977 [International Emergency Economic Powers Act](#) (IEEPA) to allow the government to freeze assets and confiscate property in response to an "unusual and extraordinary" outside threat to the country. Between the NEA's codification and the publication of this report, presidents from both parties have [declared](#) 68 national emergencies, 39 of which are still in effect. And, as of [July 1, 2020](#), there have been 59 national emergencies under the IEEPA, with 33 still in effect.

For his part, President Donald Trump has declared [12 national emergencies](#) under the NEA, all of which remain active (as of November 2020). One is of particular importance: [Declaring a National Emergency Concerning the Southern Border of the United States](#), enacted February 2019. This declaration [diverted approximately](#) \$3.6 billion from congressionally-appropriated funds for military projects to construct Trump's promised wall on the United States-Mexico border.

President Trump twice [vetoed attempts](#) by Congress to end a presidentially declared national emergency. In July 2020, [the Supreme Court](#) upheld President Trump's assertion of emergency powers to use funds to build the border wall.

It is time to address the NEA's shortcomings. Among other things, Congress did not anticipate that a president would redirect funds on an emergency basis and then repeatedly veto congressional bills ending the associated emergency. As it stands, presidential emergency powers allow the executive to redirect vast swathes of discretionary funding with little to no oversight. Congress must act to tighten controls on emergency powers and reestablish its appropriations authority.

Solutions

- **End all long-standing national emergencies and reauthorize emergency declarations if necessary.** There are more than two dozen standing emergencies. Congress should preemptively end all of them. Then, Congress should convene a formal review of each (as required by law every six months) and reinstate emergency declarations that remain necessary. Congress should also [repeal laws](#) that are obsolete or unnecessary. For those emergencies still deemed appropriate, language should be amended to remove potential avenues for abuse. Congressional approval should be required for any sanctions program within a certain time period.
- **Rein in presidential emergency spending powers.** Congress should create a statutory definition for national emergency, and invert the emergency declaration process. Instead of the current system which requires Congress to affirmatively vote to end an emergency, Congress should make all emergency declarations automatically expire absent an affirmative decision to extend the emergency. In addition, Congress should issue new criteria for emergency declarations, and specifically require a connection between an emergency and the powers invoked.

Resources

Sen. Lee's [Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act](#), S. 764 (116th Congress, 2019).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 531 et seq. (116th Congress, 2020).

[Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency](#), *United States Senate: Special Committee on the Termination of National Emergency*, November 19, 1973.

Harold C. Relyea, [National Emergency Powers: A Brief Overview of Presidential Suspensions of the Habeas Corpus Privilege and Invocations of Martial Law](#), *Presidential Studies Quarterly* Vol. 7, No. 4, Fall, 1977.

Elizabeth Goitein, [The Alarming Scope of the President's Emergency Powers](#), *The Atlantic*, 2019.

L. Elaine Halchin, [National Emergency Powers](#), *Congressional Research Service*, March 23, 2020.

Christopher A. Casey, et al., [The International Emergency Economic Powers Act: Origins, Evolution, and Use](#), *Congressional Research Service*, July 14, 2020.

[Declared National Emergencies Under the National Emergencies Act](#), *Brennan Center for Justice*, September, 2020.

Elizabeth Goitein, [Good Governance Paper No. 18: Reforming Emergency Powers](#), *Just Security*, October 31, 2020.

Issue 8: Misuse of acting officials

Presidential administrations have historically used loopholes in the Federal Vacancies Reform Act (FVRA) to sidestep the Senate confirmation process. These loopholes have become glaringly obvious through the Trump Administration's [unprecedented reliance](#) on this practice. President Donald Trump has abused the authority granted to him by installing agency officials in contravention of the limits imposed by the FVRA.

These practices have subverted the Senate's important [constitutional power](#) to provide "advice and consent" to nominations of executive officers or to delegate the authority when deemed proper. Congress enacted the FVRA to preserve continuity of agency leadership in the event of a death or resignation by allowing presidents to temporarily fill vacancies with acting officials. The FVRA permits an acting official to serve for 210 days after the vacancy occurs or, "once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate."

