BAKER’S DOZEN:

Thirteen Crucial Issues Policymakers Can Act on Now

February 2, 2023
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

As the 118th Congress begins its two-year term in earnest, the Project On Government Oversight has again compiled our biennial Baker’s Dozen report. We hope this collection of commonsense recommendations to increase effectiveness, ethicality, and accountability in our federal government will serve as a resource for members of Congress and their staff, new and returning alike, as they set their agendas for the coming term.

The following 13 chapters reflect the breadth of POGO’s mission, our organizational commitment to uplifting justice and equity in our policy work, and the sprawling nature of the challenges our legislative and executive branch policymakers are tasked with solving. Each chapter details a problem that keeps our federal government from accomplishing its goal of safeguarding constitutional principles while also being truly effective, ethical, and accountable to the people. Each chapter also includes recommended solutions to address aspects of those problems.

In our 2023 Baker’s Dozen, we highlight opportunities for better tracking and measurement of federal spending programs, which would help gauge the effectiveness of those programs, ensure small businesses can compete for federal contracts, and incentivize responsible spending at the Pentagon. We offer recommendations for ensuring government officials in every branch of government are adhering to the highest ethical standards, and for enabling meaningful and transparent oversight of our internal watchdogs. And we recommend ways to prevent and address abuse of the government’s national security powers, as well as the U.S. financial systems that insulate corrupt actors from sanctions and accountability.

In addition to recommendations for legislative reforms, we have again included recommendations for administrative actions that can begin to address some of these problems. Though we generally believe that lasting change must come from the legislative branch, the executive branch plays a critical role in executing the policies and solutions we’ve proposed. It can also lead by example in areas where Congress is hesitant to enact changes that may disrupt the status quo.

If Congress and the White House implement the nonpartisan, commonsense recommendations we present, they will be making meaningful and demonstrable
progress toward a government that is accountable to the people it serves — one worthy of holding the public trust.

We at POGO welcome the chance to work with members of Congress and executive branch officials to make that a reality.
Holding Government Officials Accountable for Ethical Leadership

By Walter M. Shaub, Jr., senior ethics fellow

Democracy is an act of trust. We entrust leaders with power to affect our lives, and in return, we expect them to use that power solely and conspicuously for our benefit.

In our current raucous and polarized political environment, there’s likely no one approach that will singlehandedly restore public trust in government. But ensuring transparent, ethical leadership is a critical first step. There can be no doubting that unethical behavior erodes the public’s trust, calling into question the legitimacy of government. It also reduces the effectiveness of government programs, undermines national security, and potentially disrupts economic growth and civic stability. Even the appearance of breaking trust with the public can be incredibly damaging.

The federal government’s three branches each have government ethics programs to prevent misuse of power; however, those programs need improvement. In the legislative branch, the House of Representatives and the Senate have established ethics committees to supervise their ethics programs, but a lack of substantive conflict-of-interest requirements makes those programs weak. In the executive

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branch, the Office of Government Ethics administers a set of government ethics regulations and oversees a strong conflict-of-interest program, but the conflict-of-interest law doesn’t apply to the president or vice president, and the office has no effective means for enforcing the law or regulations against political appointees. In the judicial branch, the Judicial Conference is the supervising ethics office, with day-to-day ethics program activities carried out by the Administrative Office of the United States Courts. But the program lacks transparency, and it doesn’t cover Supreme Court justices.

**Conflicts of Interest**

We begin with Congress, the first branch of government established under the Constitution. Members of Congress currently face no restrictions on their ability to participate in stock trading, despite daily access to insider information. The specter of insider trading looms over the institution, since the people have no way of knowing what nonpublic information their representatives may have received before making stock trades. The mere appearance of insider trading is damaging the public’s faith in the institution, and it may be influencing markets. But it’s clear this issue has moved


far beyond appearances. News reports have exposed widespread conflicts of interest. Members have repeatedly violated financial disclosure requirements.

For a time, 2022 seemed like the year in which Congress would finally address these problems. Bipartisan efforts to address the issue picked up momentum throughout the year, with multiple bills enjoying wide support in both chambers. But the effort stalled before the mid-term election, and the 117th Congress failed to enact a bill.

The need for conflict-of-interest reform is acute, and it is not limited to the legislative branch. In September 2021, the Wall Street Journal revealed that 131 federal judges had presided over cases potentially affecting their own financial interests. In his

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10 James V. Grimaldi, Coulter Jones, and Joe Palazzolo, “131 federal judges broke the law by hearing cases where they had a financial interest,” Wall Street Journal, September 28, 2021,
2021 year-end report, Chief Justice John Roberts acknowledged the news report and emphasized that the judiciary was taking the issue “seriously,” but he downplayed the severity of the problem. This raises a question as to whether the chief justice lacks proper perspective or objectivity regarding the judiciary’s ethical failures. For context, consider that the judges’ conduct in some of these cases could well have been crimes if the conflict-of-interest law for executive branch officials were applicable to them. Roberts, himself, along with other current and former justices may have participated in cases despite owning interests in companies involved.

