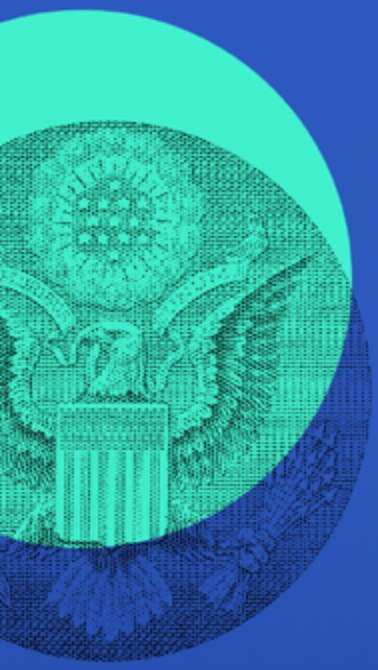
REPORT

POGO

THE BAKER'S DOZEN:

13 Policy Areas Critical to an Effective, Ethical, and Accountable Government

February 18, 2021



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THE PROJECT ON GOVERNMENT OVERSIGHT (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing.

We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

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Introduction

Since 2015, the Project On Government Oversight has welcomed each new Congress with a collection of recommendations for legislative action to strengthen democracy, crack down on misconduct, and reduce waste and corruption. These recommendations are based largely on findings from our own investigations, and together have formed essential, nonpartisan "to do" lists for Congress.

But this is an extraordinary time. We have faced an erosion of norms and safeguards across the federal government over the years. That erosion helped undermine the credibility of government institutions to the extent that hundreds of violent insurrectionists attacked the United States Capitol based on the lie perpetuated by then-President Donald Trump and many of his political allies that the 2020 presidential election had been stolen. That lie persisted despite the fact that officials who had been tasked with assessing the security of the election—many of whom had been appointed by Trump himself—determined that there had been no fraud and no election-steal.[1] There are few things more essential to a thriving constitutional democracy than the rule of law, respect for the rule of law, free and fair elections, and the peaceful transition of power between presidential administrations. All of those core tenets have been tested to the point of breaking.

While legislation will be necessary to set new limits on future presidents to guard against some of the worst abuses of power emanating from the White House, some of the damage to the functioning of the executive branch can only be addressed by the executive branch itself. So for 2021, we're doing things a little differently. We've not only included recommended legislative actions but also executive actions that can make much needed reforms and improvements to how our government functions.

Many of the recommendations in this report focus on issues POGO has championed since our founding in 1981, such as making government spending less wasteful and more effective or providing insiders with meaningful whistleblower protections.

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[1] Alex Marquardt, "Federal election official blasts Trump's false election claims as 'laughable,' 'baffling' and 'insulting,'" CNN, November 13, 2020. https://www.cnn.com/2020/11/13/politics/hovland-trump-election-claims/index.html

But this report also reflects a new and growing focus on equity and fairness in our justice system. It's another basic tenet of democracy that government powers should not be corruptly used against the people the government serves, yet, as we wrote in June 2020 in the wake of mass protests across the country, "Black Americans have been disproportionately targeted and harmed by that abuse of power throughout our nation's history."[2]

Fighting that abuse of power and others is the foundation of our efforts, from policing the use of surveillance tools, to reforming our immigration system, to working to increase government transparency and reduce waste in the national defense budget. If Congress and the White House implement the nonpartisan, commonsense recommendations we present, they would be going a long way toward creating a more effective, ethical, and accountable federal government that safeguards constitutional principles—a government that works for all the people. We at POGO welcome the chance to work with members of Congress and executive branch officials to make that a reality.

[2] Project On Government Oversight, "Statement on the Recent Police Violence against Black People and Peaceful Protesters," June 2, 2020. https://www.pogo.org/analysis/2020/06/statement-on-the-recent-police-violence-against-black-people-and-peaceful-protesters/

Promoting Accountability When Government Officials Commit Wrongdoing

This summer, tens of thousands of peaceful protesters braved a pandemic to protest the killings of George Floyd and Breonna Taylor, as well as other acts of police brutality in their own communities.[3] Too often they were met with even more brutality in response, whether by local police departments or heavily armed federal officials, some of whom refused to identify themselves.[4] The thousands of protestors who gathered in DC on January 6, 2021, to protest the certification of the 2020 general election were not met with the same response.[5] There was, in fact, very little law enforcement presence, despite prior indications that violence was likely.[6] The result of such lax response was the deadly insurrection at the U.S. Capitol. This dramatic difference in law enforcement response to the different protests underscores the systemic prejudicial nature of how law enforcement views the threats presented by

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[3] Larry Buchanan, Quoctrung Bui, and Jugal K. Patel, "Black Lives Matter May Be the Largest Movement in U.S. History," *New York Times*, July 3, 2020. https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html

[4] Adam Gabatt, "Protests about police brutality are met with wave of police brutality across US," *Guardian*, June 6, 2020. https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd; Laurel Wamsley, "Amnesty International Documents 125 Incidents of Police Violence Against Protesters," NPR, August 4, 2020. https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/08/04/899084543/amnesty-international-documents-125-incidents-of-police-violence-against-protest; Peter Baker, Maggie Haberman, Katie Rogers, Zolan Kanno-Youngs, and Katie Benner, "How Trump's Idea for a Photo Op Led to Havoc in a Park," *New York Times*, June 2, 2020. https://www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html; Garrett M. Graff, "The Story Behind Bill Barr's Unmarked Federal Agents," *Politico Magazine*, June 5, 2020. https://www.politico.com/news/magazine/2020/06/05/protests-washington-dc-federal-agents-law-enforcement-302551; Amir Vera, Konstantin Toropin, and Josh Campbell, "US attorney requests DHS investigation after video shows masked, camouflaged federal authorities arresting protesters in Portland," CNN, July 20, 2020. https://www.cnn.com/2020/07/18/us/portland-arrests-federal-authorities/index.html

[5] Ben Fox, Ashraf Khalil, and Michael Balsamo, "Thousands Cheer Trump At 'Save America' Rally Protesting Election Results," AP, January 6, 2021. https://baltimore.cbslocal.com/2021/01/06/trump-supporters-gather-near-white-house-for-save-america-march/

[6] Federal Bureau of Investigations, "FBI Assistant Director in Charge Steven M. D'Antuono's Remarks at Press Briefing Regarding Violence at U.S. Capitol," Press Statement, January 12, 2021. https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/fbi-assistant-director-in-charge-steven-m-dantuonos-remarks-at-press-briefing-regarding-violence-at-us-capitol-011221; Carly Roman, "US Capitol Police knew about potential for violence, according to the FBI," *Washington Examiner*, January 10, 2021. https://www.washingtonexaminer.com/news/fbi-says-capitol-police-knew-about-potential-for-violence

majority white demonstrators and by majority Black and other non-white demonstrators.[7]

The officer who caused Floyd's death is facing second-degree murder charges, and the other officers present are facing charges of aiding and abetting second-degree murder, but they are the exception.[8] Most officials who violate the law or people's rights get away with it—from local police officers and prosecutors to the highest ranks of the federal government. Ordinary citizens who seek redress face a series of roadblocks to justice.[9]

Criminal charges? Police officers are subject to different standards for using force than civilians, and receive special procedural protections when facing investigation. Officers often refuse to testify against each other, and prosecutors are reluctant to bring charges against the departments they rely on for convictions in other cases. The federal government could theoretically step in, but rarely does.

Internal discipline? Law enforcement unions are remarkably successful at fighting it. Civil suits for damages? Plaintiffs must overcome a series of judge-made defenses before a case ever reaches trial.

And prosecutors are even less likely to be criminally charged or sanctioned for misconduct than police who engage in misconduct.

Congress and the new administration need to work to dismantle these barriers to accountability.

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[7] Brakkton Booker, "Protests In White And Black, And The Different Response Of Law Enforcement," NPR, January 7, 2021. https://www.npr.org/2021/01/07/954568499/protests-in-white-and-black-and-the-different-response-of-law-enforcement; Rachel Chason and Samantha Schmidt, "Lafayette Square, Capitol rallies met starkly different policing response," *Washington Post*, January 14, 2021. https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/

[8] Ian Milhiser, "The 3 former officers who aided Derek Chauvin are charged in George Floyd's killing," *Vox*, June 3, 2020. https://www.vox.com/2020/6/3/21279481/george-floyd-second-degree-murder-derek-chauvin-thao-kueng-lane

[9] Katherine Hawkins, "Unqualified Impunity: When Government Officials Break the Law, They Often Get Away With It," Project On Government Oversight, October 22, 2020. https://www.pogo.org/analysis/2020/10/unqualified-impunity-when-government-officials-break-the-law-they-often-get-away-with-it/

One of the first to fall should be qualified immunity, a doctrine that protects government officials from being sued for violating people's constitutional rights unless plaintiffs can point to a judicial precedent holding officials liable for nearly identical misconduct. This is the doctrine that has made it almost impossible to hold law enforcement officers accountable through civil suits. In the words of U.S. District Judge Carlton W. Reeves, in practice this protects "law enforcement officers from having to face any consequences for wrongdoing."[10] And courts have narrowed the ability to sue federal officials for violating constitutional rights nearly out of existence.[11]

Similarly, there is little legal recourse available to individuals whose constitutional rights have been violated by state or local government officials. If a local official is violating someone's rights while acting in their official capacity, it's essential that the public be able to hold that official's organizational employer responsible as well, so that necessary systemic changes will be implemented in the institution to prevent future misconduct. If a state or local government imprisons someone without due process in violation of the Constitution, that individual should be able to petition the federal government for relief from that unlawful detention. Unfortunately, Congress has dramatically limited the legal process to submit such petitions to the federal government (commonly referred to as *habeas corpus*), most notably by passage of the Antiterrorism and Effective Death Penalty Act of 1996.

Taken all together, these examples paint a startling picture that is anathema to our democracy's foundational principles of limited government, individual responsibility, freedom, and liberty.

There are also serious deficiencies in the accountability structure for Department of Justice attorneys. While most federal agency inspectors general have the authority to investigate matters of alleged professional misconduct by agency attorneys, the current law prohibits the Justice Department inspector general from doing so.[12]

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[10] *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA (S.D. Miss. Aug. 4, 2020). https://casetext.com/case/jamison-v-mcclendon

[11] *Hernandez v. Mesa*, 140 S.Ct. 735 (2020). https://www.supremecourt.gov/opinions/19pdf/17-1678_m6io.pdf

[12] 5 U.S.C. App. §8E. (2020). https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5a-node20-section8E&num=0&edition=prelim

Instead, the accountability process rests with the department's Office of Professional Responsibility, which has proven ineffective at holding department attorneys to account,[13] in part because its decisions are reviewed within the normal department chain of command.

Additionally, recent events have highlighted the dangers created by the varied laws regarding the use of federal force domestically.[14] In the days after federal law enforcement was deployed across the country in response to widespread protests against systemic racism in policing, experts struggled to make sense of the various laws authorizing those actions.[15] If the boundaries of the law aren't clear, accountability becomes nearly impossible.

The principle at stake here is a simple one: If the government deprives an individual of his or her constitutional rights, that injured individual should be able to hold the government and perpetrator to account. The body of law that has undermined this principle must be uprooted to ensure that individuals may effectively seek redress for violations of their constitutional rights.

While many of these fundamental reforms require legislation, the executive branch also has the ability and responsibility to act where it is able to ensure that representatives of the federal government can and will be held accountable for abusing their authority.

Finally, no discussion of holding government officials accountable for wrongdoing would be complete without addressing the actions of then-President Donald Trump, members of Congress, and federal officials in inciting a violent mob attack on the U.S.

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[13] Nick Schwellenbach, "Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards," Project On Government Oversight, March 13, 2014. https://www.pogo.org/report/2014/03/hundreds-of-justice-department-attorneys-violated-professional-rules-laws-or-ethical-standards/

[14] Elizabeth Goitein, "Yes, Trump Can Legally Deploy Troops to Suppress Protestors," Brennan Center for Justice, June 3, 2020. https://www.brennancenter.org/our-work/analysis-opinion/yes-trump-can-legally-deploy-troops-suppress-protests

[15] Mandy Smithberger, "Preventing Presidents from Abusing Force at Home," Project On Government Oversight, November 18, 2020. https://www.pogo.org/analysis/2020/11/preventing-presidents-from-abusing-force-at-home/; Scott R. Anderson and Michel Paradis, "Can Trump Use the Insurrection Act to Deploy Troops to American Streets?" *Lawfare*, June 3, 2020. https://www.lawfareblog.com/can-trump-use-insurrection-act-deploy-troops-american-streets

Capitol designed to disrupt the certification of the 2020 presidential election, and the immediate response to that attack. The House of Representatives impeached Trump for his role in inciting the insurrection, and yet little more than a month after the attack on our democracy from within, Trump's Senate allies insist that everyone should just move on rather than hold the former president accountable.[16] In fact, 45 senators voted in favor of a procedural vote that would have dismissed the impeachment without a trial,[17] ignoring the widespread consensus that the Senate may convict officials even after they leave office.[18] This resistance to even holding a trial in the Senate underscores the difficulties of holding those with the most power accountable for abusing it.

While details are still emerging about the various roles members of Congress may have played in the planning of the attack, it's clear that disinformation spread by members to undermine public faith in the 2020 election results contributed to the rage that led to the deadly attack. Those members too must be held accountable for their actions in a manner that reflects the gravity of those actions.

Recommendations for Legislative Action

- **Abolish qualified immunity.** Congress should eliminate the judge-created defense of qualified immunity for all government officials. Limiting the defense to certain categories of officials or conduct is not sufficient, and would have the effect of codifying flawed Supreme Court decisions for the first time. Abolishing qualified immunity would dramatically improve accountability by making it easier for individuals to prevail in court over

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[16] Mark Moore, "GOP senators blast Dems for moving forward with Trump impeachment trial," *New York Post*, January 27, 2021. https://nypost.com/2021/01/27/gop-senators-blast-dems-for-pursuing-trump-impeachment-trial/; John L. Dorman, "GOP Sen. Marco Rubio dismissed Trump's impeachment trial as 'stupid,'" *Business Insider*, January 24, 2021. https://www.businessinsider.com/marco-rubio-senate-impeachment-trial-trump-stupid-2021-1; Todd J. Gillman, "Cornyn calls Trump impeachment trial 'bad idea,' warning of precedent for future ex-presidents," *Dallas Morning News*, January 21, 2021. https://www.dallasnews.com/news/politics/2021/01/21/cornyn-calls-trump-impeachment-trial-bad-idea-warning-of-precedent-for-future-ex-presidents/

[17] Siobhan Hughes and Lindsay Wise, "Most Republican Senators Reject Constitutionality of Trump Impeachment," *Wall Street Journal*, January 26, 2020. https://www.wsj.com/articles/republicans-challenge-trump-impeachment-trial-11611683182

[18] "Constitutional Law Scholars on Impeaching Former Officers," January 21, 2021. https://www.politico.com/f/?id=00000177-2646-de27-a5f7-3fe714ac0000

government officials who abused their authority by violating individuals' constitutional rights.

- **Create a cause of action against federal officials who violate individuals' rights.** Congress should amend 42 U.S.C. § 1983 to authorize lawsuits against federal officials who violate constitutional rights, just as such suits are authorized against state and local officials. This would pave the way to hold all government officials legally accountable for misconduct.

- **Allow individuals to sue if their rights are violated by government actors like police officers or prosecutors.** Congress should create a cause of action for lawsuits against police departments, prosecutors' offices, and municipal governments for their employees' violations of individual rights. Holding state and municipal agencies accountable for employee conduct while on official business will put pressure on agencies to ensure their employees are obeying the law.

- **Make it easier to hold state and local law enforcement accountable for their misconduct.** Congress should amend the criminal prohibitions in 18 U.S.C. § 242 to allow conviction of an official who deprives an individual of their rights "intentionally or recklessly," rather than "willfully." Leveling the playing field by criminalizing the deprivation of rights will help ensure local police officers take extra steps to protect the rights of civilians.

- **Empower the Department of Justice inspector general to investigate department attorney misconduct.** Congress should authorize the Justice Department inspector general to investigate allegations of misconduct by department attorneys and require the inspector general to report any findings of misconduct to state bar associations. Congress should also remove the jurisdictional carve-out that currently prohibits the inspector general from investigating department attorneys from Section 8E of the Inspector General Act of 1978. These actions would bring the department in line with standard federal agency practice and would mitigate real and perceived issues of accountability around the conduct of federal attorneys, including federal prosecutors.

- **Strengthen the legal authority of the Justice Department's civil rights division.** Congress should expand the Justice Department's civil rights division's authority to prosecute or otherwise address police brutality and other abuses. This expanded mission would jumpstart the long process ahead of making sure that accountability is achieved.

- **Limit the government's ability to avoid accountability by classifying its unlawful actions.** Congress should reform the state secrets privilege by requiring the disclosure of relevant classified evidence to judges and to opposing counsel who have the requisite security clearance, and by limiting the use of the privilege where its invocation would shield crimes or constitutional violations from judicial review. This reform is necessary to ensure that the classification system is not abused to shield wrongdoers from accountability.