The Trump Administration has [abused the FVRA](#) and sidestepped the Senate to give power to individuals who would likely be the subject of difficult confirmation processes. For example, Ken Cuccinelli was appointed to a role [created](#) just for him—principal deputy director of the U.S. Citizenship and Immigration Services—and immediately granted authority over the agency. In March 2020, a federal judge [ruled](#) that his appointment to the role was unlawful under both the FVRA and the Appointments Clause.

Other violations have gone unchecked. For instance, President Trump appointed two acting directors of national intelligence after Dan Coats resigned effective August 2019 and used those appointments as leverage to nominate and [confirm](#) Representative John Ratcliffe, a political ally with little previous intelligence experience. Similarly, after securing the resignation of Attorney General Jeff Sessions, President Trump installed Sessions's Chief of Staff, Matt Whitaker, as acting attorney general even though the Department of Justice has a specific [statutory](#) line of succession. Whitaker's appointment as acting attorney general rather than his formal nomination [prevented](#) the Senate from engaging and probing his serious ethics issues, including his role in overseeing Special Counsel Mueller's investigation after Whitaker had made potentially prejudicial statements about it. Such practices have upended the Senate's critical role in confirming nominees, the legislative-executive balance of power, and, ultimately, our constitutional order.

It has been over two decades since presidential abuse resulted in urgent reform of the FVRA. In the 1990s, President Bill Clinton utilized the FVRA to appoint an acting assistant attorney general after his nominee was not approved by the Senate. The Trump Administration has bypassed the Senate confirmation process on a much larger scale and demonstrated a need for FVRA reform.

Solutions

- **Reduce the period of time that acting officials can serve and add enforcement mechanisms.** The simplest way to curb abuses of the FVRA is to reduce the length of time that acting officials may serve. While the FVRA should continue to permit the president to fill positions with acting officials while they search for an individual to nominate, that process should be completed expeditiously. If an individual is appointed outside of the normal line of succession and serves beyond the date the FVRA authorizes, then Congress should provide that they may not draw a salary or otherwise use federal resources. An exception to this rule is appropriate for individuals who serve in an acting capacity during or after a presidential transition.
- **Require the president to select acting officials who have some experience at the agency and require first assistants to serve at least a month or two prior to becoming an acting official.** The FVRA is fundamentally a mechanism to provide continuity in agency leadership. Requiring acting leadership to come from within an agency would provide an important safeguard against the installation of someone with no experience in agency affairs.
- **Require agencies to identify by rule or regulation what position is first assistant.** This requirement protects against the agency's creation of positions that can be filled with someone who is subsequently promoted to serve in an acting capacity.
- **Clarify that agency-specific statutory lines-of-succession are the exclusive means by which agency vacancies should be filled unless those positions are also vacant or filled by acting officials.** This change would restore the FVRA to its proper function: serving as an option of last resort for the president to fill unexpected vacancies. Where, however, the agency has already laid out in specific detail who will serve as the acting official in case of a vacancy, that law should control.
- **Require acting officials to testify before Senate and House appropriations subcommittees within 60 days of their appointment as acting official.** The requirement that acting officials testify promptly adds a measure of accountability and gives Congress and the American people an opportunity to hear from individuals who temporarily serve as acting officials. Representative Porter's [Accountability for Acting Officials Act](#) includes such a requirement and permits each committee to waive this provision with mutual assent of the chair ranking member.
- **Bolster reporting of vacancies, either by directing the Government Accountability Office or agency heads to provide notice of vacancies and/or the end of a term of an acting officer.** More accurate information about agency vacancies would aid Congress in its oversight efforts. Agencies or the Government Accountability Office should be required to make public a list of agency positions for which there is a vacancy or an individual serving in an acting capacity.