Prohibiting judges from owning conflicting financial interests would not only bolster public confidence in the impartiality of the justice system, it would reduce the need for case-by-case recusals. If, as appears to be the case from Roberts’ response to the news report, the judiciary is unwilling to ban conflicting holdings, Congress should establish a statutory ban.

Despite a strong conflict-of-interest law applicable to the financial interests of executive branch employees, their spouses, and their minor children, the executive branch has not been immune to conflict-of-interest problems. One shortcoming is immediately obvious: The law does not apply to the president or vice president. The immediate and trickle-down consequences of their exemption have been made all too clear. But even in the case of executive branch officials who are covered by the


12 18 U.S.C. § 208(a) (2022) [see note 3].


14 18 U.S.C. § 208(a) (2022) [see note 3].

15 18 U.S.C. §§ 202(c), 208(a) (2022) [see note 3].

conflict-of-interest law, news outlets have reported instances of either conflicting financial interests or the appearance of conflicts of interest. Concerns have been especially sharp with respect to the Federal Reserve Board and Federal Reserve banks, whose activities can move markets and affect a wide range of financial interests.

**Ineffective and Unequal Enforcement**

The executive branch suffers from another problem: the lack of an effective mechanism for enforcing the conflict-of-interest laws and ethics rules against political appointees at the top. Federal agencies enforce ethics rules against roughly 2.1 million career executive branch employees through well-established disciplinary

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procedures, but the government’s structure largely insulates the subset of roughly 4,000 political appointees from accountability for their actions. Only the president can fire a presidential appointee, and senior administration officials are responsible for hiring and firing lower-level political appointees.

The Office of Government Ethics is powerless to take any disciplinary action directly against political appointees who violate conflict-of-interest laws or government-wide ethics regulations. Congress has provided a mechanism for administrative enforcement of only one ethics law: the Hatch Act, a law prohibiting misuse of government positions to influence elections. The Office of Special Counsel is authorized to file complaints with the Merit Systems Protection Board alleging violations of the Hatch Act. Among other penalties, the board can impose civil monetary penalties on employees it determines have violated the law. But even this meager enforcement mechanism is not being used to its full extent. The Office of Special Counsel has declined to file complaints seeking civil monetary penalties against those presidential appointees who are subject to the Merit Systems Protection Board’s jurisdiction.

More stringent ethics enforcement mechanisms for the executive branch are critical for holding appointees accountable and for ensuring equal application of the law. In

22 5 U.S.C. § 1215(a) [see note 21].
24 An exception to the law authorizing administrative imposition of fines bars the Office of Special Counsel from filing complaints against a subset of presidential appointees whose appointments have been confirmed by the Senate. 5 U.S.C. § 1215(b) (2022), https://www.law.cornell.edu/uscode/text/5/1215. The exception does not apply to other presidential appointees, whom the president can appoint without Senate confirmation. But the Office of Special Counsel has elected to act as though the exception applies to all presidential appointees.
the last administration, for example, the special counsel condemned then-presidential aide Kellyanne Conway for what he characterized as repeated, willful violations of the Hatch Act. But after the president refused to remove Conway, the special counsel dropped the matter, electing not to file a complaint with the Merit Systems Protection Board seeking civil monetary penalties. Conway was one of numerous political appointees that the special counsel found guilty of Hatch Act violations in the last administration. And, like all but one of the others, she faced no consequences. The only time the special counsel sought to impose a fine was when the accused appointee was a Black woman. POGO raised its concern about potential implicit bias then, and a second time after the special counsel admonished another Black female presidential appointee for actions nearly identical to those alleged against the former president’s white son-in-law. Implicit bias can infect all manner of decision-making, and while these two instances are not enough to show a pattern, they warrant further scrutiny of the prosecution decisions of the Office of Special Counsel.