- **Restore access to habeas corpus.** Congress should repeal the limits to habeas corpus codified in the Antiterrorism and Effective Death Penalty Act of 1996. Doing so will provide an effective avenue of recourse for individuals whose liberty has been taken away by the government to show that their rights were violated and receive redress.

- Require federal law enforcement entities to compile and publicly release information about deaths and injuries of individuals in federal custody, and misconduct by law enforcement agents and prosecutors. Congress should require all federal law enforcement entities to collect and publicly release demographic information about individuals who have been injured while in federal custody, including race, religion, sex, or any other protected class; witness statements; and data about settlements and awards paid out as a result of lawsuits over federal officials' misconduct or over wrongful deaths. That information should be released to the public after redactions necessary to protect community members' identities have been made. Increasing transparency around these incidents will help hold officials at all levels accountable for their actions and ensure justice is pursued.

- **Close legal loopholes and address vague provisions in federal law concerning the domestic use of federal forces.** Congress should amend the Insurrection Act to ensure that a president's invocation of the act's provisions is subject to expedited judicial review and will sunset within several days if Congress does not approve invocation of the act. Congress should also amend federal law to ensure that federal law enforcement activities are properly limited to federal property and its immediate vicinity. Addressing the ambiguities in these laws will help ensure that they are not improperly used against the public.

Recommendations for Executive Action

- **Require the compilation and public release of information about deaths and injuries of individuals in federal custody, and misconduct by law enforcement agents and prosecutors.** The administration should direct all federal law enforcement entities to collect and publicly release demographic information about individuals who have been injured while in federal custody, including race, religion, sex, or any other protected class; witness statements; and data about settlements and awards paid out as a result of lawsuits over federal officials' misconduct or over wrongful deaths. That information should be released to the public after redactions necessary to protect community members' identities have been made. Increasing transparency around these incidents will help hold officials at all levels accountable for their actions and ensure justice is pursued.

- **Release evidence of and officially acknowledge human and civil rights violations by past administrations.** The administration should establish a process for reviewing allegations of human and civil rights violations by previous administrations, including in cases where there are lawsuits pending. The federal government should be transparent about previous abuse allegations. Establishing such a process will help future administrations review allegations of human and civil rights violations perpetrated by the government.

Promoting an Executive Branch Ethics Framework that Protects the Public Interest

In a troubling trend, the U.S. public has, for the past five years, ranked "political corruption" and "corrupt government officials" as one of their leading fears.[19] In the wake of the January 6, 2021, attack on the U.S. Capitol by violent insurrectionists who were convinced, against all evidence, that the 2020 presidential election had been stolen, the consequences of not addressing the root of these concerns have never been more obvious. Without lending any legitimacy to the heinous actions perpetrated by those domestic terrorists, it is important to consider what steps our political leaders can take to begin to restore the people's faith in our system of government and confidence in the integrity of our leaders and institutions, even when they don't agree with those leaders or their positions.

There has been a seemingly unending list of controversies involving federal officials and their eyebrow-raising dealings over recent years that has undoubtedly contributed to the erosion of trust in our political leaders. These controversies, including those involving the Clinton Foundation and its ties to government,[20] the ties between the Trump Organization and the federal government,[21] and numerous government officials and their individual conflicts of interests and misuse of government funds,[22] have laid bare just how inadequate federal ethics laws, regulations, and enforcement mechanisms are. The weaknesses in the legal structure that is meant to keep executive branch officials working at the behest—and for the benefit—of the people rather than for their own political or financial agenda are

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[19] Shreya Sheth, Chapman University, *America's Top Fears of 2019*, 2. https://www.chapman.edu/wilkinson/research-centers/babbie-center/_files/americas-top-fears-2019.pdf; Change Research, *CNBC "State of Play" Poll*, (September 2020), 4. https://changeresearch.com/wp-content/uploads/2020/09/CNBC-CR_National-Toplines_Wave-13_September-4-6-Wave-13_-9_4-6.pdf

[20] Chris Matthews, "Clinton Foundation Lawyers Thought Non-Profit Was Shady Too," *Fortune*, October 18, 2016. https://fortune.com/2016/10/18/clinton-foundation-conflicts/

[21] Citizens for Responsibility and Ethics in Washington, *President Trump's 3,400 Conflicts of Interest*, (September 24, 2020). https://www.citizensforethics.org/reports-investigations/crew-reports/president-trumps-3400-conflicts-of-interest/

[22] Jason Paladino, "The Chairman of the Revolving Door," Project On Government Oversight, March 6, 2020. https://www.pogo.org/investigation/2020/03/the-chairman-of-the-revolving-door/

systemic and will need significant reform. Fixing the flaws in the system is essential in order for the whole public, whether they support those in office or not, to have confidence that decisions and actions being made in our names and with our tax dollars are not being driven by personal gain that runs counter to the best interests of the people.

The rule of law—including the principle that no one is above the law—is foundational to our democratic system. However, it's become obvious that the laws are written in a way that they can be applied unevenly and unequally, and so whether an official is held to account for not adhering to the rule of law depends on who that official is or what their rank is.

Perhaps the most egregious example of this is that many ethics laws simply don't apply to the president or vice president.[23] Until 2016, it was taken for granted that top officials would voluntarily comply with ethics laws even though the laws technically didn't apply to them. With then-President Donald Trump's refusal to divest or sufficiently insulate himself from the operations of the Trump Organization, despite the recommendation and urging of federal ethics officials,[24] the public was again given a clear picture of the limits of ethics laws and how regulations fall short when it comes to accountability for those at the highest levels of our government.

The problem doesn't end there. Even when the laws meant to promote ethical behavior by government officials do apply to a government official, there is a clear distinction between how those laws are enforced against high level officials versus rank-and-file civil servants. Enforcement of the Hatch Act is a prime example. The act prohibits executive branch employees from engaging in certain political activities while functioning in their official governmental capacity in order to ensure tax dollars are not spent on partisan election activities. Potential violations of that act are investigated by the Office of Special Counsel (OSC). When the OSC finds violations by rank-and-file civil servants, it is able to prosecute those employees in front of the

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[23] 18 U.S.C. § 202(c) (2020). https://uscode.house.gov/view.xhtml?req=(title:18%20section:202%20edition:prelim)

[24] Peter Overby, "Exiting Ethics Chief Walter Shaub Calls Trump White House 'A Disappointment'," NPR, July 7, 2017. https://www.npr.org/2017/07/07/536018496/exiting-ethics-chief-walter-shaub-calls-trump-white-house-a-disappointment

Merit Systems Protection Board, an independent and quasi-judicial agency that reviews federal employment disputes, which then can impose penalties against the employee ranging from a reduction in pay grade or removal to a civil fine of up to $1,000.[25] By contrast, if a political appointee violates that law—even in more public and pernicious ways than do lower federal employees—there is no independent enforcement mechanism to hold them accountable. OSC can only recommend to the president or agency head that a senior appointee who violated the law be disciplined. The system is set up in a way that what is law for rank-and-file federal employees is a mere suggestion for those at the highest levels.[26] It's hard to blame the public for mistrusting the federal government when they see senior advisers to the president flouting laws meant to prevent the misuse of taxpayer dollars for partisan electoral purposes without any consequence.

Unfortunately, deficiencies in our federal ethics system aren't limited to the Hatch Act. The Office of Government Ethics, an independent agency that "leads and oversees the executive branch ethics program,"[27] has very little authority to investigate alleged ethics violations, and has no authority at all to order corrective action when there is a violation.[28] Instead, OGE can recommend that an agency inspector general investigate alleged ethics violations by an agency employee, and only if that investigation isn't completed in a reasonable amount of time can OGE conduct its own investigation. If OGE finds a violation after their own investigation, the office's final product is "a nonbinding recommendation that appropriate disciplinary or corrective action be taken against the employee."[29] It's imperative that Congress revisit the application and enforcement structures of the Hatch Act and other federal ethics laws to ensure they apply equally and fairly to federal officials at all levels across government and are aggressively enforced.

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[25] Whitney K. Novak, Congressional Research Service, *The Hatch Act: A Primer*, IFII512 (April 20, 2020), 2. https://fas.org/sgp/crs/misc/IF11512.pdf

[26] Charles Clark, "Does the Hatch Act Need a Makeover for the Trump Era?" *Government Executive*, July 11, 2019. https://www.govexec.com/management/2019/07/does-hatch-act-need-makeover-trump-era/158327/

[27] "What We Do," Office of Government Ethics. https://www.oge.gov/web/oge.nsf/about_what-we-do (accessed December 16, 2020)

[28] Liz Hempowicz, "The Hot-Potato Scenario of Ethics Investigations," Project On Government Oversight, August 30, 2018. https://www.pogo.org/analysis/2018/08/the-hot-potato-scenario-of-ethics-investigations/

[29] 5 CFR § 2638.504(e)(2) (2020). https://www.law.cornell.edu/cfr/text/5/2638.504

Finally, it's important to address the harmful impact on confidence in government decision-making caused by the revolving door between government and private industry. The integrity of decisions, missions, programs, and spending throughout the government is at risk when those decisions are being steered by individuals who come from, and may well go back to, companies that have a financial interest in the outcome of those decisions.[30] Congress and the executive branch should focus on ensuring that high level government officials going through the revolving door do so in a way that protects government policies from undue industry influence. This should include placing restrictions on those coming into government, and requiring robust transparency around potential conflicts of interest and how they will be managed. These and other reforms must be accompanied by redefining "lobbying activities"—a term that informs most revolving door laws but is too narrow to capture all the malignant forms of influence peddling that shape policymaking—and robust enforcement mechanisms.

Only by addressing the root causes of the distrust in government can Congress and the executive branch begin to rebuild confidence that our government is, on the whole, operating for the good of the country rather than to personally benefit individual officials.

Recommendations for Legislative Action

- **Apply ethics laws to the president and vice president.** Congress should amend the definition of "officers" used in 18 U.S.C. §202(c) to expressly include the president and vice president in the primary prohibition against government actors participating in matters affecting their personal financial interests. A president or vice president with financial conflicts of interest would either divest or put the conflicting assets into a blind trust. Requiring such action would give the U.S. public confidence that any decisions made by our top leaders are not colored by their own financial interests.

- **Create an avenue to enforce the Hatch Act against high level political appointees.** Congress should amend 5 U.S.C. §1215 to empower the Office

[30] Mandy Smithberger, Project On Government Oversight, *Brass Parachutes: The Problem of the Pentagon Revolving Door* (November 5, 2018), 4. https://s3.amazonaws.com/docs.pogo.org/report/2018/POGO_Brass_Parachutes_DoD_Revolving_Door_Report_2018-11-05.pdf

of Special Counsel to petition the Merit Systems Protection Board to order political appointees and senior White House officials to pay significant fines for violating the Hatch Act. OSC should still be required to send their findings related to political appointees to the president, who could still choose to follow OSC's recommendations regarding removal or demotion. This preserves a president's constitutional authority to appoint and remove officers that serve at their pleasure, while providing a critical check against the use of tax dollars and government resources for partisan electoral purposes.

- **Require an explanation to Congress of the resolution of Hatch Act findings and recommendations involving senior political appointees.** Congress should amend the Hatch Act to require that the president and agency heads submit a detailed explanation to Congress on what their respective final decisions are in each Hatch Act case transmitted to them by the Office of Special Counsel in which corrective action was recommended. These responses should be made available to the public. Such communication will help inform Congress and advocates about whether additional revisions to the law are necessary.

- **Increase transparency of the revolving door.** Congress should require that the Department of Defense publicly post the database of officials going through the revolving door to industry that it is required by law to maintain. Congress should also require other agencies to maintain and make publicly available a similar database. This additional transparency will further incentivize compliance with ethics laws, expose any systemic weaknesses in the law that Congress should address, and ensure the fair and consistent application of these standards and restrictions.

- **Empower the Office of Government Ethics to fulfill its mission.** Congress should expand the law to ensure the Office of Government Ethics has clear, independent authority to investigate complaints and to issue binding corrective and disciplinary actions when there is a non-criminal ethics violation. These reforms would ensure consistent application of ethics rules and the exceptions to them across government.

- **Require just cause before a president can remove the Director of the Office of Government Ethics.** Congress should amend the law to specify that a president can only remove the director of OGE before their five-year term is over if the president has just cause. The law requires the director of OGE to

review the financial disclosures of senior government officials for compliance with conflicts of interest laws and regulations. Insulating the director from politically or otherwise improperly motivated firings through "for-cause" removal protections ensures they have the independence they need to fulfill that important function.

Recommendations for Executive Action

- **Submit an explanation to Congress of the resolution of Hatch Act findings and recommendations involving senior political appointees.** The president and all agency heads should communicate a detailed explanation to Congress of their respective final decisions in each Hatch Act case transmitted to them by the Office of Special Counsel in which corrective action was recommended. These responses should be made available to the public. Such communication will help demonstrate to executive branch employees that the president takes the Hatch Act seriously, encouraging civil service employees to comply with the law.

- **Require the Office of Special Counsel to communicate when it closes investigations into political appointees because they leave government service.** The president should direct the head of the Office of Special Counsel to report to the White House and Congress when the office closes an investigation into potential violations of the Hatch Act before completion because the subject of the investigation left government service. Closing an investigation because no violation occurred and closing an investigation because the subject is no longer in government are very different. This process would be helpful in cases where the former government official decides to return to government service—it would preserve the record and allow members of Congress to question a future nominee about the allegations if their subsequent appointment requires Senate confirmation.

- **Publicly post final submissions of ethics records**. The president should direct the Office of Government Ethics to publicly post all ethics records for executive branch officials occupying positions for which the pay is set at Level 1 or 2 of the Executive Schedule, including ethics agreements, waivers, recusals, screening arrangements, certificates of divestiture (including requests for certificates), authorizations to accept gifts, STOCK Act notices of employment negotiations (limited to employment for which the government employee was hired), disciplinary actions and reprimands related to ethics violations, and any documents demonstrating compliance

with ethics agreements. While some of these records are publicly available or can be made available through the Freedom of Information Act or by submitting OGE Form 201, the public shouldn't have to jump through hoops to review them. It is foreseeable that these documents will continue to receive public scrutiny, so proactively publishing them will reduce the administrative burden on the agencies processing numerous requests.

- **Require government officials to enter into a binding revolving door exit plan.** The president should require departing senior government officials to enter into a binding revolving door exit plan that sets forth the programs and projects from which the former employee is banned from working. Like financial disclosure statements, these reports should be filed with the Office of Government Ethics and made available to the public. These clear restrictions and the additional transparency will protect executive branch decision-making from even the appearance of a conflict of interest created by subsequent employment related to federal service, and will allow the public to see how government agencies interpret laws to prevent conflicts of interest and whether there is consistent and fair application of those laws.

Protecting Truth-Tellers Who Blow the Whistle

Whistleblowers are critical in the fight against corruption, abuse, waste, and fraud. They are the eyes and ears of the taxpayers, and their disclosures—when acted on—have the potential to save lives, save taxpayer dollars, and result in a more effective federal government that works in the public's interest. Recent whistleblower disclosures led to the Environmental Protection Agency remedying widespread deficiencies in lead paint inspections that left the public at great risk,[31] and the Transportation Security Administration to improve coronavirus procedures for airport screeners to better protect the public in the initial months of the pandemic[32]—both changes that almost surely saved lives.

Stronger whistleblower protections also encourage insiders to come forward with information about waste or fraud by easing fears that retaliation will go unchecked, allowing the government to recoup tax dollars. Since 1986, when Congress strengthened whistleblowing laws, the government has recovered more than $64 billion previously lost to fraud and false claims against the United States.[33] Unfortunately, recent actions by the Department of Justice have made it more difficult for whistleblowers to help the government recover funds under the False Claims Act, a law dating back to 1863 aimed at holding those who defraud the government accountable. In modern times, the False Claims Act empowers private individuals to sue companies that defraud the government, which triggers a federal investigation into the alleged fraud. The government can then choose to intervene and bring the case itself or decline to step in, allowing the whistleblower to continue the litigation. These *qui tam* suits (lawsuits filed by individuals on behalf of the government) led to

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[31] Office of Special Counsel, "EPA Whistleblower Prompts Fixes to Address Faulty Lead Paint Inspections that Put Public at Risk," Press Release, November 15, 2018. https://osc.gov/News/Pages/18-47-EPA-Whistleblower-Prompts-Fixes-to-Address-Faulty-Lead-Paint-Inspections-that-Put-Public-at-Risk.aspx

[32] David Koenig, "Lawyer: TSA makes changes after whistleblower complaint," AP, July 8, 2020. https://apnews.com/article/4225f2a6f57d053453e7e7964fcae734

[33] Department of Justice, "Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017," Press Release 17-1467, December 21, 2017. https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017

the recovery of over $2 billion in fiscal year 2020.[34] However, a memo issued by the Justice Department in 2018, referred to as the Granston memo, expanded the authority for government attorneys to seek dismissal of *qui tam* lawsuits, resulting in an immediate uptick in dismissals.[35]

Despite the clear and irreplaceable value that whistleblowers provide, they are often met with retaliation rather than celebration for telling the truth. In 2020, the Government Accountability Office found that employees who filed whistleblower complaints were terminated at significantly higher rates than other federal workers governmentwide.[36] While termination is one of the most extreme forms, there are many degrees of retaliation—from a hostile work environment to revoked security clearances. As POGO has previously cautioned, "retaliation against whistleblowers is widespread and poses a significant barrier to the accountability and transparency of government and corporate conduct."[37] Retaliation discourages others from coming forward when they see wrongdoing, perpetuating a culture of keeping wrongdoing hidden rather than exposing it so that it may be addressed.