- **Permit putative acting officials and those impacted by their decisions to seek judicial review of their authority.** The FVRA must be enforceable for it to deter presidential misconduct. For that reason, individuals who believe they are entitled to serve in an acting capacity should be permitted to challenge an unlawful appointment in court. Those impacted by an unlawful appointment should be able to do the same. Congress should vest the United States District Court for the District of Columbia with jurisdiction over such cases and permit direct appeal to the Supreme Court.

Resources

Rep. Porter's [Accountability for Acting Officials Act](#), H.R. 6689 (116th Congress, 2020).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 901 et seq. (116th Congress, 2020).

[Amicus Brief of Citizens for Responsibility and Ethics in Washington and Former Government Ethics Officials, *Maryland v. United States*](#), No. 18-cv-2849 (D. Md. November 26, 2018).

Steve Vladeck, [Trump is Abusing His Authority to Name "Acting Secretaries." Here's How Congress Can Stop Him.](#), *Slate*, April 9, 2019.

Rebecca Jones, [The Dangers of Chronic Federal Vacancies](#), *Project on Government Oversight*, August 6, 2019.

[The Vacancies Act: A Legal Overview](#), *Congressional Research Service*, May 28, 2020.

Margaret Taylor, [Is It Time to Reform the Federal Vacancies Act?](#), *Lawfare*, March 10, 2020.

Brianne J. Gorod and Becca Damante, [How the Trump Administration is Evading Senate Advice and Consent](#), *Constitutional Accountability Center*, April 10, 2020.

Steve Vladeck, [Good Governance Paper No. 7: Executive Branch Vacancies](#), *Just Security*, October 22, 2020.

[Federal Vacancies Reform Act](#), *Protect Democracy*.

Issue 9: Broken confirmation processes

The Senate has a constitutional responsibility to provide advice and consent to judicial and executive branch nominees. In recent years, both parties have taken steps to reduce the derailing role that the filibuster plays in this congressional responsibility. During the Obama Administration, the Senate [changed](#) its rules so that federal judicial nominees for lower courts and executive-office nominees could advance to confirmation votes by a simple majority of senators. And during the Trump Administration, this rule was [extended](#) to Supreme Court justices.

Consideration of executive branch nominees [lasts](#) five times as long as it did 40 years ago.

This timeframe risks leaving open executive positions and tacitly encourages presidents to sidestep the Senate confirmation process—[flaws the Trump Administration has capitalized upon](#) (as discussed in issue 8 of this section).

And yet, this influx of time fails to yield any net benefit or a more investigative confirmation process. No independent senatorial investigative mechanisms exist besides the subpoena, which cannot be enforced without the assistance of the Department of Justice. The result is a system that is not capable of properly vetting individuals who have been nominated for powerful positions in our government.

Solutions

- **Establish a standard form, procedure, and timeline for consideration of executive branch nominees.** Those procedures should establish circumstances in which the consideration of a nominee can be delayed to investigate credible and substantiated accusations of unethical or unlawful conduct.
- **Establish a non-partisan congressional office to conduct all background investigations of judicial nominees.** Congress should not rely on executive branch agencies to conduct fact finding inquiries about judicial nominees. Instead, the Senate should establish a non-partisan congressional office to handle referrals or requests for more information about a nominee's alleged unethical or unlawful conduct.

Resources

Sen. Specter's [A resolution providing for protocol for nonpartisan confirmation of judicial nominees](#), S.Res. 327 (108th Congress, 2004).

Barry J. McMillion, [Length of Time from Nomination to Confirmation for U.S. Circuit and District Court Nominees: Overview and Policy Options to Shorten the Process](#), *Congressional Research Service*, November 20, 2013.

Alicia Bannon, [Obstruction of the Senate and the Future of Rules Reform on Nominations](#), *BNA Reports*, August 19, 2014.

Senator John C. Danforth, [How to Fix the Supreme Court Confirmation Mess](#), *Time*, November 11, 2018.

Rudy Mehrbani, et al., [Proposals for Reform: Volume II](#), *Brennan Center For Justice at New York University School of Law: National Task Force on Rule of Law & Democracy*, October 3, 2019.