**Supreme Court Ethics**

Though every other federal judge in the United States is subject to binding ethics rules, the Supreme Court’s members have refused to adopt a code of ethics. The

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lack of constraints on their individual conduct and the vagueness of recusal standards undermine the credibility of a court already at the center of controversy. Absent an ethics code, the justices are not behaving admirably. Reporters have chronicled how justices indulge in the perks of high office by accepting offers of lavish travel to exclusive venues from individuals and organizations who may be seeking to influence them. They appear to politicize the court by speaking, often behind closed doors, to private groups that advocate distinct policy agendas. They profit off their public

Court.” His silence on the question of creating a separate code of ethics for the Supreme Court suggested a similar hostility to that alternative. A decade later, when several bills and a resolution addressing the need for a Supreme Court code of ethics were pending in Congress, Roberts asserted that the independence of the judiciary depends in part on its “power to manage its internal affairs.” See John G. Roberts, Jr., Supreme Court of the United States, 2011 Year-End Report on the Federal Judiciary, (December 31, 2011), 5, https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf; Roberts, 2021 Year-End Report, 1 [see note 11].

29 Task Force on Federal Judicial Selection, Project on Government Oversight, Above the Fray, 15-17 [see note 28].


service by selling books about their lives or the law. And they speak intemperately about sensitive matters that call the court’s integrity into question.

Currently, each justice is the sole arbiter of the propriety of their own actions. A clear set of rules would empower justices to bolster public trust through transparent compliance. It would also foster a common understanding among the nine justices as to the ethical expectations of their high office and return to the American people power to evaluate the conduct of individual justices against objective standards.

Among other ethical questions, each Supreme Court justice is able to rely on their own discretion when applying recusal standards. And while the law requires recusal in a limited number of specific circumstances and whenever “impartiality might reasonably be questioned,” it is the judges and justices themselves who are tasked with evaluating the reasonableness of questions regarding their own impartiality. The recusal decisions of federal district and appeals court judges are subjected to review on appeal, but the decisions of Supreme Court justices are subject to no such review.


34 To the extent that the justices’ reluctance to embrace a code of ethics may be predicated on the infeasibility of enforcing rules against one another, they conflate the enforceability of rules with the value of having rules. There is, after all, also no mechanism for enforcing the code of ethics applicable to all other federal judges, yet even Roberts has lauded its value. See United States v. Microsoft Corp., 253 F.3d 34, 75 (D.C. Cir. 2001) (per curiam), https://www.law.berkeley.edu/files/US_v_Microsoft3.pdf; Roberts, 2011 Year-End Report, 4-5 [see note 28].


Additionally, a lack of any requirement for justices and judges to explain their recusal decisions prevents the public from evaluating their compliance with applicable standards. The public is also in the dark about payments to the spouses of justices and judges from clients who may appear before the courts.\footnote{Judicial Spouses Shouldn’t Be Able to Hide Lucrative Contracts and Clients,” Fix the Court, October 20, 2022, \url{https://fixthecourt.com/2022/10/judicial-spouses-shouldnt-be-able-to-hide-lucrative-contracts-and-clients/}.

To earn the public’s trust, government officials must do more than just live up to high ethical standards. They must also show the public that they are living up to those standards. The very premise of representative government depends on the public’s ability to hold government officials accountable. For that reason, Congress should make government ethics records readily accessible to the public.

**Recommendations for Legislative Action**

**Prohibit conflicts of interest for federal elected officials, Supreme Court justices, and judges.** Congress should prohibit federal elected officials, Supreme Court justices, and judges — along with their spouses and minor children — from owning or trading financial interests that conflict with their official duties. Lawmakers should craft language carefully to avoid weakening existing ethics obligations, such as the strict requirements for establishing qualified blind trusts.

**Prohibit conflicts of interest for senior officials in financial agencies and Federal Reserve banks.** Congress or executive branch leaders should prohibit senior officials in financial agencies and Federal Reserve banks — along with their spouses and minor children — from owning or trading a wide range of potentially conflicting financial interests. Ownership of diversified mutual funds and exchange-traded funds should be permitted, but only with 45 days advance notice of any trades. Appropriate exceptions would permit investments related to a spouse’s employment and certain investments that are not amenable to divestiture, though those investments would continue to be covered by the conflict of interest law.\footnote{18 U.S.C. § 208(a) (2022) [see note 3]. The general counsel of each financial agency should be authorized to prohibit all trades by covered agency (or bank) employees.
during brief blackout periods prior to the agency taking significant actions likely to affect markets.

**Create a strong mechanism for enforcing executive branch ethics rules.** Congress should codify a strong mechanism to address violations of government ethics rules by political appointees in the executive branch, balancing the public's need for accountability with fairness to individual political appointees. To address potential ethics violations, legislation should require the Office of Special Counsel to investigate alleged violations of ethics rules at the request of the director of the Office of Government Ethics. Following an investigation and an opportunity for the political appointee to respond, the legislation would authorize the director to seek civil penalties for suspected violations before the Merit Systems Protection Board. The political appointee could then appeal to the Court of Appeals for the Federal Circuit for a limited judicial review of any adverse board decision, just as the law currently permits career employees to do.