Whistleblowers who have suffered retaliation and wish to pursue legal recourse may find themselves doubly victimized by a flawed enforcement system. For example, the Merit Systems Protection Board, which adjudicates whistleblower retaliation complaints among other federal employment disputes, has lacked a quorum since

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[34] Department of Justice, "Justice Department Recovers Over $2.2 Billion From False Claims Act Cases in Fiscal Year 2020," Press Release 21-55, January 14, 2021. https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020

[35] Neil Gordon, "Justice Department Plan to Weed Out 'Frivolous' Whistleblower Cases May Do More Harm than Good," Project On Government Oversight, January 31, 2018. https://www.pogo.org/analysis/2018/01/justice-department-plan-to-weed-out-frivolous-whistleblower-cases-may-do-more-harm-than-good/; Letter from Assistant Attorney General Stephen E. Boyd to Senator Charles Grassley about the Department's False Claims Act dismissal authority, December 19, 2019, 2. https://www.grassley.senate.gov/sites/default/files/2019-12-19%20DOJ%20to%20CEG%20%28FCA%20dismissals%29.pdf

[36] Yvonne D. Jones, Clifton G. Douglas Jr., Katherine Wulff, et al., Government Accountability Office, *Whistleblowers: Office of Special Counsel Should Require Information on the Probationary Status of Whistleblowers,* GAO-20-436 (May 2020), 9. https://www.gao.gov/assets/710/707219.pdf

[37] Nick Schwellenbach, ed., *Caught Between Conscience and Career*, (Washington, DC: Project On Government Oversight, Government Accountability Project, and Public Employees for Environmental Responsibility, 2019), 9. https://www.pogo.org/analysis/2019/03/caught-between-conscience-and-career/#73911

January 2017 and has had no members since March 2019.[38] These persistent vacancies mean that many federal whistleblowers are stuck in bureaucratic limbo, unable to fully avail themselves of whistleblower protections.

Whistleblowers in the intelligence community are particularly vulnerable to unchecked retaliation because there is no independent mechanism to enforce the statutory protections laid out in the Intelligence Community Whistleblower Protection Act. Rather than being able to petition a body like the Merit Systems Protection Board or a court to enforce their protections, intelligence community whistleblowers can only turn to either their agency's inspector general or the inspector general for the intelligence community. Under Presidential Policy Directive 19, the last level of review in an intelligence community whistleblower's case is a panel of three inspectors general from the intelligence community, referred to officially as an External Review Panel.[39] However, those panels' decisions are merely recommendations that the head of the whistleblower's agency can disregard without consequence. Similarly, military servicemember whistleblowers also lack an independent means to enforce their legal protections, and must rely on the leadership of their branch of the armed services to enforce the decisions of an inspector general. If the head of their branch decides against ordering corrective action, the only recourse available to a whistleblower is to petition the secretary of defense.[40] Leaving the enforcement of whistleblower protection laws to the agencies ultimately responsible for the retaliation renders those protections all but meaningless.

In addition to whistleblowing about wrongdoing, there is also policy dissent—when agency employees raise concerns about an agency's policy decision that may not be illegal or even improper, but nevertheless may be dangerous or unethical. A few agencies have created internal policy-dissent channels through which employees can voice their opposition. In a July 2020 report, POGO found that many federal employees say these channels are a waste of time, and that some employees fear or

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[38] Nicole Ogrysko, "Senate forces 'first' for MSPB as the agency loses all members," *Federal News Network*, March 1, 2019. https://federalnewsnetwork.com/workforce-rightsgovernance/2019/03/senate-forces-first-for-mspb-as-the-agency-loses-all-members/

[39] "Presidential Policy Directive 19: Protecting Whistleblowers with Access to Classified Information," White House, October 10, 2012. https://www.dni.gov/ICIG-Whistleblower/resources/PPD-19.pdf

[40] 10 U.S.C. § 1034(h) (1989). https://www.law.cornell.edu/uscode/text/10/1034

have faced reprisal from agency management for using them.[41] While agency regulations generally prohibit retaliation against employees when they use those channels, the prohibitions are difficult to enforce against a recalcitrant agency. It's unclear if the use of dissent channels is also protected by federal whistleblower statutes,[42] a distinction that matters because these statutory protections afford due process and an enforcement structure that can be applied against an agency.

While Congress has continued to strengthen whistleblower laws and enforcement procedures, clear gaps remain.[43] Congress and the executive branch should address these gaps in order to encourage and provide a safe environment for individuals to come forward and voice policy disagreements or report misconduct and malfeasance when they see it. Those reforms should reflect all the various ways truthtellers are currently retaliated against, and should recognize the fact that anonymity from those in a position to retaliate against an individual may be the most effective protection.

Recommendations for Legislative Action

- **Protect whistleblowers from common retaliation tactics that often pass as legitimate personnel actions.** Congress should outlaw retaliatory investigations by designating them a prohibited personnel practice; apply best-practice burden of proof standards to the adjudication of retaliatory security clearance actions; prohibit government employees from exposing a whistleblower's identity without the whistleblower's express consent; and create an actionable right for whistleblowers to maintain their anonymity. These reforms will close critical loopholes, delegitimizing common retaliatory tactics that are often presented as legitimate personnel actions.

- **Create an independent means of due process relief for intelligence community and servicemember whistleblowers.** Congress should create

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[41] Daniel Van Schooten and Nick Schwellenbach, *Stifling Dissent*, Project On Government Oversight, July 31, 2020. https://www.pogo.org/report/2020/07/stifling-dissent/

[42] Per 5 U.S.C. §2302(b)(9), it is unlawful to retaliate against a whistleblower when they exercise their right to communicate a complaint or grievance where that right is granted by any law, rule, or regulation. The question of whether this statutory provision applies whistleblower protections to employees who use established dissent channels has never been tested in court.

[43] *"Protecting Those Who Blow the Whistle on Government Wrongdoing": Hearing before the House Committee on Oversight and Reform's Subcommittee on Government Operations*, 116th Cong. 4 (January 28, 2020) (testimony of Liz Hempowicz, Director of Public Policy at the Project On Government Oversight). https://www.pogo.org/testimony/2020/01/the-state-of-whistleblower-protections-and-ideas-for-reform/

and empower independent adjudicators to decide and enforce appropriate relief in claims of whistleblower retaliation for employees of the intelligence community and for servicemembers. This reform will help ensure that these employees' rights are enforceable, which should encourage timely, secure, and lawful whistleblowing disclosures about critical issues in traditionally opaque workforces.

- **Apply fair burden of proof standards to military whistleblower retaliation claims.** Congress should amend servicemember whistleblower protections so they align with the best-practice burden of proof standards in most public and private sector whistleblowing laws that are applied to non-military civil service employees. This reform would help ensure that servicemembers don't have to meet an unfair and unequal standard under the law.

- **Afford whistleblowers the right to have their retaliation claims decided by a jury of their peers.** Congress should create the right for whistleblowers to seek relief in federal court before a jury for whistleblower retaliation. This reform would create parity with most private sector whistleblowing laws and would allow whistleblowers the opportunity for timely, independent relief.

- **Add enforcement mechanisms to the Lloyd-La Follette Act.** Congress should add enforcement mechanisms to the Lloyd-La Follette Act—which prohibits actions that would interfere with an individual's right to petition Congress—the lack of which currently give a false sense of security to whistleblowers who come directly to Congress with allegations of wrongdoing. Specifically, Congress should create independent due process relief for those whistleblowers who are retaliated against for communicating with Congress. This enforcement would ideally help whistleblowers to safely and confidently make disclosures directly to Congress.

- **Establish intra-agency policy dissent channels so employees can safely express dissent about agency policy decisions.** Congress should require agencies to stand up comprehensive and easy-to-navigate policy dissent channels that provide optional anonymity and strong protection against retaliation. Because traditional whistleblower protections typically exclude disclosures related to policy dissent, establishing these channels will provide an important means for employees to quickly alert agency leadership about serious concerns.

- **Extend whistleblower protections to staff of the judicial and legislative branches of government.** Congress should pass best-practice whistleblower protections for itself and for the judicial branch. Such reforms would ensure that employees of these branches can report waste, fraud, and abuse without putting their own careers on the line.

Recommendations for Executive Action

- **Require agency heads to provide a detailed explanation when they decline to meaningfully discipline agency supervisors who broke the law by retaliating against whistleblowers.** The president should require their appointees to send a public, written explanation to the White House, congressional committees of jurisdiction, and agency inspector general when the head of an agency declines to follow recommended disciplinary measures against agency supervisors who are found to have engaged in whistleblower retaliation. This will set clear expectations that the administration will not tolerate whistleblower retaliation, and will discourage unlawful retaliatory behavior in the first place.

- **Restore full operation of the Merit Systems Protection Board.** The president should prioritize the nomination of three qualified individuals to serve on the Merit Systems Protection Board. Nominees should be personally and demonstrably committed to upholding the federal merit system. By prioritizing these nominations, the president will restore functionality of the board, including its power to issue final decisions in whistleblower retaliation cases and to issue critical stays of personnel actions that whistleblowers face.

- **Rescind the Granston memo.** The attorney general should rescind the policy expanding authority of Department of Justice attorneys to ask that *qui tam* lawsuits be dismissed. The department should re-prioritize resources currently spent on seeking dismissals to instead assess whether the department should intervene in cases to aid in returning money to taxpayers. This would likely result in the federal government recovering more taxpayer money that had been stolen through fraud.

Supporting Effective Independent Internal Watchdogs

For more than 40 years, inspectors general have played a vital role in conducting independent oversight of the executive branch. Inspectors general help to achieve a more effective, ethical, and accountable federal government, and are uniquely qualified to identify waste, fraud, and abuse from within the executive branch. In fiscal year 2018 alone, inspectors general across the federal government identified potential savings of approximately $36.2 billion, representing a $14 return on every $1 of taxpayer money that Congress invested in those offices.[44] Given the importance of inspectors general, it is critical that individuals appointed to these positions be independent and well-qualified. The politicization of these positions can threaten the independence of inspectors general and, as a result, hobble the effectiveness of their work.

According to the Inspector General Act of 1978, inspectors general must be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[45] It is crucial that inspectors general remain independent from the executive branch, which they are tasked with overseeing, and Congress set these requirements as a commonsense baseline to ensure inspectors general can do their jobs effectively.

There are currently 74 statutory federal offices of inspectors general. About half of all inspectors general oversee relatively small federal entities and are appointed by those boards or commissions. The other half oversee federal agencies, and Congress has required that those inspectors general be nominated by the president and confirmed

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[44] *Overseeing the Overseers: Council of the Inspectors General on Integrity and Efficiency @ 10 Years: Hearing before the U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Government Operations,* 116th Cong. 2 (September 18, 2019) (testimony of Michael E. Horowitz, Chair, Council of the Inspectors General on Integrity and Efficiency). https://oig.justice.gov/sites/default/files/2019-12/t190918_0.pdf

[45] 5 U.S.C. App. 3 § 3(a). https://www.law.cornell.edu/uscode/text/5a/compiledact-95-452/section-3

by the Senate.[46] For those positions, rigorous Senate vetting is essential to ensure the nominees are able to perform the job. In fact, as former inspectors general recently wrote, strong, Senate-confirmed leadership is a critical component of robust oversight.[47]

Yet, presidents have increasingly relied on acting leadership for a significant number of inspector general offices—that is, they have installed temporary leadership to head the office, individuals who were not subject to Senate vetting and confirmation. According to POGO's Inspector General Vacancy Tracker, at the time of this writing more than a dozen inspector general positions are without permanent leadership.

Acting officials pose a risk of not conducting the meaningful and effective oversight that someone confirmed by the Senate would. As POGO has previously explained, "if the acting officer is 'auditioning' for the job, they may not want to make waves by investigating actions of the administration they are hoping will nominate them to fill the job permanently."[48] Furthermore, since they are only acting in a caretaker role until a permeant leader is appointed, an acting inspector general may not make the long-term strategic decisions that are necessary for the organization.

Also central to the success of inspectors general is the ability to do their job independently, without fear of being retaliated against or fired by the president. Currently, a president can remove all presidentially appointed inspectors general for any reason, despite the intent of Congress that "inspectors general only be removed when there is clear evidence of wrongdoing or failure to perform the duties of the office, and not for reasons unrelated to their performance."[49] Congress should preserve the important role of inspectors general and help to ensure that inspectors

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[46] "Inspector General Vacancy Tracker," Project On Government Oversight. https://www.pogo.org/database/inspector-general-vacancy-tracker/ (accessed January 21, 2021)

[47] Letter from nine former inspectors general to congressional leaders urging reforms to inspector general laws, May 5, 2020, 2. https://www.pogo.org/letter/2020/05/former-inspectors-general-call-on-congress-to-pass-overdue-reforms-to-ig-system/

[48] Rebecca Jones, "The Dangers of Chronic Federal Vacancies," Project On Government Oversight, August 6, 2019. https://www.pogo.org/analysis/2019/08/the-dangers-of-chronic-federal-vacancies/

[49] Letter from eight senators to President Donald Trump requesting detailed reasoning for the president's decision to remove Intelligence Community Inspector General Michael Atkinson, April 8, 2020, 1-2. https://www.grassley.senate.gov/sites/default/files/2020-04-08%20CEG%20et%20al%20to%20POTUS%20%28IC%20IG%20removal%29.pdf

general are able to work independently by insulating their offices from political or other improper pressure.

Recommendations for Legislative Action

- **Bolster inspector general independence through for-cause removal protections.** Congress should mandate that appointing authorities may only remove inspectors general from office upon a showing of sufficient good cause. "Good cause" should be limited to permanent incapacity; neglect of duty; malfeasance; conviction of a felony or a crime involving moral turpitude; knowing violation of a law or regulation; gross mismanagement; gross waste of funds; or abuse of authority. When operating under these protections, inspectors general would ideally be insulated from having their core job duties undermined by political pressures.

- **Ensure the independence and qualifications of acting inspectors general.** Congress should mandate that if a presidentially appointed inspector general office becomes vacant, the pre-designated first assistant to the inspector general becomes the acting inspector general for purposes of the Federal Vacancies Reform Act. Congress should further mandate that if there is no first assistant, the president may select a high ranking individual who was already serving in an inspector general office to become acting inspector general. This reform ensures that only those who are knowledgeable regarding the work of an inspector general can head the office until someone permanent is confirmed. It would also preempt issues of conflicting priorities by preventing non-inspector general office agency employees from overseeing the very agency they work for.

Ensuring Fair Administration of Justice

The Department of Justice plays a unique role in our government. It enforces federal law, but must also ensure the "fair and impartial administration of justice for all Americans."[50] It is not only the nation's chief prosecutor but also an enforcer of civil rights with the power to investigate systemic deprivations of constitutional rights by the federal, state, and local governments.[51] And even though the department possesses a great deal of discretion over how it carries out these duties, it frequently operates without meaningful oversight from outside entities. These dynamics make it essential that the department have robust decision-making processes that ensure it acts in a fair, even-handed manner.

For too long, the Justice Department has not held itself or other entities to constitutional standards. It has failed to ensure that defendants' rights are protected, as evidenced by a series of instances of prosecutorial misconduct by the department's lawyers in recent years.[52] The Justice Department has abused the discretion it has regarding how it enforces the law in order to show more leniency to wealthy defendants with well-connected lawyers than to those too poor to afford their own counsel.[53] And to make matters worse, in 2018 the Justice Department shuttered its Office for Access to Justice, a vital entity within the federal government dedicated to increasing meaningful access to legal aid for indigent individuals in states and localities.[54]

The department's treatment of federal defendants before trial also creates cause for concern. The rate at which federal defendants are incarcerated prior to trial far outpaces that in the states, shattering the principle that individuals are innocent until

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[50] "About DOJ," U.S. Department of Justice. https://www.justice.gov/about (accessed January 26, 2021)

[51] Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141(a). https://www.justice.gov/crt/law-enforcement-misconduct-statute-42-usc-14141

[52] Letter from The Constitution Project President Virginia Sloan to Senators Patrick Leahy and Charles Grassley recommending legislation to clarify federal prosecutors' discovery obligations, June 5, 2012. https://archive.constitutionproject.org/pdf/60512_senatecriminaldiscoveryhearingletter.pdf

[53] Sarah Turberville, "Double Standards at DOJ," Project On Government Oversight, February 19, 2020. https://www.pogo.org/analysis/2020/02/double-standards-at-doj/

[54] Katie Benner, "Justice Dept. Office to Make Legal Aid More Accessible Is Quietly Closed," *New York Times*, February 1, 2018. https://www.nytimes.com/2018/02/01/us/politics/office-of-access-to-justice-department-closed.html

proven guilty.[55] Detention prior to trial should be the exception, not the default standard. Such overuse of pretrial detention is additionally concerning because it carries with it significant collateral consequences. For instance, defendants detained before trial are more likely to be convicted and to receive a harsher sentence, and the use of pretrial detention is more—not less—likely to lead to a defendant re-offending.[56] Pretrial detention also has a coercive effect on a defendant's decision to waive their constitutional right to trial. More than 97% of federal criminal cases are resolved via guilty plea.[57]

This incredibly high rate of guilty pleas can also be attributed to other concerning practices that must be addressed, including federal prosecutors' threat of sentencing enhancements for those who seek to go to trial, lack of discovery to defendants before a guilty plea is entered, and demanding a waiver of defendants' rights on appeal as part of the plea bargain, to name a few.[58] The consequences of a criminal conviction—whether at trial or by guilty plea—can be enormous, from deprivation of liberty and life, to consequences after conviction such as the loss of voting rights, loss of access to housing and occupational licensing, loss of education opportunities, and many, many others.[59] In light of the consequences and the clear power imbalance between accused individuals and federal law enforcement and prosecutors, the government has a clear responsibility to ensure that defendants who enter guilty pleas do so fully informed of the consequences, and that the use of practices which tend to have a coercive impact on plea bargaining is reduced.