Issue 10: Inadequate Senate impeachment rules

President Donald Trump's impeachment by the House of Representatives on December 18, 2019 and acquittal by the Senate on February 5, 2020 exposed flaws in the process of impeachment. During President Trump's trial, Senate Republicans declined to subpoena [any](#) witnesses who could have provided testimony about the President's misconduct. The deliberate effort not to hear and consider evidence that would have substantiated the counts of impeachment against President Trump defied Senate precedent. In every previous [impeachment trial](#) in the Senate's history, the Senate heard from witnesses who did not offer testimony before the House of Representatives.

Other aspects of Senate trial procedure should be updated so that ambiguities in the rules do not sidetrack future impeachment proceedings. Senate rules [require](#) each senator to swear an oath to do impartial justice, but a senator's ethical obligations at trial are not delineated in further detail. No clear standards for a senator's recusal are set forth in Senate rules or precedent. Instead the standing impeachment [rules](#) contemplate a senator both providing testimony and voting on the articles themselves.

In addition, the [authority](#) of the presiding officer at a trial should be spelled out in greater detail. There are convincing reasons for the Chief Justice of the United States to play a more active role in determining questions of relevance and other evidentiary issues, including the chief justice's relative familiarity with [neutral principles](#) that could be applied to resolve those questions.

Solutions

- **Amend the Senate impeachment trial rules to permit the House managers to issue up to five subpoenas for testimony and five subpoenas for documents unless a majority of senators present oppose their issuance.** The House of Representatives should be entitled to present their case to the Senate. Regardless of whether the House obtained testimony or records in its proceedings, the Senate rules should empower them to present a full case to the Senate so that the senators can fulfill their responsibility to do impartial justice. The Senate should also retain the power to approve additional subpoenas sought by the House or the defense.
- **Amend the Senate impeachment rules to clarify the role of the chief justice in Senate trials of the president.** Require the chief justice of the Supreme Court, in his or her capacity as president of the Senate sitting as a court of impeachment, to make an initial ruling on all questions of admissibility. Permit the chief justice to cast a tie-breaking vote on other procedural questions that end in a tie vote of the senators assembled.

- **Amend the Senate impeachment trial rules to require the recusal of any senator who is a fact witness to or participant in the course of conduct relating to an article of impeachment.** The Constitution does not require every senator to be present during an impeachment trial and explicitly permits conviction and removal from office to be decided by members present. A conflict of interest is an appropriate reason for a senator not to be present at an impeachment trial, and Senate rules should spell out more clearly when a senator should recuse.

Resources

[The case for a Trump impeachment inquiry](#), *CREW*, July 24, 2019.

[Senate impeachment trial procedure](#), *Public Citizen and CREW*, November 7, 2019.

Conor Shaw, [The Senate Must Conduct an Impeachment Trial that Is Serious and Fair](#), *Just Security*, December 19, 2019.

Gabe Lezra, [There Is No Reason to Exclude Evidence in an Impeachment Trial on Grounds of Hearsay](#), *Just Security*, January 28, 2020.

Issue 11: Poor compensation for members of Congress and staff

Congressional staff are the backbone of the legislative branch. They draft legislation, conduct investigations, work with constituents and interest groups, and perform countless other critical tasks ranging from top-secret intelligence gathering to ensuring members have water before a hearing. Despite these essential functions, they are [vastly underpaid](#) and overworked.

Average chief of staff salaries are estimated to be [40 percent](#) lower than comparable private sector salaries; similar analyses have [shown](#) that pay gaps for other senior staff like legislative directors and counsels reach up to 65 and 145 percent. Lower level staff are [equally underpaid](#): staff assistants in the private sector can make 20 percent more than their congressional counterparts, and legislative correspondents can command over 35 percent more.