**Require the Office of Special Counsel to report to Congress on its Hatch Act enforcement.** Congress should hold the Office of Special Counsel accountable for vigorous and even-handed enforcement of the Hatch Act by requiring it to disclose information about its enforcement activities. Specifically, the office should be required to notify Congress whenever it elects not to investigate an allegation against a political appointee or, in the case of a violation, file a complaint with the Merit Systems Protection Board seeking a civil penalty. As a safeguard against implicit bias, the office should publicly disclose anonymized demographic information pertaining to its Hatch Act prosecution determinations, further distinguishing between political appointees and career employees.

**Establish ethics requirements for Supreme Court justices.** Congress should ensure that Supreme Court justices are bound by a code of ethics, clarify recusal obligations, and enact a comprehensive ban on justices receiving earned income (including royalties) and on justices receiving any payment or reimbursement for travel expenses. The code of ethics should address issues of independence, impartiality, the appearance of impropriety, outside activities and affiliations, political activity, gifts, and transparency. Among other things, recusal standards should address instances in which a party or affiliate of a party spent money in support of a justice’s nomination or
provided income or a gift to the justice, member of the justice's immediate family, or business owned by any these individuals. Justices should also be required to explain their recusal decisions. To provide further transparency for recusal decisions, Congress should require disclosure of any source of income that paid the spouse of a justice or judge more than $5,000 for legal, consulting, or related work the spouse performed.
Tracking Federal Spending for Impact, Equity, and Constitutionality

By Sean Moulton, senior policy analyst, and Dylan Hedtler-Gaudette, government affairs manager

The federal government derives much of its money, just like its overall authority, from the people. And as such, the government owes taxpayers some degree of accountability for the trillions collected and spent in their name each year.

President Ronald Reagan famously said, “Trust but verify.” While Reagan was referring to international negotiations with the former Soviet Union, many taxpayers feel the same way about their money and the federal government. The public deserves transparency around the use of these funds to ensure their money is being properly allocated, and our internal and external watchdogs need transparency to fight waste, fraud, and abuse in these spending programs.

The federal government has an unfortunate record of fiscal mismanagement, waste, and outright fraud in federal spending programs. Perpetuating this problem and undermining efforts at correcting it is the limited amount of data collected and public information provided about federal awards. In a recent example, the COVID assistance programs of the last few years have distributed hundreds of trillions of dollars — and experienced higher than usual levels of fraud and waste, evidence of which continues to be uncovered. While Congress made efforts to attach to the funds the same best practice recipient reporting requirements that successfully mitigated waste, fraud, and abuse of American Recovery and Reinvestment Act funds in 2009, the executive branch ignored such efforts and used existing federal spending data collection methods. Beyond the implications for higher fraud, this decision guaranteed that

federal agencies, Congress, and the public would be left guessing about the specific impact these relief programs had across the country.

Subawards and Assistance Awards

Information currently collected about federal awards is neither detailed nor reliable enough to answer fundamental oversight questions. What impact did this spending have on employment? Were some communities missed by this program? How equitably were these funds distributed? We do not know.

This problem is illustrated well by our long deficient tracking of subaward information, a critical component of federal spending. Many federal awards go to state or local agencies, which then distribute them to specific recipients or locations. Therefore, subaward data is a critical link in the chain of transactions, one that would allow us to follow federal dollars further, better see which communities that programs are reaching and which communities are left out, and better measure the equity and impact of federal spending. But this link remains broken, as the subaward data collected remains wholly unreliable. Many programs, for example, are missing almost all data about subawards, while other programs create multiple records about the same subaward.41 While audits of the quality of spending data overall, conducted under the Digital Accountability and Transparency Act, have ushered in modest improvements in the quality of data for prime awards, those audits have ignored the most broken component of federal spending data — subawards.42 The reporting of subaward data must be fixed if the public is to understand where their tax dollars ultimately go.

Another major data gap that became clear during the COVID-19 pandemic spending is that the federal government does not track as much information about assistance awards (grants, loans, direct payments, insurance awards, and others) as it collects for contracts. Agencies don’t report demographic information like the gender,

ethnicity, or veteran status of business owners who receive assistance as part of their awards tracking. Nor do they systematically collect data on the industry sector of recipients. No information is collected to determine whether a business receiving assistance is a Historically Underutilized Business Zone Firm, a Labor Surplus Area Firm, or an 8(a) Business Development Program participant. All of these data points and more have been collected for years for each federal contract. This enormous data gap means there is no good way to evaluate assistance spending for equity and impact. It also makes it nearly impossible to measure whether agencies are meeting congressional mandates to prioritize traditionally underserved communities, where those statutory directives exist.