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[55] Administrative Office of the U.S. Courts, "Table H-14. U.S. District Courts—Pretrial Services Release and Detention For the 12-Month Period Ending September 30, 2019." https://www.uscourts.gov/sites/default/files/data_tables/jb_h14_0930.2019.pdf (accessed January 27, 2021)

[56] Léon Digard and Elizabeth Swavola, The Vera Institute, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (April 2019), 2-4. https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf; The Constitution Project, *Don't I Need A Lawyer?* (March 2015), 12. https://archive.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf

[57] National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment on the Verge of Extinction and How to Save It* (2018), 14. https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf

[58] National Association of Criminal Defense Lawyers, *The Trial Penalty*, 17-18. [see note 57]

[59] "What are collateral consequences?" National Inventory of Collateral Consequences of Conviction. https://niccc.nationalreentryresourcecenter.org/#about (accessed January 22, 2021)

The Justice Department has also failed to ensure that federal dollars are not used to prop up unconstitutional practices in courthouses across the country. For example, it has not required states and localities in receipt of billions of dollars in federal criminal justice grants to take the basic step of reporting on their ability to protect constitutional rights in the criminal legal system.

The principle of fair and impartial justice is foundational to our democracy. But such justice is not possible unless the government creates mechanisms to *ensure* that the Justice Department carries out its solemn responsibility. Congress and the Justice Department must enact policies that place guardrails on the conduct of department lawyers and rein in abusive practices.

Recommendations for Legislative Action

- **Establish the Office for Access to Justice within the Department of Justice.** Congress should establish an Office for Access to Justice as a separate component within the Justice Department dedicated to increasing access to legal resources and aid for indigent individuals. Re-establishing this office would help ensure that the resources of the federal government are being used to uphold the rights of the most vulnerable populations, instead of infringing upon them.

- **Collect and release additional data about pretrial representation and outcomes.** Congress should require the executive branch to increase data collection regarding pretrial representation and outcomes, particularly relating to arrest, charge, declination, dismissal, or other disposition, as well as to the time of assignment of counsel in each case. This information would help decision-makers understand the impacts of pretrial detention on the pursuit of justice and help inform them about any need for future reforms.

- **Narrow the use of pretrial detention.** Congress should amend the federal Bail Reform Act of 1984 to eliminate or narrow the instances for which pretrial detention is the default, clarify the evidence necessary to prove risk of flight, and eliminate monetary conditions for release. These changes will better ensure that pretrial detention is ordered only in the cases where the defendants pose a genuine flight or safety risk, and will result in a more equitable application of the law.

Recommendations for Executive Action

- **Address disparity in prosecutorial decision-making at the Department of Justice.** The president should task the attorney general with ensuring that policies regarding prosecutorial decisions do not reward the powerful and punish marginalized groups, including but not limited to increasing transparency around instances when the department overturns the decisions of line prosecutors working across the country. By doing so, the attorney general can begin to rebuild confidence that the Justice Department impartially applies the law fairly to all people.

- **Re-establish the Office for Access to Justice within the Justice Department.** The president should direct the attorney general to re-establish the Office for Access to Justice as a separate component within the Justice Department. Re-establishing this office would better enable the department to carry out its mission to ensure equal justice for all.

- **Collect and release additional data about pretrial representation and outcomes.** The president should direct the attorney general to increase data collection regarding pretrial representation and outcomes, particularly relating to arrest, charge, declination, dismissal, or other disposition, as well as to the time of assignment of counsel in each case. This information would help decision-makers understand the impacts of pretrial detention on the pursuit of justice and help inform them about any need for future reforms.

- **Reduce the overuse of pretrial detention in federal cases.** The attorney general should order the Justice Department's criminal division to reduce the overuse of pretrial detention in federal cases. This would mitigate the harm to individuals, communities, and public safety created by overreliance on and inequitable use of pretrial detention.

- **Reduce the coercive force of federal plea-bargaining practices in criminal cases.** The attorney general should order the Justice Department's criminal division to ensure that all guilty pleas are voluntary, made with the effective assistance of counsel, and made with full understanding of the consequences. The attorney general should also prohibit federal prosecutors from leveraging sentencing enhancements and waiver of constitutional rights on appeal to coerce guilty pleas from criminal defendants. These reforms would help ensure that the Justice Department can better protect the constitutional rights of criminal defendants.

- **Adopt formal policies regarding prosecutors' constitutional and ethical duty to timely disclose favorable evidence to the defense.** The attorney general should direct the Justice Department's criminal division to share all evidence with the defense in a timely manner. This will help guarantee that defendants receive a fair trial by giving them the opportunity to present a proper a defense.

- **Improve oversight of detention conditions in federal prisons and in private and local jails that hold detainees for the U.S. Marshals Service.** The attorney general must lead the effort to increase compassionate release and home confinement in response to the pandemic, and to increase oversight of the system more generally. This will help ensure the various detention systems operated and utilized by the federal government adhere to uniform conditions that meet the basic standards of care.

Protecting Civil Rights and Civil Liberties by Limiting Overbroad Surveillance

Pervasive monitoring and indiscriminate police action are incompatible with democratic society and civil rights, yet novel surveillance technologies and police tactics are too often left unchecked. Unless we enact strong rules and limits, surveillance tools and improper enforcement techniques will cause a variety of harms. Selective targeting and prosecution of certain groups, fear that chills constitutionally protected and other sensitive activities, and denial of basic dignity and autonomy all flow from a lack of civil-liberties safeguards in law enforcement. And these problems are at their most extreme in how they harm people of color, religious minorities, and other marginalized communities.

In particular, we have seen law enforcement increasingly use technologies that threaten civil liberties and even public safety over the last several years. Primary among these is the use of facial recognition technology. While this technology could aid law enforcement operations, it also creates unparalleled potential for invasive surveillance. Some of the most authoritarian regimes, like China and Russia, have already shown how facial recognition can be used to stockpile records of individuals' daily lives and suppress vital activities such as protests.[60] But abuse is not limited to those nations: Misuse of facial recognition has already occurred in the United States.[61] And even absent intentional misuse, facial recognition creates serious dangers.

Facial recognition can be highly prone to error based on circumstance and manner of use. Misidentifications pose a serious threat to public safety, civil liberties, effective law enforcement operations, and police-community relations. Further, people of color

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[60] Paul Mozour and Aaron Krolik, "A Surveillance Net Blankets China's Cities, Giving Police Vast Powers," *New York Times*, December 17, 2019. https://www.nytimes.com/2019/12/17/technology/china-surveillance.html; Paul Mozour, "One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority," *New York Times*, April 14, 2019. https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html; James Vincent, "Moscow rolls out live facial recognition system with an app to alert police," *Verge*, January 30, 2020. https://www.theverge.com/2020/1/30/21115119/moscow-live-facial-recognition-roll-out-ntechlab-deployment

[61] Kevin Rector and Alison Knezevich, "Social media companies rescind access to Geofeedia, which fed information to police during 2015 unrest," *Baltimore Sun*, October 11, 2016. https://www.baltimoresun.com/news/crime/bs-md-geofeedia-update-20161011-story.html

are more likely to be misidentified by this technology, so its use threatens to undermine constitutional promises of equal treatment and non-discrimination.[62]

Equally concerning is the government's use of location tracking technologies. Although the Supreme Court began to curtail such use with its 2018 *Carpenter v. United States* decision, there are few statutory legal limits, leaving major loopholes and uncertainty in how the law will be applied to emerging technologies. Location tracking allows the government to monitor the sensitive details of individuals' lives just as intimately as if it was snooping inside your house or through your phone. It's essential that we enact location privacy laws to build a clear set of rules around the principles of *Carpenter*, and close the loopholes that allow for improper location monitoring without a warrant.

Neither the public nor Congress know how many individuals have had their communications monitored through the National Security Agency's warrantless-surveillance authority that was adopted in 2008 under Section 702 of the Foreign Intelligence Surveillance Act,[63] and serious gaps exist in PATRIOT Act authorities that permit overbroad collection of private and highly sensitive information.

In order to prevent these harms, limits must be placed on the use of technologies that pose such a grave threat to our civil liberties. The government must create robust safeguards to ensure that any permitted use is subject to oversight, transparency, and disclosure to the public and litigants.

Recommendations for Legislative Action

- **Enact comprehensive rules on facial recognition surveillance.** Congress should codify rules on when and how facial recognition surveillance may be used, with an emphasis on requiring judicial warrants, limiting the use of the technologies to investigations involving serious crimes, establishing

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[62] Drew Harwell, "Federal study confirms racial bias of many facial-recognition systems, casts doubt on their expanding use," *Washington Post*, December 19, 2019. https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/

[63] ProPublica, "FAQ: What You Need to Know About the NSA's Surveillance Programs," August 5, 2013. https://www.propublica.org/article/nsa-data-collection-faq; Electronic Frontier Foundation, "NSA Spying," https://www.eff.org/nsa-spying (accessed January 27, 2021)

minimum testing standards that must be met before a new technology can be used by law enforcement, setting clear limits on how the courts should rely on facial recognition technologies as evidence, and requiring early disclosure to defendants about the use of these technologies in their cases. These rules will prevent facial recognition from being abused against criminal defendants and will limit the government's ability to use the technologies to stockpile sensitive information in overbroad or improper ways.

- **Protect the constitutionally guaranteed privacy rights of the U.S. public.** Congress should require that law enforcement obtain a warrant before officers can use data tracking an individual's location. Congress should also enact comprehensive safeguards around the collection and use of this kind of sensitive information. The Constitution's Fourth Amendment, along with other due process rights, are essential to the rule of law, and this reform would ensure that those rights are not undermined by technological advances.

Recommendations for Executive Action

- **Place commonsense limitations on the use of facial recognition technology.** The executive branch should issue internal rules that limit the use of facial recognition by federal law enforcement agencies, including requiring law enforcement to obtain a warrant before officers can use facial recognition technology, and limiting the use of this technology to investigations involving serious crimes. By placing reasonable restrictions on the use of facial recognition technology, the federal government can simultaneously safeguard the civil liberties of the U.S. public and provide space for the technology to become a more consistent and safer tool.

- **Increase transparency around the impact of surveillance and other national security activities on the rights of the U.S. public.** In order to assuage concerns and promote better adherence to key constitutional principles, the president should direct law enforcement agencies to disclose relevant information to the public about how those agencies use location tracking and other surveillance technologies. This should include any Office of Legal Counsel opinions that interpret the laws governing the use of surveillance technologies and authorities. Law enforcement agencies should also compile and release data regarding how many U.S. residents are being affected by each type of surveillance activity, especially warrantless

surveillance under Section 702 of the Foreign Intelligence Surveillance Act (FISA). With these improvements, the executive branch can promote more public trust and engender more cooperation and buy-in when legitimate national security threats emerge.

- **Create clear and consistent rules around the use of powerful surveillance tools.** The Department of Justice should devise and implement specific and clear restrictions governing the surveillance of U.S. residents. The department should require that law enforcement obtain warrants for virtually all efforts to monitor the public's private communications. The department should also prohibit particularly invasive surveillance practices such as bulk collection of internet browsing data. The Justice Department should reject any FISA surveillance requests based on activities protected by the First Amendment. Enacting these restrictions on government surveillance authorities will ensure that the executive branch delivers on its solemn promise to protect and defend the Constitution and all of the rights and liberties conferred by it.

Upholding Constitutional Due Process Protections for Noncitizens

The Fifth and 14th Amendments' prohibitions on government deprivation of "life, liberty, or property, without due process of law" apply to all "persons" within the United States, regardless of citizenship or immigration status.[64]

While this straightforward principle has some narrow exceptions created by the Supreme Court, none of them justifies the previous administration's relentless hostility to noncitizens' rights, which violated due process and existing statutes. The Trump administration's over 400 executive actions related to immigration deprived countless individuals of constitutional due process and harmed law enforcement's ability to prosecute serious crimes.[65]

The most notorious of these changes was the Department of Justice's "zero tolerance" policy of criminally prosecuting all low level immigration offenses to the fullest extent of the law.[66] One of the many consequences of this policy was that prosecuting misdemeanor crimes related to immigration contributed to a decline in prosecutions of serious crimes in other areas of law enforcement such as gang violence, drug trafficking, and human smuggling.[67] In one example, federal prosecutors reported that they would be diverting resources from drug-smuggling cases to prioritize low level charges against all adults caught entering the United States illegally.[68] Another consequence of the department's "zero tolerance" policy was that children were separated from their parents without any means of reuniting them. While

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[64] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Wong Wing v. United States, 163 U.S. 228, 242 (1896)

[65] Sarah Pierce and Jessica Bolter, Migration Policy Institute, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency* (July 2020), 1. https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf

[66] Memorandum from Attorney General Jeff Sessions to federal prosecutors announcing zero tolerance for offenses under 8 U.S.C. § 1325, April 6, 2018. https://www.justice.gov/opa/press-release/file/1049751/download

[67] David Janovsky, "As 'Zero Tolerance' Cases Skyrocket, Other Prosecutions Slow," Project On Government Oversight, August 14, 2018. https://www.pogo.org/analysis/2018/08/as-zero-tolerance-cases-skyrocket-other-prosecutions-slow/

[68] Brad Heath, "DOJ: Trump's immigration crackdown 'diverting' resources from drug cases," *USA Today*, June 22, 2018. https://www.usatoday.com/story/news/2018/06/22/zero-tolerance-immigration-crackdown-diverting-resources-drug-cases/727532002/

administration officials publicly denied that this was an intended consequence of the policy, internal documents obtained by POGO and Open the Government show this option was chosen in part because separating families would be the "most effective" means of deterring future unauthorized border crossings.[69] This policy was built on a pilot program operated by the Department of Homeland Security and the Justice Department despite concerns that federal judges had raised about legality and misgivings that prosecutors had about separating children without adequate procedures to reunite them with their parents.[70]

"Zero tolerance" effectively ended several months after it was implemented in 2018, but many of the Trump administration's unilateral changes to immigration law continued.