These monetary discrepancies are compounded because younger staff just beginning their careers are often saddled with immense student debt. The Washington, DC metropolitan area, where many staffers reside, has become one of the more expensive places to live in the country. The cost of living in DC is [39 percent above](#) the national average. Cost of living concerns are even more pronounced for congressional interns, many of whom are unpaid. These financial realities also make it more likely that congressional staff will leave their government work to pursue more lucrative opportunities in lobbying or the private sector which creates a brain drain on Capitol Hill and raises potential ethics concerns about the revolving door between government and industry.

Low pay is also a barrier to a more inclusive workforce. If working in Congress requires an individual to draw on their savings or financial support from their family and connections, then the congressional workforce will disproportionately be composed of individuals who have access to those kinds of resources. Although people of color comprise 38 percent of the U.S. population, they [comprise](#) less than 14 percent of top House staff. Many individuals from less affluent backgrounds cannot afford to work for below-market wages on Capitol Hill and thus cannot live in one of the nation's most expensive housing and childcare markets. The end result is a staff that is not representative of the country.

Congressional staff are also asked to do increasingly more work as office budgets shrink and jobs are cut, leaving staff more vulnerable to outside influence. Smaller staff sizes with fewer institutionally knowledgeable employees also make members of Congress more reliant on help from outside sources that may be offering assistance so that they can influence Congress's legislative or oversight activities. A typical legislative assistant's portfolio may now include a half dozen separate issues or more, which will necessarily lead to issue triage and staff burnout. These [staffing problems](#), including the uncomfortable fact that [no staff position](#) has a median tenure beyond four years, may lead Congress to address fewer pressing issues, take more time to address the issues they do decide to undertake, and waste time re-learning information with which more tenured staff potentially has experience.

Although members of Congress are paid more than staff, their salaries should also be increased for similar reasons. Serving in Congress is demanding, and former members of Congress can often [secure](#) more lucrative lobbying positions when they retire. Increasing congressional pay reduces the financial incentive to retire, helps promote diversity within the legislative branch, and insulates Congress from corrupting influences by those who might employ members after they leave.

Congress cannot increase its own pay with immediate effect. The Twenty-Seventh Amendment [provides](#) that “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” Congress provided for automatic adjustments to member salaries in the Ethics Reform Act of 1989; however, Congress has [frozen](#) pay increases for members every year since 2009. As a result, member salaries have [decreased](#) by approximately 17 percent over the last 11 years when adjusted for inflation.

Solutions

- **Lift the pay freeze on member salary adjustments and increase salaries for the 118th Congress to compensate for eleven years of skipped pay increases.** Congress should return to automatic increases in member salaries and increase salaries for the next Congress by 17 percent.
- **Increase member and committee staff budgets.** Members and committees should have more resources to address issues of complexity and to reduce their reliance on lobbyists and outside groups for expertise.
- **Raise staff salaries, and eliminate the unpaid intern program.** The budgets for member and committee staff budgets should be increased to support larger and better compensated staff. In addition, staff salaries should be increased to better reflect local cost of living and the experience and expertise of congressional employees. Staff salaries should also be indexed to inflation to ensure that they continue to increase with the cost of living. Congress should also standardize paid family and medical leave as well as minimum vacation requirements.
- **Pay transition staffers for newly elected members of Congress.** Newly elected members of Congress should have resources to put together a team in the two months between the general election and the beginning of a new Congress.

Resources

Rep. Kilmer’s [Moving Our Democracy and Congressional Operations Towards Modernization Resolution](#), H.Res. 756 (116th Congress, 2019).

Sen. Warren and Rep. Jayapal’s [Anti-Corruption and Public Integrity Act](#), S. 3357, § 209 (115th Congress, 2018).

Casey Burgat and Ryan Dukeman, [Human Capital and Institutional Decline in Congressional Appropriations Committees](#), *R Street Institute*, December 14, 2018.

Kathryn Pearson, et al., [Report from the Subcommittee on Staffing Diversity and Retention](#), *APSA Task Force on Congressional Reform*, June 20, 2019.

[State of the Congressional Workplace: 2019 Annual Report: A Report on Workplace Rights, Safety and Health, and Accessibility under the Congressional Accountability Act](#), *Office of Congressional Workplace Rights*, 2019.