**Apportionments and Oversight**

There are also increasing concerns about the legal compliance of some spending actions by the executive branch. As the executive branch seeks to implement the spending allocations set by Congress, the Office of Management and Budget issues legally binding plans governing the use of federal funds by agencies. This planning process, called apportionment, is so shrouded in secrecy there are concerns that the plans may overstep the executive branch's legal authority. Since Congress is explicitly endowed with the “power of the purse” in Article I, Section 9 of the Constitution, this secrecy and potential executive overreach in spending policy runs

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43 These are just a few examples of different business designations. The Small Business Administration oversees the HUBZone program and the 8(a) Business Development Program to assist small businesses in underutilized areas or disadvantaged small business owners. The Department of Labor issues the annual Labor Surplus Area list, which details locations that have had unemployment rates 20% or more above the average for two years. See “HubZone Program,” U.S. Small Business Administration, accessed January 10, 2023, [https://www.sba.gov/federal-contracting/contracting-assistance-programs/hubzone-program](https://www.sba.gov/federal-contracting/contracting-assistance-programs/hubzone-program); “8 (a) Business Development Program,” U.S. Small Business Administration, accessed January 10, 2023, [https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program](https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program); “Labor Surplus Area: Fiscal Year 2023,” U.S. Department of Labor, accessed January 10, 2023, [https://www.dol.gov/agencies/eta/lsta](https://www.dol.gov/agencies/eta/lsta).


the risk of violating the Constitution. If Congress does not enforce these checks and balances, and if it does not act assertively to protect its spending power, then the executive branch will continue to encroach and aggrandize itself by allocating public dollars in ways and for purposes not approved by the people's tribunes in the legislative branch. Congress has started to address this problem by requiring the Office of Management and Budget to publicly post these apportionment decisions.

In addition to issues with the Office of Management and Budget and the apportionment process, there are weaknesses and gaps in the two key budget and appropriations laws, the Antideficiency Act and the Impoundment Control Act. These flaws create additional opportunities for the executive branch to circumvent the will and intent of Congress when it comes to spending public dollars. One weakness pertains to the Government Accountability Office and its ability to investigate potential violations of these two laws. Under current law, federal agencies are not required to cooperate with Government Accountability Office investigations, making accountability harder to pursue and obtain. Furthermore, agencies do not have a permanent mechanism to report to Congress when directions from the Office of Management and Budget disrupt the agency's ability to execute its budgetary directives as Congress instructed. Though Congress has shown some desire to fix this, reform legislation has not succeeded yet.

Money may not, as the saying goes, make the world go 'round, but it is an important and powerful resource. A resource that must be closely and publicly monitored not

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46 U.S. Constitution art. I § 9, cl. 7.
49 Protecting Our Democracy, statement of Liz Hempowicz, [see note 45].
only to minimize waste, fraud, and abuse but also to enable our policymakers to accurately measure the impact of spending and to redesign programs if they are not benefiting the communities they’re intended to serve. Congress and the administration should move forward with the following reforms to make it clear that they are worthy stewards of the public's tax dollars.

**Recommendations for Legislative Action**

Close the reporting loophole between assistance and contracts by requiring agencies to collect the same data from businesses receiving federal grants, direct payments, and loans that they do for contracts. This would include information on the industry sector of businesses, as well as demographic data on business owners. Congress should also require the collecting of key new data points for all prime and subaward recipients of federal funds, including the number of people employed by the company and an estimated number of people benefiting from the funded activity. This would allow policymakers to accurately assess federal spending programs for impact and equity, as well as enable watchdogs to better identify waste, fraud, and abuse.

Require a comprehensive audit of subaward data and reporting. Congress should mandate a regular audit of subaward data and reporting. The audit should be conducted by the Government Accountability Office and should include recommendations to update the system and address all identified issues. Deadlines should be established for both the audit and the overhaul to ensure issues are addressed quickly and important fixes are not delayed. Improved subaward information will enable better oversight of federal funds as everyone is able to track the money further.

Provide greater authority to the Government Accountability Office to address violations of appropriations laws. Congress should enhance the Government Accountability Office’s capacity to investigate and detect violations of appropriations law, and legally require federal agencies to cooperate with the office when such potential violations are being investigated. This will help ensure the executive branch is spending hard-earned taxpayer dollars in the manner and for the purposes that Congress intended. Such reforms will also increase the likelihood of meaningful accountability in the face of lawbreaking.
Enact reforms to key budget and appropriations laws to ensure compliance and to crack down on spending secrecy and corruption. Congress should amend the Impoundment Control Act by adding penalties for violations of the law. Congress should also amend the Antideficiency Act by requiring more reporting and public transparency in the face of potential violations of the law. These reforms will promote more accountability and transparency around the execution of federal spending.