The Department of Homeland Security designated every person living in the United States without legal permission as a potential priority for detention and deportation. As a result, the Trump administration detained a record number of noncitizens,[71] holding them in dangerous conditions with grossly inadequate medical care, in violation of constitutional due process protections.[72] The average daily number of people in Immigration and Customs Enforcement (ICE) detention peaked at 52,000 before declining dramatically during the initial months of the coronavirus pandemic.[73]

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[69] Project On Government Oversight, "New Document Shows Nielsen Signed Off on Family Separation Policy," Press Release, September 25, 2018. https://www.pogo.org/press/release/2018/new-documents-show-nielsen-signed-off-on-family-separation-policy/

[70] Letter from POGO Executive Director Danielle Brian to Senate Judiciary Committee Chairman Chuck Grassley and Ranking Member Dianne Feinstein calling for a congressional investigation into the "zero tolerance" program, July 18, 2018. https://www.pogo.org/letter/2018/07/pogo-calls-for-congressional-investigation-and-oversight-of-zero-tolerance-and-border-crisis/

[71] Hamed Aleaziz, "More Than 52,000 People Are Now Being Detained By ICE, An Apparent All-Time High," *BuzzFeed News*, May 20, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border

[72] American Immigration Council, "The End of Immigration Enforcement Priorities Under the Trump Administration," March 7, 2018. https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration; Katherine Hawkins, "Medical Neglect at a Denver Immigration Jail," Project On Government Oversight, May 21, 2019. https://www.pogo.org/investigation/2019/05/medical-neglect-at-a-denver-immigration-jail/; Katherine Hawkins and Emma Stodder, "Past Deaths in Custody Highlight Dire Risks for Immigration Detainees During Coronavirus Outbreak," Project On Government Oversight, April 29, 2020. https://www.pogo.org/investigation/2020/04/past-deaths-in-custody-highlight-dire-risks-for-immigration-detainees-during-coronavirus-outbreak/

[73] Hamed Aleaziz, "More Than 52,000 People Are Now Being Detained By ICE, An Apparent All-Time High," *BuzzFeed News*, May 20, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-

Twenty-one people died in ICE custody during 2020, more than double the previous year.[74]

Other changes by the Trump administration eliminated legal protections for asylum seekers[75] and unaccompanied children,[76] and forced them to wait in extremely dangerous conditions in Mexico without any meaningful access to immigration court[77]; drastically expanded a form of deportation without due process called "expedited removal"[78]; and authorized the Department of Homeland Security to engage in intrusive, blanket DNA collection from and surveillance of noncitizens and their families, under the unsupported assertion that that people in immigration custody are likely mainly criminals.[79] The Justice Department also used the attorney general's authority over the immigration court system to restrict immigration judges' independence and to impose even more restrictions on the right to seek asylum.[80]

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immigrants-border; Immigration and Customs Enforcement, Detention Statistics, Fiscal Year 2021. https://www.ice.gov/doclib/detention/FY21-detentionstats.xlsx (accessed December 7, 2020)

[74] Catherine E. Shoichet, "The death toll in ICE custody is the highest it's been in 15 years," CNN, September 30, 2020. https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html

[75] Nicole Narea, "The demise of America's asylum system under Trump, explained," *Vox*, November 5, 2019. https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp

[76] Nick Miroff, "Judge stops Trump policy of 'expelling' child migrants, questioning legality of border controls linked to covid crisis," *Washington Post*, November 19, 2020. https://www.washingtonpost.com/immigration/judge-halts-expulsion-minors-border-covid/2020/11/18/80e58c52-29b8-11eb-b847-66c66ace1afb_story.html; Jennifer Podkul and Cory Shindel, Kids In Need of Defense, *Death by a Thousand Cuts: The Trump Administration's Systematic Assault on the Protection of Unaccompanied Children*, (May 2018). https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf

[77] Eleanor Acer, Rebecca Gendelman, and Kennji Kizuka, Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, (October 2019), 2. https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf

[78] Letter from Katherine Hawkins, Senior Legal Analyst at the Project On Government Oversight, to Acting Secretary of the Department of Homeland Security Kevin McAleenan objecting to proposed nationwide expansion of expedited removal, September 23, 2019. https://www.pogo.org/letter/2019/09/pogo-comment-on-expansion-of-expedited-removal/

[79] Letter from Jake Laperruque and Katherine Hawkins to the Office of Legal Policy at the Department of Justice objecting to the proposed expansion of involuntary DNA collection from immigration detainees, November 12, 2019. https://www.pogo.org/letter/2019/11/pogo-comment-on-dna-collection-from-immigration-detainees/

[80] *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing before the House Committee on the Judiciary's Subcommittee on Immigration and Citizenship*, 116th Cong. (January 29, 2020) (written testimony of Katherine Hawkins, Senior Legal Analyst, Project On Government Oversight). https://www.pogo.org/testimony/2020/01/threats-to-due-process-in-us-immigration-courts/

These policies can and should be promptly reversed, and this reversal should be accompanied by rigorous investigation of past rights violations and legislation to ensure a fairer immigration system.

Recommendations for Legislative Action

- **Reduce funding for immigration detention, and end expedited removal and mandatory detention of noncitizens.** Congress should reduce funding for immigration prisons in favor of more humane alternatives such as regular home visits, self-reporting by telephone, or, where individuals pose a greater flight risk, electronic monitoring. It should repeal statutes that mandate detention but that don't require a personalized showing that an individual is a flight risk or a danger to the community, and repeal the statute authorizing deportation without due process through "expedited removal." These changes would free up resources to investigate and prosecute serious crimes, and bring our immigration enforcement structure in line with constitutional protections.

Recommendations for Executive Action

- **Restore due process for noncitizens, and provide redress for violations of immigrants' rights.** The incoming administration should review the over 400 immigration-related executive actions issued by the Trump administration and rescind those that harm immigrants without justification. The Department of Justice should reverse actions by past U.S. attorneys general that restricted asylum and compromised immigration judges' independence, and reverse *in absentia* deportation orders for individuals who did not receive fair notice of their hearings. The department should also negotiate fair settlements in any civil litigation challenging the prior administration's immigration changes. The Department of Homeland Security should drastically reduce the use of immigration detention, starting with the release of asylum seekers and individuals with serious health conditions from detention. These changes would help reestablish due process for noncitizens in immigration proceedings and address some of the most pernicious recent abuses of power in our immigration system.

- **End the use of private prisons for immigration detention.** The president should direct the Department of Homeland Security to not renew contracts with private companies to operate immigration detention centers. This will

allow for greater oversight of immigration detention centers by the executive branch and Congress.

- **End the collection of DNA and other biometric identifiers, and expunge samples from law enforcement databases.** The president should direct the Secretary of Homeland Security to repeal regulations requiring collection of DNA from people in immigration detention, and eliminate the requirement that applicants for immigration status and their sponsors submit DNA samples, facial scans, palm prints, voice prints, and iris scans. Information collected through these programs should be expunged from law enforcement databases. These changes would shield noncitizens and their sponsors from unwarranted and unnecessary collection of sensitive personal information in violation of their civil liberties.

Addressing Secret Executive Branch Legal Interpretations

The Department of Justice's Office of Legal Counsel (OLC) was established to provide legal advice to the president and all executive branch agencies. It has, over time, abused that mandate and increasingly been instrumental in eroding the rule of law. Its legal interpretations[81] frequently expand the power of the executive branch by encroaching on congressional authorities, like that to declare war. Because these interpretations are issued unilaterally by the executive branch and are considered binding on executive agencies, they also represent a dangerous usurpation of Congress's responsibility to write the law. It is time for both Congress and the executive branch to rein the office in.

The OLC's nearly unchecked legal interpretations have had a pernicious impact on U.S. policy and law. For instance, during the George W. Bush administration, the office infamously took the position that the use of torture as an interrogation technique in the "war on terror" was legally permissible[82] despite the fact that such use is unconstitutional and violates domestic and international law.[83] When the global public later learned of the full extent of this practice, it led to international criticism and an irrevocable stain on the reputation of the country.[84]

That same OLC also engaged in some startlingly questionable legal theorizing in order to justify widespread invasive surveillance programs that, among other things, circumvented warrant requirements and violated the fundamental privacy rights of

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[81] These interpretations are referred to as "opinions," but this report will use the word "interpretations" to avoid confusing OLC legal interpretations with opinions issued by judges through the courts.

[82] Human Rights Watch, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, 72, July 12, 2011. https://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf

[83] Jeffrey P. Fontas, "The Bush Administration Torture Policy: Origins and Consequences," *Inquiries Journal*, vol. 2, no. 8 (2010). http://www.inquiriesjournal.com/a?id=276; U.S. Department of Justice Office of Legal Counsel, "Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," August 1, 2002. https://www.justice.gov/olc/file/886061/download

[84] Ray Sanchez, "World reacts to U.S. torture report," CNN, December 11, 2014. http://www.cnn.com/2014/12/10/world/senate-torture-report-world-reaction/index.html; Ryan Goodman and Eric Messinger, "U.N. Committee Criticizes U.S. Record on Torture, Praises U.S. on Extraterritorial Reach of Treaty," *Just Security*, November 28, 2014. https://www.justsecurity.org/17837/un-committee-torture-concluding-observations-united-states/

millions of U.S. residents.[85] As with the use of torture, the deployment of the massive domestic spying program was unconstitutional and violated the law. OLC's willingness and ability to twist—even disregard—the law to dramatically expand the power of the executive branch to surveil U.S. residents should make clear that reforms are necessary and overdue.[86]

Abuse by—and of—this secretive office isn't limited to the Bush administration. The Obama administration used an OLC memo to justify killing U.S. citizens abroad without due process, also pursuant to the "war on terror."[87] As yet another case study in presidential overreach and disregard for bedrock constitutional principles, this OLC-provided power was used to assassinate a U.S. citizen abroad.[88] The Trump administration, too, reportedly used OLC opinions to justify troubling actions, such as bombing Syria.[89]

The key issue across administrations is that there are insufficient guardrails to keep OLC from making binding decisions regardless of their (lack of) legal merit simply because a president desires more power than they already have. There are relatively few mechanisms to guarantee the rigor of OLC's legal analyses, and little

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[85] Letter from Attorney General Alberto R. Gonzales to U.S. Senate Majority Leader William H. Frist about "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," 6, January 19, 2006. https://www.justice.gov/sites/default/files/olc/opinions/2006/01/31/nsa-white-paper.pdf; James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005. https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html

[86] Michiko Kakutani, "Unchecked and Unbalanced," *New York Times*, July 6, 2007. https://www.nytimes.com/2007/07/06/books/06book.html

[87] Memorandum from U.S. Department of Justice Office of Legal Counsel to the attorney general about "Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi," 38, July 16, 2010. https://www.justsecurity.org/wp-content/uploads/2014/06/OLC-Awlaki-Memo.pdf

[88] Mark Mazzetti, "Killing of Americans Deepens Debate Over Use of Drone Strikes," *New York Times*, April 23, 2015. https://www.nytimes.com/2015/04/24/world/asia/killing-of-americans-deepens-debate-over-proper-use-of-drone-strikes.html

[89] Jon Schwarz, "Donald Trump Ordered Syria Strike Based On A Secret Legal Justification Even Congress Can't See," *The Intercept*, April 14, 2018. https://theintercept.com/2018/04/14/donald-trump-ordered-syria-strike-based-on-a-secret-legal-justification-even-congress-cant-see/; Memorandum from Office of Legal Counsel Assistant Attorney General Steven A. Engel for the Counsel to the President about "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities," May 31, 2018. https://www.justsecurity.org/wp-content/uploads/2018/06/2018-05-31-syrian-airstrikes_1-office-of-legal-counsel.pdf

accountability for attorneys who abuse their position.[90] And while OLC's legal positions frequently infringe on Congress's prerogatives, Congress rarely fights back by asserting its constitutional authority or by articulating alternative legal analysis.[91] While the courts would ordinarily serve as an impartial arbiter of the law when there are disagreements over OLC's interpretations, it is rare for the underlying issues of an OLC opinion to end up before a court. This contributes to the outsized impact the OLC's legal interpretations have, even beyond the executive branch.

Congress would also ordinarily be an accountability check on executive power, but it often takes OLC's interpretation at face value. Congress has even codified some of the OLC's questionable legal positions despite the lack of judicial review and the office's bias toward the executive. For example, the OLC asserted in 1974 that conflicts of interest laws don't—and in fact, couldn't—apply to the president and vice president.[92] Congress then explicitly carved both positions out of criminal conflicts of interest law.[93]

Exacerbating all of these problems is the fact that OLC does not have to inform Congress, much less the broader public, about its interpretations.[94] The OLC effectively creates a body of secret law when it internally distributes a binding interpretation of a statute but then refuses to share that interpretation externally.

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[90] Shalev Roisman, "Presidential Factfinding," *Vanderbilt Law Review*, vol. 72 (2019). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335156; Erica Newland, "I worked in the Justice Department. I hope its lawyers won't give Trump an alibi," *Washington Post*, January 10, 2019. https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8_story.html; David Luban, "Selling Indulgences," *Slate*, February 14, 2005. https://slate.com/news-and-politics/2005/02/selling-indulgences.html; Avidan Cover, "Supervisory Responsibility for the Office of Legal Counsel," *The Georgetown Journal of Legal Ethics*, vol. 25 (2012). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376100

[91] Oona Hathaway, "National Security Lawyering in the Post-War Era: Can Law Constrain Power?," *UCLA Law Review*, vol. 68, no. 1 (2020). https://ssrn.com/abstract=3530588; Emily Berman, "Weaponizing the Office of Legal Counsel," *Boston College Law Review*, vol. 62, no. 2 (2021). https://ssrn.com/abstract=3455556

[92] Memorandum from Deputy Attorney General Laurence H. Silberman to Richard T. Burgess, Office of the President, about "Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution," 2, August 28, 1974. https://fas.org/irp/agency/doj/olc/082874.pdf

[93] 18 U.S.C. § 202(c) (2020). https://uscode.house.gov/view.xhtml?req=(title:18%20section:202%20edition:prelim)

[94] Daniel Van Schooten, "Office of Legal Counsel Publishes New 'Secret Law' Opinions," Project On Government Oversight, September 26, 2018. https://www.pogo.org/analysis/2018/09/office-of-legal-counsel-publishes-new-secret-law-opinions/

Laws implemented in secret restrict the ability to conduct oversight, engage in public debate, and make legislative correction—ultimately threatening the foundations of our constitutional democracy and undermining our nation's rule of law.

Presidential administrations across time and parties have treated OLC interpretations as their golden ticket to do whatever they want. It is past time for Congress and the president to work together to mitigate the corrosive influence the OLC has on our system of government.

Recommendations for Legislative Action

- **Require the Department of Justice to publicly post Office of Legal Counsel opinions.** Congress should explicitly require the Department of Justice to publicly post all final interpretations of law issued by the Office of Legal Counsel. Doing so would eliminate the body of "secret law" created by the office and allow Congress to better understand the scope of reforms necessary to rein in the secretive but influential office.

- **Provide alternative analysis to OLC's legal opinions when warranted.** Congress should enhance its capacity to provide alternative legal analysis when it disagrees with OLC opinions, either by tasking its relevant oversight committees, its general counsels, or the Congressional Research Service with conducting that analysis or by establishing a new congressional office to do that work. Providing alternative legal arguments would help ensure that OLC does not have the final word, particularly on matters of congressional authority.

Recommendations for Executive Action

- **Reform OLC's internal practices and standards to ensure it provides an objective view of the law.** The president should direct the attorney general to oversee an update to the OLC's best-practices procedures to include verifying the factual predicates of proposed executive actions and ensuring that counterarguments are adequately addressed. The Justice Department should then rigorously hold OLC attorneys accountable to those higher best-practice standards. Taking these steps would improve the quality of OLC's legal analysis and reduce opportunities to abuse the office's authority.

- **Review OLC opinions and withdraw those that undermine core constitutional principles.** The president should direct the attorney general to review final OLC opinions and rescind those that undermine constitutional principles, including civil liberties, the separation of powers, and Congress's power to declare war, among others. Identifying and rescinding legal opinions that take an expansive view of executive authorities will strengthen the rule of law and promote trust in essential public institutions while simultaneously safeguarding integral constitutional principles.

Reasserting Congressional Power

When designing our system of government, the framers of the Constitution crafted a tripartite structure with clearly delineated powers for each of the three branches. The legislative branch, as set forth in Article I of the Constitution, was arguably intended to be the most powerful actor within the system, in part because it was the body closest to the people it represents.[95] This view is bolstered by the fact that the framers endowed Congress with the specific and exclusive authority to make laws, declare war, and control the nation's tax and spending decisions (the "power of the purse"). Despite these facts, power between the legislative branch and the executive branch has steadily grown unequal, tilting heavily toward the latter. A balancing of that power is long overdue.

One area in which Congress needs to reassert itself is in the use of emergency powers.[96] Emergency powers are those that Congress explicitly delegated to the executive branch to be used only after the executive branch formally declares a national emergency. Congress granted those powers under the assumption that emergency situations require a swift response not well suited to the pace of Congress. This framework is governed by the National Emergencies Act. At present, there are nearly 70 active national emergency declarations, some of which date back several decades.[97] It is hard to argue that a situation from the 1980s, for instance, still qualifies as a genuine emergency or can't be addressed through normal processes of government. This goes beyond semantics: Permanent states of emergency pose a

[95] Philip Bump, "The president was never intended to be the most powerful part of the government," *Washington Post*, February 13, 2017. https://www.washingtonpost.com/news/politics/wp/2017/02/13/the-president-was-never-intended-to-be-the-most-powerful-part-of-government/

[96] Dylan Hedtler-Gaudette, "Congress Must Reclaim Its Role as a Check on Executive Power," Project On Government Oversight, November 7, 2019. https://www.pogo.org/analysis/2019/11/congress-must-reclaim-its-role-as-a-check-on-executive-power/; *A Guide to Emergency Powers and Their Use*, Brennan Center for Justice, last modified April 24, 2020. https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use

[97] "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated November 17, 2020. https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act

serious threat to the rule of law because they give the executive branch unfettered access to emergency powers.[98]

A president declaring a national emergency unlocks more than 120 distinct authorities that can be used, and the breadth of these authorities means the opportunities for abuse and impunity are limitless.[99] Originally, under the National Emergencies Act, Congress could terminate states of emergency though a concurrent resolution, a process that doesn't require the president's signature to become law. However, as a result of a 1983 Supreme Court decision, to end an emergency Congress must now pass a joint resolution that becomes law only if the president signs it.[100] Because a president who declares a national emergency is likely to veto such a decision by Congress, the body can really only act as a check on a president abusing these authorities by convincing a veto-proof supermajority to end a national emergency declaration. That is why, despite a bipartisan majority in both the House and Senate supporting resolutions to end then-President Donald Trump's border wall emergency declaration, Congress was unable to force the end of that declaration.[101] If Congress doesn't act to fix these and other flaws in the National Emergencies Act, the law will continue to permit executive branch abuses of these delegated authorities even against the express wishes of a majority of Congress so long as it falls short of a veto-proof majority.