R. Eric Petersen, [Staff Pay Levels for Selected Positions in House Member Offices, 2001-2019](#), *Congressional Research Service*, September 11, 2020.

Issue 12: An overburdened and unrepresentative federal judiciary

Judges hold immense power in our government. They serve as checks and balances for the legislative and executive branches, and help to ensure that the Constitution and laws are adhered to throughout the country. Additionally, as federal judges serve for life, their potential influence stretches across multiple generations. In recent years, the judicial overburden of litigation in many districts across the country has become overwhelmingly evident.

There are limitations to the amount of work that judges can get done. Rises in the population and/or case filings heighten the importance of increasing judgeships around the country to ensure the judicial system manages its caseload properly. The Judicial Conference [recommended](#) (amongst other proposals) that 73 new judgeships be created in the U.S. district courts to alleviate [the demanding workloads](#) of judges and courts in many of the most populous districts. In many districts, case filings [have drastically increased and require](#) immediate action. While others are not quite as overburdened, the establishment of more judgeships would ensure that other districts do not find themselves in similarly pressing situations.

Although neither the United States District Court for the District of Columbia and the D.C. Circuit Court of Appeals are [identified](#) as targets for additional judgeships by the Judicial Conference on the basis of their comparative workload, judgeships should nonetheless be added on those courts to ensure important cases involving the federal government are resolved expeditiously. Critical Freedom of Information Act, Administrative Procedure Act, campaign finance, and constitutional cases are routinely decided in these courts. Ensuring that these important cases can be resolved as efficiently as possible is advantageous both to the federal government and to litigants who wish to challenge its policies, decisions, and conduct.

The judiciary is not only limited in its capacity, but also in diversity. In order to function effectively and be regarded with legitimacy, judges should have respect and mutual trust with the public that they make fair and reasonable decisions. When judges do not reflect the populations they are making decisions for, it is difficult to establish that all-important trust and legitimacy. The majority of federal judges are white and/or men. Since taking office, [President Donald Trump has not prioritized](#) nominating judges of diverse backgrounds. Instead, the majority of nominees and appointees continue to be white men.

Overall, the judiciary has significant influence on our democracy; it ensures accountability in our legislative and executive branches. It is imperative that the judiciary has the capacity and makeup to carry out its necessary functions and the makeup to reflect the population, and reinforce public trust and legitimacy.

Solutions

- **Establish the five new circuit court judgeships and 73 new district court judgeships requested by the Judicial Conference of the United States in 2020.** This should include five new judgeships for the Ninth Circuit Court of Appeals, 65 new judgeships in 24 district courts, and the conversion of eight existing temporary judgeships to permanent status.

- **Establish additional judgeships in the United States District Court for the District of Columbia and the D.C. Circuit Court of Appeals to expedite resolution of cases involving matters of consequence to the operation of the United States government.** Cases that are crucial to the functioning of our democracy should not move at an average pace—they should move at an accelerated one. Time is often of the essence for litigation in these courts, and they should have additional judges to ensure cases are resolved expeditiously.
- **Prioritize increasing the diversity of the federal judiciary.** When considering judicial candidates, the president and the Senate should give explicit consideration to ensuring that more women and people of color are appointed to federal judgeships.

Resources

[Joint Statement of Judge Lawrence F. Stengel, Judge Roslynn Mauskopf, and Judge Dana M. Sabraw](#), June 21, 2018.

Barry J. McMillion, [Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis](#), *Congressional Research Service*, September 3, 2019.

Danielle Root, et al., [Building a More Inclusive Federal Judiciary](#), *Center for American Progress*, October 3, 2019. [Statement of the Honorable Brian Stacy Miller on Behalf of the Judicial Conference of the United States](#), June 30, 2020.

Vincent M. Southerland, [Good Governance Paper No. 19: The Criminal Legal System — Towards a Paradigm Shift](#), *Just Security*, November 1, 2020.