**Recommendations for Executive Action**

Upgrade current reporting of federal awards to fix key problems and expand the data collected. The Office of Management and Budget has the authority under existing spending transparency statutes — the Federal Funding Accountability and Transparency Act, and the Digital Accountability and Transparency Act — to make changes to the reporting on federal awards that ensure proper oversight. The Biden administration should use this authority to overhaul subaward reporting systems and ensure the data collected is as complete, accurate, and timely as possible. The administration should also look to expand the data collected on federal awards, closing the assistance reporting loophole and adding needed new data fields, such as the number of people employed by award and subaward recipients, to allow for fuller oversight.
Closing Loopholes in U.S. Systems that Enable Foreign Kleptocracy and Malign Influence

By Zoë Reiter, director of strategic initiatives and partnerships, and Joanna Derman, policy analyst

Today, corrupt officials, kleptocrats, traffickers of all kinds, tax dodgers, and criminals around the world take advantage of gaps in the U.S. financial and regulatory system to hide and grow their wealth. These corrupt dealings pose a direct threat to democratic institutions, including those in the United States. They allow for the concentration of power in the hands of a powerful few who extract their countries’ wealth with impunity. They help fuel kleptocrats’ efforts to weaken democratic institutions in the United States and other countries as part of their malign influence campaigns, and they weaken the effectiveness of targeted sanctions, reducing the number of ways the United States can meaningfully respond to international threats before turning to military solutions. The loopholes that enable this corruption must be closed.

Money Laundering

Russian President Vladimir Putin provides an instructive example of those who hide and grow their wealth within the U.S. financial system. Putin’s sizeable wealth is built with money he has illegally obtained from Russian citizens and the Russian government. To hide and grow his fortune, he allegedly parks large sums of money in complex, anonymous shell companies set up by or linked to his closest advisors, family, and friends. So it is no surprise that the U.S. financial system, ranked as the

most secretive financial jurisdiction in the world, serves to enable Putin’s network and other corruption networks all around the world.\textsuperscript{54}

Kleptocrats like Putin rely on opaque, stable financial structures to launder and grow their ill-gotten gains. By obscuring their assets, they dilute the effectiveness of U.S. sanctions, which rely on knowing exactly who really owns what in order to apply financial pressure.

**Malign Influence**

To sustain their corrupt dealings and expand the geopolitical alignment of international policies in favor of those dealings, kleptocratic and authoritarian regimes also exercise malign influence in the United States and in other countries to ensure policy outcomes that are favorable to their interests.

Malign influence can manifest in different ways, including purposefully opaque campaign financing, destabilizing social media campaigns, and other forms of hostile and covert efforts to disrupt U.S. political discourse. Those tracking publicly known cases of malign influence by Russia and China and their proxies have identified 17 incidents targeting the U.S. since 2008.\textsuperscript{55} These reported cases likely only represent the tip of the iceberg.

A specific and growing form of documented malign influence operation includes conducting covert influence campaigns through power brokers in the U.S. who use their proximity to power to covertly or illicitly advocate for policies of foreign adversaries. These power brokers, defined internationally as “politically exposed persons,” are people who currently hold or formerly held senior positions of political power in the U.S. or abroad, be it in public office, political parties or campaigns, or international organizations, as well as their close associates and family members.

\textsuperscript{54} “Financial Secrecy Index, 2022,” Tax Justice Network, accessed January 24, 2023, \url{https://fsi.taxjustice.net/}.

Because of their close proximity to power, politically exposed persons are at a higher level of risk for serving as vehicles of corruption and malign influence.

**Beneficial Ownership**

In the past few decades, Congress has passed critical laws to reform the banking sector by instituting better due diligence requirements. In 2020, Congress passed the Corporate Transparency Act, requiring individuals who profit from shell companies, known as beneficial owners, to disclose certain identifying information to the federal government. \(^5^6\) Under this law, the Department of the Treasury is also directed to set up a database to store all incoming beneficial ownership information, so that law enforcement authorities can protect our financial institutions from being used for money-laundering or other illicit activities.