Another area where Congress has failed to properly defend against executive branch encroachment is control over the declaration of war. For instance, the executive branch has continually and unilaterally expanded the authority granted to it by

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[98] Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *Atlantic*, January/February 2019. https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/

[99] "Emergency Powers," Brennan Center for Justice. https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers (accessed February 1, 2021)

[100] INS v. Chadha, 462 U.S. 919, (1983). https://supreme.justia.com/cases/federal/us/462/919/

[101] Susan Davis, "Trump Vows Veto After Congress Blocks His Order To Build Border Wall," NPR, March 14, 2019. https://www.npr.org/2019/03/14/703379399/congress-overturns-trumps-national-emergency-declaration-to-build-the-wall; Jacob Pramuk, "Senate votes again to block Trump's national emergency over the border but fails to get veto-proof majority," CNBC, updated September 26, 2019. https://www.cnbc.com/2019/09/25/senate-votes-to-block-trump-national-emergency-over-border-wall.html; U.S. President, Proclamation, "Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States," February 15, 2019. https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/

Congress in the 2001 and 2002 Authorizations for Use of Military Force (AUMFs), repeatedly circumventing Congress's constitutionally mandated war powers.[102] There are few things more clear in the Constitution than Article I, Section 8, in which Congress is assigned the power to declare war.[103] Congress sought to further clarify their constitutional authority in 1973 under the War Powers Act,[104] but it has been insufficient to constrain increasing assertions of broad presidential war powers. Three separate presidential administrations have illegally expanded their power to wage war across the globe, using the AUMFs to authorize hostilities in conflicts completely unrelated to those that led Congress to issue the decades old AUMFs.[105]

All of this has occurred without congressional authorization, and legislative efforts to curb this abuse have failed to check the executive branch's overreach.

There is almost no congressional duty more sacred than to weigh decisions to send U.S. troops into harm's way to fight and, potentially, to die for our country. The grave human and financial costs that endless wars exact on the nation[106] make it imperative that decisions to use military force be deliberated, and that those deliberations—and

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[102] Katherine Hawkins, "Recommendations for Reclaiming Congress's War Powers," Project On Government Oversight, February 19, 2020. https://www.pogo.org/analysis/2020/02/recommendations-for-reclaiming-congress-war-powers/

[103] U.S. Constitution art. I, § 8, cl. 11.

[104] War Powers Act, 50 U.S.C. §§ 1541–1548. (2021)

[105] Stephen Pomper, "The Soleimani Strike and the Case for War Powers Reform," *Just Security*, March 11, 2020. https://www.justsecurity.org/69124/the-soleimani-strike-and-the-case-for-war-powers-reform/; Warren Richey, "Bush pushed the limits of presidential power," *Christian Science Monitor*, January 14, 2009. https://www.csmonitor.com/USA/2009/0114/p11s01-usgn.html

[106] U.S. Department of Defense, "Casualty Status." https://www.defense.gov/casualty.pdf (accessed February 1, 2021); Neta C. Crawford, Watson Institute for International and Public Affairs, Brown University, *United States Budgetary Costs of the Post-9/11 Wars Through FY2019: $5.9 Trillion Spent and Obligated* (November 14, 2018). https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Crawford_Costs%20of%20War%20Estimates%20Through%20FY2019.pdf; Jeff Stein and Aaron Gregg, "U.S. military spending set to increase for fifth consecutive year, nearing levels during height of Iraq war," *Washington Post*, April 18, 2019. https://www.washingtonpost.com/us-policy/2019/04/18/us-military-spending-set-increase-fifth-consecutive-year-nearing-levels-during-height-iraq-war/; Project On Government Oversight, "New Report Exposes Path of Top Pentagon Officials to Pentagon Contractors," Press Release, November 5, 2018. https://www.pogo.org/press/release/2018/new-report-exposes-path-of-top-pentagon-officials-to-pentagon-contractors/

future oversight of any use of military force—be informed by facts and accurate intelligence.[107]

Finally, Congress must also reassert its authority over how taxpayer dollars are being used.[108] Under the current system, the executive branch allocates congressionally appropriated dollars largely in secret, keeping details even from Congress. This practice undermines Congress's ability to exercise its full power over spending decisions, resulting in wasteful spending or even law-breaking[109] and eroding the public's trust that their hard-earned tax dollars are being spent effectively and in the public interest.

By restoring an appropriate balance of power—and the transparency that comes with it—between the legislative and executive branches in these three areas, Congress can increase its credibility with the public and provide a meaningful check against executive branch abuses of power.

Recommendations for Legislative Action

- **Rein in unilateral executive branch authority and reestablish Congress as primary decision-maker in use of emergency powers.** Congress should amend the National Emergencies Act to require affirmative congressional approval of any declared national emergency within 30 days, without which the emergency authorities will lapse. Reforms should also require robust reporting on the specific nature of the powers used, and should mandate a clear and credible relationship between the emergency conditions and the powers utilized. "Forever emergencies" should be barred by placing a five-year cap on any discrete emergency declaration. This will allow Congress to

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[107] Craig Whitlock, Leslie Shapiro, and Armand Emamdjomeh, "The Afghanistan Papers: A Secret History of the War," *Washington Post*, December 9, 2019. https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/documents-database/

[108] Dylan Hedtler-Gaudette, "New House Bill Would Enhance Transparency in Government Spending," Project On Government Oversight, October 23, 2020. https://www.pogo.org/analysis/2020/10/new-house-bill-would-enhance-transparency-in-government-spending/

[109] Dylan Hedtler-Gaudette, "Secret Spending Decisions Undermine the Rule of Law," Project On Government Oversight, June 17, 2020. https://www.pogo.org/analysis/2020/06/secret-spending-decisions-undermine-the-rule-of-law/; U.S. Government Accountability Office, decision in the matter of "Office of Management and Budget—Withholding of Ukraine Security Assistance," B-331564, January 16, 2020. https://www.gao.gov/assets/710/703909.pdf

serve as a meaningful check against an executive abuse of these delegated emergency authorities.

- **Reassert congressional prerogative over the use of military force and to oversee use of military force.** Congress should repeal the 2001 and 2002 Authorizations for Use of Military Force (AUMF) and build regular sunset mechanisms into replacement AUMFs. Any replacement AUMF must also contain more specific and limiting language around the mission, targeted groups, types of force to be used, and geographic areas implicated, and additional reporting requirements that will allow Congress to perform effective oversight. Congress should also reform the War Powers Act to clearly define the terms "hostilities" and "imminent hostilities," and other ambiguities in the existing law to avoid future dubious interpretations and expansions of any authority Congress grants to a president to use military force. By doing so, Congress can reclaim its constitutional role in decisions over sending our troops into harm's way.

- **Require greater transparency from the Office of Management and Budget.** Congress should require the Office of Management and Budget (OMB) to publicly post all apportionment schedules, which show how money is being allocated within an agency. This requirement should apply to all special footnotes in the apportionment documents. Congress should also require OMB and affected agencies to notify Congress when apportionments will delay, disrupt, or otherwise impact the dissemination of funds and the facilitation of projects, programs, or activities that Congress has legislated. This would limit the means by which the executive branch can undermine Congress's constitutional role to appropriate funds and authorize their use.

Empowering the People Through Government Transparency

An informed and engaged citizenry is a bedrock principle of our democracy, and the United States has long been a country that seeks to be open and honest with its people. In 1913, future Supreme Court justice Louis D. Brandeis famously wrote, "Sunlight is said to be the best of disinfectants."[110] In a 2002 ruling against secret deportation hearings, U.S. Circuit Judge Damon Keith wrote, "Democracies die behind closed doors. … When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."[111] Improving transparency will not only increase trust in government but also strengthen and enhance the government's credibility. In the wake of the deadly insurrection at the Capitol, which was fomented by disinformation, this rebuilding of credibility must be a top priority for Congress and the executive branch. While the United States has certainly made great strides over the years toward being more open and transparent, opportunities remain to further those efforts throughout all branches and agencies of the federal government.

Over the years Congress has passed numerous laws requiring greater transparency and openness around federal records, meetings, advisory committees, rulemaking, spending, and more. Most notable among these open government laws is the Freedom of Information Act (FOIA), which has been amended several times to improve performance. Yet, despite these efforts, there are still numerous issues that impact FOIA's effectiveness. FOIA is a process to review and decide on disclosure of records to the public, yet it continues to be an overly slow, confusing, and limited tool for access. Agencies too often miss by a wide margin the 20 business-day deadline to provide requested records, especially for larger and more complex requests.[112] The Department of Justice has long pointed to budget constraints and competing

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[110] Louis D. Brandeis, "What Publicity Can Do," *Harper's Weekly*, December 20, 1913. http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v

[111] Detroit Free Press, et al. v. Ashcroft (6th Cir. 2002). https://caselaw.findlaw.com/us-6th-circuit/1432834.html

[112] Andrew Wyner, "Sunshine Week: Many Agencies Violate FOIA's 20-Day Requirement," Project On Government Oversight, March 16, 2012. https://www.pogo.org/analysis/2012/03/sunshine-week-many-agencies-violate-foias-20-day-requirement/

administrative priorities as factors that have made it difficult to process requests in a timely manner.[113]

One particularly concerning issue with FOIA is that overly expansive exemptions meant to protect classified or otherwise legally sensitive information are instead being used to withhold information that rightfully belongs to the public. Exemption 5—meant to protect certain internal government deliberations—is the most frequently abused. Under Exemption 5, agencies shield draft government documents, records of pre-decisional deliberations, and government attorney-client deliberations from public release. While there are legitimate reasons to keep some of these documents from being released, the government has too often used the exemption "to inappropriately cover other information, such as records that may paint the agency in a bad light, records that reveal problems, and records that contain embarrassing information."[114]

Agencies have also pointed to loopholes within FOIA's scope that block requests for records that are retained by contractors working for the federal government. Unlike federal agencies, private companies that contract with the government are not subject to FOIA. While that arrangement likely makes sense for truly proprietary information, it has been stretched beyond the point of reasonableness. The public's ability to access records related to federal prisons and immigration detention centers provides a window into this problem. The federal government operates a number of federal prisons and immigration detention centers, and the records related to operating them are therefore subject to FOIA. However, the government also contracts with private companies to operate the majority of immigration detention facilities, and those records—the same types of records that are subject to FOIA at the government-operated facilities—are out of the public's reach. Sometimes contractors are required to turn over some of their records to the federal agency in charge of supervising them, in which case those records then become subject to FOIA, but this information sharing

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[113] "The Increase in FOIA Lawsuits Isn't the Problem – It's Agencies Underfunding their Transparency Obligations," American Oversight, March 17, 2020. https://www.americanoversight.org/the-increase-in-foia-lawsuits-isnt-the-problem-its-agencies-underfunding-their-transparency-obligations; Department of Justice Office of Information Policy, "FOIA Update: FOIA Affected By Budget Constraints," January 1, 1990. https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints

[114] Nick Schwellenbach and Sean Moulton, "The 'Most Abused' Freedom of Information Act Exemption Still Needs to Be Reined In," Project On Government Oversight, February 6, 2020. https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/

is limited. For example, Immigration and Customs Enforcement releases and publishes some limited information about ICE detainees and detention facilities online, but it does not provide a holistic picture of the detention center system.[115] By simply contracting out all aspects of managing these facilities, the federal government is able to greatly reduce transparency around their operations.

Furthermore, under current interpretation of the statute, even members of Congress can be denied information using FOIA exemptions if they are not asking for that information in the capacity of a committee or subcommittee chair. The limits that FOIA establishes to protect sensitive information (such as classified documents or personal information) do not apply when responding to a member of Congress, who have the same requirements to protect government information that executive agencies have. The Justice Department's Office of Information Policy issued guidance in 1984 allowing agencies to respond to congressional requests for information with documents that have been subject to FOIA redactions.[116] These practices severely limit Congress's ability to conduct oversight and pass legislation to address issues facing the public. No member of Congress should be denied access to the information they need to do their jobs regardless of otherwise applicable FOIA exemptions.

Another problem lies in the lack of funding for agency FOIA offices. Budgetary issues and shortfalls regularly plague agency FOIA offices and are often the reasons, at least in part, for the agency's failure to meet the 20 business-day deadline to respond as required by law or to address FOIA backlogs.[117] However, agencies determine how to allocate funding for administrative activities, and they frequently short-change the FOIA offices. Congress can, and should, appropriate specific funding for FOIA offices as a designated line item in an agency's budget to address this pattern of under-

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[115] Mia Steinle, "ICE's Private Detention Centers Keep Data Under Lock and Key," Project On Government Oversight, May 3, 2017. https://www.pogo.org/analysis/2017/05/ices-private-detention-centers-keep-data-under-lock-and-key/

[116] Department of Justice Office of Information Policy, "FOIA Update: OIP Guidance: Congressional Access Under FOIA," January 1, 1984. https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia

[117] Department of Justice Office of Information Policy, "FOIA Affected by Budget Constraints." [see note 113]

resourcing these important offices and then pointing to those lack of resources to excuse poor compliance with the law.

In addition to problems with FOIA, there are also concerning issues with a number of other statutes. One is the Administrative Procedures Act, which requires government agencies to alert the public of proposed and final government rulemaking, and to allow the public to comment on notices of rulemakings. It's up to the agencies to determine how long they will allow a proposed rule to be open for comment, but unfortunately, agencies are not consistent in allowing a reasonable and sufficient amount of time for the public to weigh in on it. While some agencies regularly allow 60 or even 90 days, other agencies have limited the comment period to just a few days or even no public comment period at all.[118] Strangely, this is permitted by a loophole in the Administrative Procedures Act. Known as the "good cause exemption," the loophole allows agencies to issue a final rule without a public comment period if the agency finds, "for good cause" that holding a public comment period is unnecessary or impractical.[119] While this is supposed to allow for simple changes such as updating dates or email addresses in regulations, some agencies have used this option in questionable ways.[120] Without a standard in place, agencies can use this exemption to inappropriately curtail the public's involvement in the decision-making process.

The federal government should also increase the degree of public transparency around the administrative review of regulations drafted by agencies. The Office of Information and Regulatory Affairs (OIRA) reviews drafts of major rules that are either economically significant (any rule that would result in an annual effect on the economy of $100 million or more, or would adversely affect the economy, the environment, public health, or a community) or deemed significant for policy reasons (often rules seen as controversial or sensitive). Executive Order 12866 on "Regulatory Planning and Review," issued by President Bill Clinton in 1993, established transparency requirements for OIRA, including that the office must publish all

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[118] Sean Moulton, "Secrecy and Imbalance in Regulatory Review," Project On Government Oversight, October 24, 2017. https://www.pogo.org/investigation/2017/10/secrecy-and-imbalance-in-regulatory-review/

[119] 5 U.S.C. § 553(b)(3)(B). https://www.law.cornell.edu/uscode/text/5/553

[120] Sean Moulton, "EPA Contradicts Its Own Statements on FOIA Rule," Project On Government Oversight, October 31, 2019. https://www.pogo.org/analysis/2019/10/epa-contradicts-its-own-statements-on-foia-rule/

documents exchanged between it and the agency during the review, publicly noting all changes in the draft regulation made at OIRA's recommendation, and maintaining a public log of meetings and communications with outside parties related to regulatory actions under review.[121] Under current guidance, however, implementation of these requirements is extremely limited, applying only to communications between top officials in OIRA and regulatory agencies, and to formal meetings with outside parties.[122] This is not sufficient. The public has a right to know about efforts by all parties, those in and out of government, to influence the rulemaking process, what changes are made to draft regulations, and where those changes originated.

Another flawed policy is "incorporation by reference," through which agencies are permitted to adopt standards developed by industry associations merely by referencing them. For the government, adopting privately written standards is a way to eliminate duplicative work and tap private-sector expertise. However, many of these referenced standards carry copyright protections and cannot be republished by the agency. Some associations require members of the public to pay for print or printable electronic copies.[123]

Recommendations for Legislative Action

- **Require agencies to show specific identifiable harm before being permitted to withhold documents under the Freedom of Information Act's discretionary exemptions.** Congress should clarify that agencies must identify a specific harm rather than speculating that general harm might result from disclosure. This requirement would help ensure that agencies are not abusing the law's exemptions to withhold information that should be made public.

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[121] Executive Order 12866, 58 Fed. Reg. 51735 (October 4, 1993).

[122] Sean Moulton, "Greater Transparency Needed for Regulatory Review Meetings," Project On Government Oversight, April 18, 2019. https://www.pogo.org/analysis/2019/04/greater-transparency-needed-for-regulatory-review-meetings/

[123] David Hilzenrath, "Big Oil Rules: One Reporter's Runaround to Access 'Public' Documents," Project On Government Oversight, December 6, 2018. https://www.pogo.org/investigation/2018/12/big-oil-rules-one-reporters-runaround-to-access-public-documents/

- **Close loophole that allows agencies to treat requests for information from members of Congress as FOIA requests.** Congress should clarify that the Freedom of Information Act prohibits executive branch agencies from responding to congressional requests for information with records that have been subject to FOIA redactions. This clarification would ensure that executive branch agencies are not using the law's exemptions to withhold information from elected officials conducting oversight.

- **Create separate line item in agency budgets for FOIA offices.** Congress should appropriate specific funding to agencies' FOIA offices rather than including said funding in the overall category of general administrative activities. Direct funding would help agency offices prioritize its FOIA response work and eliminate backlogs without starving the office of competing resources.