While these milestones are encouraging, the federal government's attempt to combat money laundering still falls short. This is especially the case in the real estate sector, as the U.S. has shockingly few regulations on who is able to purchase a home or property. \(^5^7\) Added to that, certain professionals — including real estate professionals, lawyers, and trust and company service providers — are recruited by bad actors to set up complex anonymous structures that obscure their owners' true identities. \(^5^8\) Right now, these individuals aren't required to find out who the real investors are behind the purchases and investments they make for clients. They don't even have to report suspicious activity to law enforcement. \(^5^9\)

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Fighting Financial Crime

Another challenge in combatting financial crimes is that the federal agencies tasked with this mission often lack the resources they need to do their work. Though in recent years Congress has increased funding levels for the Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN), which is the federal entity primarily tasked with combatting money laundering and illicit cash flows, the scope of FinCEN’s critical mission requires continued resources. Without the proper funding, FinCEN cannot effectively strengthen existing anti-money laundering programs and improve data sharing.\(^{60}\)

As experts have already underscored, preventing corruption on this scale would not only directly crack down on financial crime, it would also bolster our ability to fight socio-economic inequality and begin to close the racial wealth gap, both of which are at least partially the products of foreign opaque cash driving up the cost of housing across the county.\(^{61}\)

The bottom line is that we know kleptocrats seek to use illicit flows of wealth to influence U.S. policy, and we know who they are recruiting to help them. We also know that our financial systems make it easy for corrupt actors to hide and move their wealth with impunity. To address these problems, we need to make it harder to anonymously own and anonymously operate a company, and we must hold individuals who facilitate corruption accountable.

Recommendations for Legislative Action

**Strengthen capacity of law enforcement to crack down on financial corruption.**

Congress must ensure that all relevant federal agencies have the tools necessary to hold perpetrators of illicit financial activities accountable. Deterring potential threats requires robust enforcement mechanisms, such as the ability to swiftly terminate contracts, levy financial fines, impose civil and criminal penalties, and possibly debar

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contractors who either violate federal transparency protocols or fail to comply with mandatory reporting requirements.

**Increase funding for anti-money laundering efforts and for combatting illicit foreign flows of wealth into the U.S.** Congress should increase funding to federal agencies, like the Department of the Treasury’s Financial Crimes Enforcement Network, that combat money laundering and illicit foreign flows of money into the United States. This funding should be reliable, consistent, and prioritized in every fiscal year appropriations cycle to ensure that the government can afford to strengthen existing anti-money laundering programs. Moreover, Congress should take the necessary steps to conduct rigorous oversight regarding how that money is distributed within the agencies to assess whether those funds are being utilized in a manner that best meets the challenges at hand.

**Go after anonymous ownership.** Congress should fix loopholes in section 885 of the Fiscal Year 2021 National Defense Authorization Act and require all companies receiving federal contracts in excess of $500,000 to publicly disclose their beneficial ownership information to the federal government for review. Lawmakers should ensure that section 885 no longer allows covered entities to decline to submit their beneficial ownership information.

**Close loopholes in financial systems that allow individuals to enable corruption.** Congress should introduce much-needed anti-money laundering regulations to require trust companies to find out the true owners of the purchases and investments they make for clients. This would help flag and stop the flow of illicit funds into the United States, contributing to the fight against corruption and the fight for our national vision of economic equity, transparent governance, and global anti-poverty.

**Strengthen deterrence and detection against malign influence.** Congress should pass legislation that creates a uniform definition of politically exposed persons, including domestic politically exposed persons as well as those from international organizations, and their close associates and family members. This would ensure that such individuals are appropriately identified and assessed for risk across relevant oversight and compliance programs within the U.S. anti-money laundering framework. Congress should also create explicit requirements to implement risk-based customer due diligence transactions for transactions involving politically exposed persons.
These requirements should not only apply to financial institutions currently covered in the federal anti-money laundering regime but also to other designated, non-financial businesses and professions that handle significant politically exposed persons’ financial transactions.

**Recommendations for Executive Action**

Require real estate and private equity sectors to expand customer due diligence mechanisms. The Department of the Treasury should promulgate rulemaking for existing laws to ensure that investment advisors and real estate professionals are required to obtain the true identity of their clients and report suspicious activity to the Treasury Department.  

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Promoting and Preserving the Integrity of Government Policymaking

By Dylan Hedtler-Gaudette, government affairs manager

One way that lack of public trust in government manifests is a pervasive sense that our government in Washington is corrupt, and that those who work in and around government are the agents and drivers of that corruption. In 2021, the American public ranked lobbyists and members of Congress as the least honest and least ethical professionals in the country, with both receiving negative ratings of 60% or higher.

The public is right to be vigilant. Government corruption puts a thumb on the scale in favor of the already powerful and well-connected. It allows them to gain undue advantage, and in turn corrodes the efficacy of public policy at the expense of everyone else, especially marginalized communities underrepresented within Congress and among those who influence it. After all, if large corporations exploit programs and dollars intended for legitimate small businesses, or if certain powerful companies are awarded lucrative contracts that crowd out genuine market competition, or if ineffective enforcement of ethics rules fosters widespread conflicts of interest and potential insider trading among government officials, it is the general public that loses out.