- **Make private prison and detention center records subject to the Freedom of Information Act.** Congress should require that prison and immigration detention center contractors provide their contracting agencies with any and all records related to the operation of those facilities so that they may be accessible to the public under FOIA. Agency FOIA personnel can then make determinations on the use of any exemptions to redact or withhold records. This requirement would address the loophole shielding private prisons and detention centers from necessary transparency and the accompanying oversight that transparency makes possible.

- **Require proactive publication of White House and agency-head visitor logs and calendars.** Congress should statutorily require that each agency—including the White House, the Vice President's residence, and all other regularized places that executive branch personnel meet with outside actors—report to Congress and make publicly available visitor logs and meeting records. These records should include calendars in a searchable, sortable, and downloadable electronic format and be updated at regular intervals. This transparency will allow the public to see who our leaders are meeting with as they make decisions about which direction to take our country.

- **Require greater transparency from the Office of Information and Regulatory Affairs in the regulatory review process.** Congress should codify transparency requirements laid out in Executive Order 12866. These requirements include that all communications and documents exchanged

between an agency and OIRA, and any changes made to the rule after it was submitted to OIRA, be made public. They also include that all changes made at OIRA's suggestion be identified as such. Congress should also require OIRA to disclose the names and affiliations of all people—including government officials—participating in meetings or other communications concerning a regulatory action being reviewed by OIRA. Congress should also require OIRA to disclose all materials exchanged before or after a meeting, not just those used at the meeting, as well as any materials exchanged between OIRA and entities other than government agencies. This added transparency, especially about those individuals involved in meetings regarding potential regulatory action, would help restore public trust in OIRA and its processes.

- **Require unimpeded public access to all material incorporated by reference into regulations.** Congress should require agencies to provide the public with unimpeded access through a government-controlled website to any standards incorporated by reference into rules, standards, and regulations, or proposed to be incorporated. Further, Congress should clarify that copyright protections do not apply to any material incorporated—by reference or otherwise—into laws or regulations. This would help establish equitable access to the material and greater knowledge about the substance of proposed and final regulations.

- **Codify minimum length of 60 days for public comment periods.** Congress should establish that all public comment periods for regulatory activities must be at least 60 days long, with clear guidelines for what would constitute an emergency that allows the agency to shorten that timeframe. Congress should also clarify how the "good cause exemption" should be interpreted and applied by agencies. Having a minimum length for comment periods will help to ensure meaningful public participation and to restore trust that the public's voice is being heard in the regulatory process.

Recommendations for Executive Action

- **Close loophole that allows agencies to treat requests for information from members of Congress as FOIA requests.** The administration should rescind the Office of Information Policy's 1984 guidance entitled "Congressional Access Under FOIA," thereby discontinuing the use of FOIA exemptions to redact records when responding to congressional requests for information. This clarification would ensure that executive branch agencies are not using

the law's exemptions to withhold information from elected officials conducting oversight.

- **Require greater transparency from Office of Information and Regulatory Affairs in the regulatory review process.** The administration should instruct all agencies to fully comply with the public reporting requirements detailed in Executive Order 12866, which executive agencies and OIRA have routinely ignored. This transparency is necessary to help restore trust in OIRA and its processes and to give the public a better understanding of who is shaping our regulatory policy.

Promoting Smart Decision-Making and Meaningful Transparency for Government Spending

The public deserves to know how their tax dollars are spent, and whether that spending is effective and in the public interest. But the data that serves as the government's primary window into this spending continues to be riddled with inaccuracies and incomplete information.[124] These issues are especially pernicious when it comes to data about federal funds that are distributed by contractors or state agencies, both of which are areas where the data is so unreliable that it is almost useless, creating significant gaps in public records about this spending.[125]

Transparency is particularly important when the government spends money in response to emergencies. Because of the urgent nature of this spending, it often occurs outside of the usual practices that ensure integrity, competition, and oversight. Yet, despite the clear need for transparency about this spending, it is inconsistently tracked. For example, agencies "tag" contract spending related to certain national disasters with a National Interest Action code, to designate the spending as related to an emergency or nationally significant action. However, agencies don't similarly tag assistance awards, which include grants, loans, and direct payments, making it impossible to track all federal spending in response to an emergency. Furthermore, agencies don't use these codes consistently after the initial disaster is over, even when the government continues to spend federal dollars in response to the disaster.[126]

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[124] Sean Moulton, "Spending Data Has Improved—Probably," Project On Government Oversight, December 19, 2019. https://www.pogo.org/analysis/2019/12/spending-data-has-improved-probably/; Government Accountability Office, *DATA Act: Quality of Data Submissions Has Improved but Further Action Is Needed to Disclose Known Data Limitations*, GAO-20-75 (November 8, 2019). https://www.gao.gov/assets/710/702586.pdf

[125] Nicholas Trevino, "How to Improve USASpending.gov," Project On Government Oversight, August 31, 2018. https://www.pogo.org/analysis/2018/08/how-to-improve-usaspending-gov/; Letter from the Project On Government Oversight to the Treasury Department and the Office of Management and Budget on recommendations to improve USASpending.gov, June 28, 2018. https://www.pogo.org/letter/2018/06/pogo-offers-recommendations-to-improve-usaspendinggov/

[126] Contracts are tagged with National Interest Action codes, which are used to track multi-agency spending in response to various national events, most often hurricanes.

Tracking federal coronavirus emergency spending has been no exception. Worse, the lack of sufficient tracking was exacerbated by guidance released by the Office of Management and Budget that all but ensured that the over $2 trillion in relief funds will receive less oversight and accountability than Congress intended.[127] This guidance directed agencies to ignore the clear recipient reporting requirements contained in the law that would track in greater detail how those funds were used and how many jobs were preserved or created. Instead, the guidance allowed agencies to continue using the existing and error-ridden emergency spending tracking infrastructure.

Emergency spending tracking isn't the only thing that is past due for an overhaul: Reforms are also necessary to address a lack of transparency and smart decision-making in routine defense spending. The Department of Defense has the largest discretionary budget of all federal agencies, and its spending continues to be riddled with waste, fraud, and abuse with virtually no accountability. Insufficient efforts to address wasteful and mismanaged spending have not only been costly but also have, as the coronavirus pandemic made clear, undermined the fiscal ability of our country to adequately respond to crises.[128]

We can keep our nation safe at a significantly lower cost by cutting unneeded weapon systems and programs.[129] Defense contractors' capture of the Pentagon has encouraged wasteful spending and program mismanagement.[130] Reducing troops overseas, cutting weapon systems that aren't combat effective, eliminating the Space

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[127] Sean Moulton, "Administration Seeks to Minimize Transparency of Coronavirus Relief Funds," Project On Government Oversight, May 13, 2020. https://www.pogo.org/analysis/2020/05/administration-seeks-to-minimize-transparency-of-coronavirus-relief-funds/

[128] Mandy Smithberger, "National (In)Security and the Pentagon Budget," Project On Government Oversight, September 14, 2020. https://www.pogo.org/analysis/2020/09/national-insecurity-and-the-pentagon-budget/

[129] Mandy Smithberger, "Spending Smarter, Spending Less: Opportunities to Reduce Excessive Pentagon Spending," Project On Government Oversight, May 15, 2019. https://www.pogo.org/resource/2019/05/spending-smarter-spending-less-opportunities-to-reduce-excessive-pentagon-spending/; Center for International Policy Sustainable Defense Task Force, *More Security, Less Spending* (June 2019). https://67ae62e0-a930-4a42-8f98-6c406ea4d9de.filesusr.com/ugd/3ba8a1_635241b0a0894b3fb377c88e500c3620.pdf

[130] Jason Paladino, "The Chairman of the Revolving Door," Project On Government Oversight, March 6, 2020. https://www.pogo.org/investigation/2020/03/the-chairman-of-the-revolving-door/; Mandy Smithberger, *Brass Parachutes: Defense Contractors' Capture of Pentagon Officials Through the Revolving Door* (November 5, 2018). https://s3.amazonaws.com/docs.pogo.org/report/2018/POGO_Brass_Parachutes_DoD_Revolving_Door_Report_2018-11-05.pdf

Force, and reducing the department's overreliance on service contracts could help save hundreds of billions of dollars every year.[131]

The Pentagon's operations also need to be reformed. The department has a long history of buying and operating weapon systems before design and testing is complete, a practice that not only risks the safety of servicemembers but also unnecessarily increases costs of retrofits and modifications. Recently, this fundamentally flawed process even led the services to recommend cutting systems that they have only owned for a few years, effectively making them "concurrency orphans."[132] The Pentagon's continued pursuit of overly complex weapon systems with immature and overly expensive technologies also undermines readiness and combat effectiveness.[133] After a weapon system has been acquired, the department often struggles to control the costs of operating the system because it doesn't own the intellectual property rights. This allows the defense contractors that retain those intellectual property rights to effectively serve as feudal lords over our military services, since Pentagon officials must continue to work with the contractor—whose financial incentive is to keep costs high—to maintain the system over time.[134] Finally,

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[131] Dan Grazier and Mandy Smithberger, "Cut the Pentagon Budget By Nearly $1 Trillion Over 10 Years," Defense Priorities Symposium on Department of Defense Budget Cuts, July 20, 2020. https://www.defensepriorities.org/symposium/dod-budget-cuts/essays/cut-the-pentagon-budget-by-nearly-1-trillion-over-10-years; Dan Grazier, "The Space Force's Real Mission: Wasting Taxpayer Dollars," *The American Conservative*, June 9, 2020. https://www.theamericanconservative.com/articles/the-space-forces-real-mission-wasting-taxpayer-dollars/

[132] Dan Grazier, "The Littoral Combat Ship and the Folly of Concurrency," Project On Government Oversight, July 17, 2020. https://www.pogo.org/analysis/2020/07/the-littoral-combat-ship-and-the-folly-of-concurrency/; Dan Grazier, "$21 Billion Worth of F-35 Concurrency Orphans?" Project On Government Oversight, October 12, 2017. https://www.pogo.org/analysis/2017/10/21-billion-worth-of-f-35-concurrency-orphans/

[133] Dan Grazier, "How Bells, Whistles & Greed Blew Up The Defense Budget," *The American Conservative*, August 3, 2020. https://www.theamericanconservative.com/articles/how-bells-whistles-greed-blew-up-the-defense-budget/; Mark Thompson, *The U.S. Navy's Titanium "Tin Can": How the sea service transformed destroyers, its most common warship and once among the cheapest, into Frankenships*, Project On Government Oversight (January 10, 2019). https://www.pogo.org/analysis/2019/01/the-u-s-navys-titanium-tin-can/

[134] Dan Grazier, "Defense Contractors Holding the Pentagon Hostage with Service Contracts," Project On Government Oversight, November 30, 2017. https://www.pogo.org/investigation/2017/11/defense-contractors-holding-pentagon-hostage-with-service-contracts/; Dan Grazier, "Why Do Air Force Planes Need $10,000 Toilet Seat Covers?" *The American Conservative,* June 14, 2018. https://www.theamericanconservative.com/articles/why-do-air-force-planes-need-10000-toilet-seat-covers/

decades of defense industry mergers have reduced competition, thereby driving up costs and undermining innovation.[135]

Congress and the executive branch must also increase discipline in how our national security is funded, and avoid relying on supplementary and off-budget accounts. From the 1950s to 2001 the United States only used supplemental spending to augment the department's usual budget for the first few years of a war when costs were somewhat unpredictable. They then incorporated most if not all of those costs into the department's base budget.[136] Since 2001, however, unbudgeted spending has become commonplace. An account called Overseas Contingency Operations (OCO) has become a slush fund used to pay for a variety of unbudgeted projects—many of which the department admits should be funded by the base budget—to the tune of tens of billions of dollars each year.[137] Over time, reliance on these off-budget accounts has expanded. One example is the European Deterrence Initiative, which maintains the "readiness and responsiveness of U.S. forces in Europe" and supports "the collective defense and security of NATO allies." It is funded through OCO rather than the Pentagon's base budget.[138] Relying on off-budget funds like OCO has also undermined planning and made it more likely the department would pursue lower priority, more expensive programs that wouldn't normally make the cut.[139]

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[135] Mark Thompson, "The Incredibly Shrinking Defense Industry," Project On Government Oversight, August 1, 2019. https://www.pogo.org/analysis/2019/08/the-incredibly-shrinking-defense-industry/

[136] Congressional Budget Office, *Funding for Overseas Contingency Operations and Its Impact on Defense Spending* (October 1, 2018), 2. https://www.cbo.gov/system/files/2018-10/54219-oco_spending.pdf; Jacob Marx, "The Pentagon's War Time Slush Fund," Project On Government Oversight, March 26, 2015. https://www.pogo.org/analysis/2015/03/pentagons-wartime-slush-fund/

[137] Mandy Smithberger, "Pentagon Admits Half of War Spending Account is Slush," Project On Government Oversight, October 3, 2016. https://www.pogo.org/analysis/2016/10/pentagon-admits-half-of-war-spending-account-is-slush/; Mandy Smithberger, "House Gambles on Current Wars for Defense Industry Earmarks," Project On Government Oversight, May 4, 2016. https://www.pogo.org/investigation/2016/05/house-gambles-on-current-wars-for-defense-industry-earmarks/; Peter G. Petersen Foundation, "What are Overseas Contingency Operations?" October 7, 2020. https://www.pgpf.org/blog/2020/10/what-are-overseas-contingency-operations

[138] Paul Belkin and Hibbah Kaileh, *The European Deterrence Initiative: A Budgetary Overview*, Congressional Research Service, IF10946 (June 16, 2020). https://fas.org/sgp/crs/natsec/IF10946.pdf

[139] Erica Fein and Mandy Smithberger, "America should save emergency spending for emergencies," *Defense News*, March 27, 2020. https://www.defensenews.com/opinion/commentary/2020/03/27/america-should-save-emergency-spending-for-emergencies/

Recommendations for Legislative Action

- **Improve spending data accuracy.** Congress should require agency inspector general offices to continue, and expand on, the data quality audits begun under the Digital Accountability and Transparency Act of 2014. The biennial audits should be extended another six years, and should be expanded to include separate evaluations of subaward data. Improving data collection and quality will make that data more complete, reliable, and consistent, thereby significantly enhancing the ability of policymakers and the public to track federal fund distribution from state agencies and from major contractors to subcontractors.

- **Eliminate Overseas Contingency Operations account.** Congress should stop providing the Pentagon off-budget funding through the Overseas Contingency Operations (OCO) account, and require the Department of Defense to produce sunset plans to show how useful programs currently funded through that account could be funded instead through the base budget. Eliminating the OCO account will increase fiscal discipline and deter funding expensive, lower-priority programs that waste taxpayer dollars.

- **Eliminate and stop creating new off-budget Pentagon spending accounts.** Congress should stop the practice of funding Pentagon activities through disparate budgets, and instead capture the overall budget and strategy of the Defense Department and military services in one agency budget. Eliminating off-budget accounts will increase efficiency, reduce duplication, and enhance strategic decision-making.

- **Reduce wasteful national security spending.** Congress should identify and cut programs and spending that do not make us safer or more effective. This should include authorizing base realignment and closure reviews for the Defense Department's bases and the Department of Energy's federal labs, and canceling overly complex and expensive systems like the *Ford* carrier, the B-21, and the F-35. Taking these actions would increase security, increase military effectiveness, and reduce overall costs.

Recommendations for Executive Action

- **Obtain intellectual property rights for goods developed with taxpayer money.** When negotiating contracts and other transactions, the Department of Defense should, to the maximum extent possible, ensure that the government retains the intellectual property rights for goods and systems

researched and developed with taxpayer money. This would help the government reduce long term costs by empowering the government to maintain these systems independently or to invite other contractors to compete to provide those services.

- **Fly before you buy.** The secretary of defense should direct the department's procurement officials to stop purchasing weapon systems before operational testing is complete and any identified problems have been resolved. This will reduce wasteful spending, ensure our military is operating systems that are safe and effective, and make it more likely the department can afford to buy systems in the quantity necessary to meet defense requirements.

- **Enhance collection and disclosure of federal award data.** The Department of the Treasury should ensure federal award data collected and shared with the public through USASpending.gov includes the purpose and impact of federal spending. This award data should include full award documents or statements of work, information on the recipients' use of funds, past performance reviews, and other information necessary for assessing the effectiveness of spending. Improving the quality and transparency of federal spending data will allow for more robust oversight and give policymakers better tools to evaluate the efficacy of various government spending.

- **Track emergency spending.** The Office of Management and Budget and the Treasury Department should create a system to track all federal spending awards for national emergencies, disasters, health crises, and other national events. Clear and consistent standards will enhance the government's and the public's ability to identify waste, fraud, and abuse, and will help policymakers better assess the efficacy of different types of disaster spending, allowing them to better address emergency situations in the future.

Empowering Congress to Better Serve Its Constituencies

The Constitution vests lawmaking power firmly within the legislative branch and requires elections every two years so the public can appraise the performance of their elected representatives.[140] This structure was meant to establish Congress as the branch of government that is closest and most accountable to the people. Unfortunately, the principle that Congress is the branch most accountable to the people has waned in recent decades, and Congress's abysmal public approval rating—most recently at 25%[141]—has become something of a morbid running joke across the nation.

One of the drivers of this disapproval is a growing sense of distrust in Congress because of a public perception that members of Congress are divorced from the reality the public faces every day; that they deal in lies, half-truths, and hidden agendas in order to further their own interests; and that the laws that apply to the public don't apply to them.[142]

Actions by some members of Congress have only exacerbated this. For example, some members of Congress have recently been indicted for insider trading and for misusing campaign funds for personal and sometimes tawdry purposes.[143] Still others have used campaign contributions to pay for memberships to exclusive social clubs, in

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[140] U.S. Const. art. I

[141] "Congress and the Public (Gallup Historical Trends)," *Gallup News*. https://news.gallup.com/poll/1600/congress-public.aspx (accessed February 4, 2021)

[142] Andrew Dugan, "Majority of Americans See Congress as Out of Touch, Corrupt," *Gallup News*, September 28, 2015. https://news.gallup.com/poll/185918/majority-americans-congress-touch-corrupt.aspx

[143] Michelle Ye Hee Lee, "Omar's marriage to political consultant draws renewed scrutiny of campaign spending," *Washington Post*, March 13, 2020. https://www.washingtonpost.com/politics/omars-marriage-to-political-consultant-draws-renewed-criticism-of-campaign-spending/2020/03/13/a4311ea4-6543-11ea-acca-80c22bbee96f_story.html; Dartunorro Clark, "Former GOP Rep. Chris Collins pleads guilty to insider trading charges," *NBC News*, October 1, 2019. https://www.nbcnews.com/politics/politics-news/former-gop-rep-chris-collins-pleads-guilty-insider-trading-charges-n1060811; Brakkton Booker, "Former Rep. Duncan Hunter Gets 11 Months In Prison For Misusing Campaign Funds," NPR, March 17, 2020. https://www.npr.org/2020/03/17/817327952/former-rep-duncan-hunter-gets-11-months-in-prison-for-misusing-campaign-funds; Bess Levin, "Oh, Was This GOP Rep. Not Supposed To Finance His Alleged Affairs With Campaign Funds?" *Vanity Fair*, June 25, 2019. https://www.vanityfair.com/news/2019/06/duncan-hunter-alleged-affairs-uber

violation of federal law.[144] These issues persist across party and across time, and the perception is—rightly or wrongly—that such ethical problems are the norm rather than the exception.

The good news is that it doesn't have to be this way. Congress has the power to rebuild trust by enacting stronger ethics laws that govern the institution, and by demonstrating to the public that self-dealing, rampant financial conflicts of interest, and any other behavior that undermines the public's confidence in a member's governing ability will not be acceptable going forward.

Congress must also recognize how important it is to communicate its invaluable work to the public. National news will almost always highlight the dysfunction of the institution, which makes it all the more critical that the institution make its work easily accessible to the public so that constituents can see the work that is being done that won't make it into headlines.

Whether it is the versions of legislation that Congress ends up voting on, transcripts and video of congressional hearings, or easy-to-use resources that provide insight into what members of Congress are working on and what the results are, there are myriad areas where Congress can improve accessibility and informational transparency. Making efforts in these and other similar spaces will further demystify the legislative branch, improve general civics literacy within the nation, and, in doing so, give the public a stronger sense of inclusion and faith in the legislative process. Such efforts can only help Congress be more representative and bolster the public's view of the institution as a whole.

In addition to strengthening the public's trust and support of the institution, Congress must also strengthen its own ability to do its job.[145] The institution has a multifaceted mandate that includes everything from appropriating tax dollars to considering and

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[144] Chris Marquette, "House lawmakers use campaign money for membership dues to plush club," *Roll Call*, July 8, 2020. https://www.rollcall.com/2020/07/08/house-lawmakers-use-campaign-money-for-membership-dues-to-plush-clubs/

[145] Letter from Demand Progress et al. to House and Senate Committees on Appropriations about "Strengthening the Legislative Branch by Increasing its 302(b) Allocation," June 22, 2020. https://s3.amazonaws.com/demandprogress/letters/Strengthening_the_Legislative_Branch_by_Increasing_its_302b_Allocation_2020-06-22.pdf

approving international trade treaties to conducting oversight of the entire federal government.[146] Despite this massive mandate, Congress has a long history of paradoxically insisting on chronically under-funding itself and on shorting itself of the staffing and other non-budgetary resources necessary to conduct its work. Congress is and has been facing a critical capacity problem and must act to rectify that issue immediately.[147]

It will never be politically convenient for Congress to increase its resources, whether that's through larger funding levels for its support agencies, pay-raises for its staff, or providing high enough security clearances to staff for Congress to perform effective oversight in the national security and intelligence spaces. While it's certainly easier not to take these actions, the easy thing is not always the right thing.

The conundrum here is clear: As Congress is less and less able to fulfill its mission effectively, the public has a less favorable view of the institution as a whole. As that public approval decreases, Congress's ability to do politically difficult things—like increase its budget—decreases, making the institution even less able to fulfill its mission. The challenge is real, but the only solution is for Congress to step up and take the hard votes necessary to adequately resource itself. The very integrity of the legislative branch may depend on it.

Ultimately, it is in the interest of Congress and the nation to reform and strengthen itself. Without an effective, accountable, and transparent legislative branch, our system of government, facilitated by the rule of law and the separation of powers, cannot perform with integrity and responsiveness. Enacting commonsense and transformational changes will help undergird the system as a whole and increase the people's faith and trust in their government.

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[146] Kevin Kosar, "Congress must invest in its own capacity again," R Street, March 9, 2019. https://www.rstreet.org/2016/03/09/congress-must-invest-in-its-own-capacity-again/

[147] Curtlyn Kramer, "Vital Stats: Congress has a staffing problem, too," Brookings Institution, May 24, 2017. https://www.brookings.edu/blog/fixgov/2017/05/24/vital-stats-congress-has-a-staffing-problem-too/; Chris Marquette, "Groups call on appropriators to increase funding for committees, member offices," *Roll Call*, June 22, 2020. https://www.rollcall.com/2020/06/22/groups-call-on-appropriators-to-increase-funding-for-committees-member-offices/

Recommendations for Legislative Action

- **Enact reforms to strengthen congressional ethics.** Congress should reform the STOCK Act to reflect modern electronic data standards and improve public accessibility. Additionally, Congress should require all members of Congress, their spouses, and their dependent children to place certain financial assets into a blind trust for the duration of their service in office. In doing so, Congress will remove potential conflicts of interest and bolster the institution's credibility with the public.

- **Enhance the role and efficacy of the Government Accountability Office.** Congress should reinvigorate its own capacity by further empowering the Government Accountability Office (GAO), an indispensable congressional oversight tool. Specifically, Congress should enact rules that require federal agencies to respond to and cooperate with GAO when it is conducting audits and investigations, including with regard to potential violations of appropriations laws such as the Antideficiency Act or the Impoundment Control Act. Additionally, Congress should authorize GAO to audit the intelligence community, currently a glaring gap in GAO's jurisdiction that has helped facilitate a persistent lack of accountability and transparency in that community. By strengthening GAO, Congress will improve its ability to hold the executive branch accountable and enhance the mission to root out waste, fraud, and abuse.

- **Strengthen national security oversight.** Congress should, either through statute or internal rules, expand the number of congressional staff with security clearances while maintaining the rigorous clearance process standards. By doing so, Congress will enable staff to effectively aid members of Congress in overseeing some of the most pressing and consequential issues of the day, ranging from the conduct of war to the abuse of surveillance programs, thereby fundamentally transforming its capacity to conduct meaningful national security oversight.

- **Improve congressional oversight enforcement mechanisms.** Congress must reform and enhance its inherent contempt power. Reforms should include creating an expedited cause of action process whereby a federal court can swiftly adjudicate a dispute over compliance with congressional subpoenas, and creating financial penalties that can be levied for noncompliance. By enhancing its ability to compel entities to cooperate with its investigations, Congress will improve its efficacy while providing greater

accountability and transparency around potential abuses and misdeeds by the executive branch.

- **Promote greater integrity of congressional hearings.** The Senate should follow the House's lead and enact internal rules governing witnesses at congressional hearings. Specifically, witnesses should be required to provide a thorough and comprehensive accounting of any financial and professional relationships with foreign governments or foreign government-backed entities that could call into question the integrity of their participation. By requiring better reporting from potential hearing witnesses, Congress can undergird the integrity and utility of its hearings.

- **Ensure better transparency of congressional fellowships.** Both chambers of Congress should require all fellows working in a congressional office while being paid by an outside entity to register with the clerk of the House or secretary of the Senate, and to detail certain information, including who is paying the fellow, what the salary rate is, and what committees or policy areas the fellow will be working on. Creating such rules for fellowships will help engender a more honest policy process that is less susceptible to inappropriate industry or special interest influence.

- **Increase transparency around the work of Congress.** Congress should amend its internal rules to facilitate more public access to the vital work that Congress does. Specifically, Congress should provide electronic copies of final versions of legislation that will be considered by the relevant committee, called the "manager's mark," no later than 48 hours in advance of committee consideration. Congress should also require committees to publish or otherwise make widely available records of all of its public activities within 24 hours of those activities occurring. Materials or records to make publicly available include but should not be limited to unofficial transcripts of all committee activities and any associated videos and audio recordings. By making congressional materials easier for the public to access, Congress can increase its credibility with the public and rebuild a common understanding of the legislative process.

- **Extend whistleblower protections to congressional staff and contractors.** Congress should pass best-practice whistleblower protections for the employees and contractors who staff the legislative branch. This would ensure that these individuals can report waste, fraud, and abuse, and

promote a more ethical and effective legislature, without putting their own careers on the line.

- **Increase resources for Congress.** Congress should gradually increase its annual budget by appropriating larger sums to line items directly linked to improving institutional capacity, like staff pay, technological modernization, accessibility improvements, and investments in congressional support services. By enhancing its resources, Congress will improve its ability to fulfill its mission to serve the people and increase its efficacy in doing so. This improved performance will, in turn, bolster the public's view of the institution as a whole and strengthen the policymaking process.

Protecting the Integrity of the Judicial Branch

The federal judiciary broadly and the Supreme Court in particular have been increasingly called upon to adjudicate major policy questions in recent years.[148] Such questions have ranged from who the president will be to what our immigration policy looks like to what the precise contours of civil rights protections will be for certain groups of the U.S. public.[149] This growing impact has not been accompanied by a commensurate enhancement of critical accountability, transparency, or ethics standards.[150]

The legitimacy of the judicial branch derives largely from public faith in the institution and in the fairness and impartiality of its decisions. There are multiple reasons to be concerned that public faith could be weakened to the point that the court's legitimacy will be adversely impacted. One such reason, and perhaps the most recognizable to the public, is the fierce political battle for the Supreme Court that has culminated in increasingly contentious Supreme Court confirmation hearings.[151] But partisan politics aren't limited to Supreme Court judicial selections. For instance, then-President Donald Trump stated that "remaking the federal judiciary" through the appointment of

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[148] Dylan Matthews, "The Supreme Court is too powerful and anti-democratic. Here's how we can scale back its influence," *Vox*, September 29, 2020. https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler

[149] Linda Greenhouse, "Bush Prevails; By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle," *New York Times*, December 13, 2000. https://www.nytimes.com/2000/12/13/us/bush-prevails-single-vote-justices-end-recount-blocking-gore-after-5-week.html; Adam Liptak and Michael D. Shear, "Trump's Travel Ban Is Upheld by Supreme Court," *New York Times*, June 26, 2018. https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html; Adam Liptak, "Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules," *New York Times*, last modified June 16, 2020. https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html

[150] Dylan Hedtler-Gaudette and Anthony Marcum, "Simple Reforms to Improve Transparency and Public Trust in the Federal Judiciary," *Project On Government Oversight*, *Analysis*, March 2, 2020. https://www.pogo.org/analysis/2020/03/simple-reforms-to-improve-transparency-and-public-trust-in-the-federal-judiciary/

[151] Letter from former federal judges to the United States Senate urging senators not to rush consideration of a Supreme Court justice in the days before a presidential election, September 22, 2020. https://www.pogo.org/letter/2020/09/former-federal-judges-urge-senate-not-to-rush-scotus-nominee/; Sheryl Gay Stolberg and Adam Liptak, "Kavanaugh Portrayed as a Hopeless Partisan as Hearings on Supreme Court Nominee Open," *New York Times*, September 4, 2018. https://www.nytimes.com/2018/09/04/us/politics/kavanaugh-confirmation-supreme-court.html

almost 300 judges was a signature accomplishment of his administration.[152] Another reason for concern is the lack of a consistent recusal standard for Supreme Court justices. This lack undermines the notion of impartiality in the important decisions Supreme Court justices must regularly make.[153] Finally, high profile allegations of sexual harassment and other workplace misconduct show that the judiciary is just as susceptible to integrity issues as any other public institution, a reason for concern exacerbated by the fact that employees and contractors working for the judicial branch do not have legal protections against retaliation if they blow the whistle on misconduct or wrongdoing.[154]

In addition, the work of the courts themselves must be easily accessible to the public. The outcomes of federal court cases are just as impactful on our lives as acts of Congress, yet public court records, which are accessed through the Public Access to Court Electronic Records (PACER) system, are hidden behind a paywall that charges by the page, serving as an unnecessary barrier between the public and *public* court records.[155] The proceeds from these charges have been used by the judiciary as an unaccountable slush fund that far exceeds the cost of operating the website, in violation of the law.[156] As taxpayers already fund the operations and staffing of the federal judiciary to the tune of billions of dollars every year, the records created and maintained by the judiciary should be freely available to the public.

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[152] "Trump Administration Accomplishments," Trump White House Archives, last updated January 2021. https://trumpwhitehouse.archives.gov/trump-administration-accomplishments/

[153] "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," Fix the Court, December 2, 2019. https://fixthecourt.com/2019/12/recent-times-justice-failed-recuse-despite-clear-conflict-interest/; *H.R. 1, the "For the People Act of 2019": Hearing before the House Committee on the Judiciary*, 116th Cong. 5, (January 29, 2019) (testimony of Sarah Turberville, Director, The Constitution Project at POGO). https://docs.pogo.org/testimony/2019/Sarah-Turberville-POGO-Testimony-on-HR-1-1.2019.pdf?mtime=20190128154545

[154] Dylan Hedtler-Gaudette and Sarah Turberville, "Sexual harassment by judges operating with impunity shows courts need their own #MeToo," *NBC News*, February 15, 2020. https://www.nbcnews.com/think/opinion/olivia-warren-s-testimony-sexual-harassment-judges-shows-courts-need-ncna1137321

[155] Anthony Marcum and Aubrey Neal, "R Sheet on PACER Reform," R Street, September 5, 2019. https://www.rstreet.org/2019/09/05/r-sheet-on-pacer-reform/

[156] Jared Serbu, "Federal Judiciary can't use PACER as IT slush fund, appeals court rules," *Federal News Network*, August 6, 2020. https://federalnewsnetwork.com/agency-oversight/2020/08/federal-judiciary-cant-use-pacer-as-it-slush-fund-appeals-court-rules/

In short, the courts are long overdue for reforms that can help restore public confidence in the institution.[157]

Recommendations for Legislative Action

- **Increase public accessibility to the work of the federal courts.** Congress should enact legislation that removes the paywall on Public Access to Court Electronic Records (PACER) and that modernizes access to court records. This would drastically improve public access to federal court records and allow for increased public understanding of the workings of the federal judiciary.

- **Make the Supreme Court more accountable and transparent.** Congress should direct the Supreme Court to promulgate a code of conduct for itself that will be made publicly available. Additionally, Congress should amend the STOCK Act to require the Supreme Court and the rest of the federal judiciary to comply with periodic transaction reporting requirements. In enacting these reforms, Congress can help strengthen public trust in the federal court system and mitigate some of the concerns arising from the role of partisan politics in judicial selection.

- **Address judicial conflicts of interest.** Congress should enact a requirement that directs all judges and justices to provide short written explanations for their recusal decisions, including when they decline to recuse despite an apparent conflict. This requirement will help ensure that judges and justices are performing their duty in a fair and impartial manner, and will create a paper trail that will help Congress and the public hold individual judges and justices accountable when they aren't.

- **Extend whistleblower protections to judiciary staff and contractors.** Congress should pass best-practice whistleblower protections for the employees and contractors that staff the judicial branch. This would ensure that these individuals can report waste, fraud, and abuse, and promote a more ethical and effective judiciary without putting their own careers on the line.

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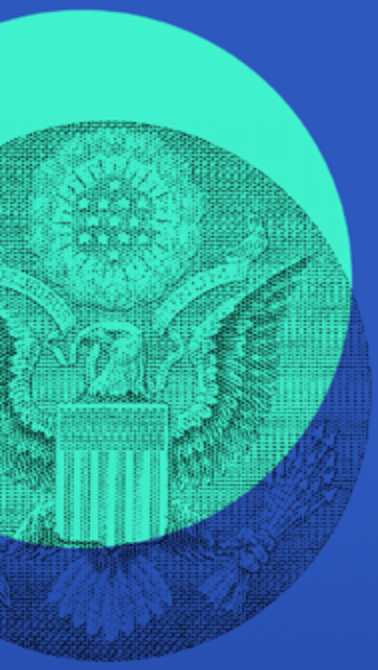
[157] Dylan Hedtler-Gaudette and Anthony Marcum, "Simple Reforms." [see note 150]



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