It is time for Congress to act by advancing reforms to lobbying rules and other restrictions on the actions of incoming and former government officials as they enter or leave government service. Such reforms would serve multiple essential purposes, boosting public trust of the federal government while preventing the kind of influence-peddling and special interest capture that leads to corruption, abuse of power, wasted taxpayer dollars, and ineffective policymaking.

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64 Saad, “Military Brass, Judges Among Professions at New Image Lows” [see note 63].
Foreign Agent Registration

One particularly glaring manifestation of this problem is undue foreign influence on domestic policymaking. This influence comes in the form of direct lobbying as well as more insidious influence peddling. This influence may not be captured under the current lobbying statutory framework, which includes the Lobbying Disclosure Act, a law that governs direct domestic lobbying by requiring registration and certain informational disclosures by lobbyists, and the Foreign Agents Registration Act, a law that facilitates a more comprehensive set of lobbying and representational rules for those operating on behalf of foreign entities, including more stringent disclosure parameters.65

Two illustrative weaknesses in the Foreign Agents Registration Act are the act’s outdated process for submission and public posting of registration materials, and a glaring loophole that permits some foreign agents to skirt the act entirely and register under the less stringent Lobbying Disclosure Act.66

Furthermore, as a recent POGO investigation highlighted, there are numerous instances of former high-ranking U.S. military officers pursuing lucrative employment opportunities with foreign nations and foreign-owned businesses, often with the explicit or implicit expectation they will use their former positions, and the insight and connections they developed in them, to influence U.S. policy for the benefit of those foreign entities.67 This is facilitated — even blessed — by Congress, in a law that created a bureaucratic process allowing former military officials to obtain waivers from the head of the relevant military branch and the secretary of State. These waivers grant exceptions to the emoluments clause of the Constitution.68 This process

is too opaque for adequate oversight, and it appears to be too permissive to protect our domestic policy from undue foreign influence.

**Cooling Off Periods**

There is a significant domestic angle to this problem as well. For example, former senators and representatives, as well as staff from both chambers, can trade on the insight and connections they made as public servants by becoming lobbyists and professional influence-peddlers on behalf of corporate interests. The Senate currently has a cooling off period that requires former senators to wait two years before becoming lobbyists. The House has a similar restriction, though the cooling off period for former representatives is only one year. Similar rules are in place for former congressional staffers from both chambers. However, the ability of these former congressional members and staff to influence their former colleagues is likely to extend well beyond those timeframes.

Former government officials using their connections to shape and influence policy for private clients is not exclusive to Congress. There are dozens of federal agencies that comprise the executive branch, and officials from virtually all those entities end up leaving government service to pursue employment with corporate entities they used to oversee, or to become lobbyists who specialize in lobbying their former agencies. Given how impactful these agencies are in terms of promulgating and implementing wide-ranging regulations and distributing public dollars intended for vital public goods — education, public health, national defense, clean water access, affordable housing programs, agricultural subsidies, and energy production, among many others — it is

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72 *The Senate Code of Official Conduct*, Rule 37.9 at 18 [see note 70]; *House Ethics Manual* [see note 71]; 18 U.S.C. § 207 [see note 70].

essential that rules exist to ensure the integrity of these federal agencies. The programs that agencies manage must be facilitated on the basis of what is best for the public and most consistent with the law and congressional intent, not on the basis of which industries, companies, and interest groups have gained greatest access, or which have the most former agency officials on their payrolls.

Congress should enact restrictions on both incoming and outgoing officials to minimize this revolving door’s corrosive effects on the policymaking and implementation processes. Stronger restrictions are not without precedent. The Biden administration’s ethics executive order provides several good ideas in this regard.\textsuperscript{74} There are also better revolving door ethics requirements in place for high-ranking Department of Defense officials that include longer cooling-off periods and a definition of lobbying which accounts for the “behind-the-scenes” work that plays a big role in companies gaining inside information that gives them an unfair competitive advantage.\textsuperscript{75}

Considering the very real, as well as perceived, problem of government corruption and its ill effects on governance, Congress must act to advance stronger and more efficacious rules around lobbying and special interest influence across the board.

**Recommendations for Legislative Action**

**Enact restrictions on lobbying for and employment with foreign entities.** Congress should enact restrictions and enhanced reporting and disclosure requirements on executive and legislative branch officials that regulate their ability to work for foreign entities after they leave government service. It should also place certain restrictions on individuals entering government service if they have previously worked for foreign entities. These restrictions could be modeled on cooling-off periods and recusal requirements currently in place for lobbying but should be applied to general


employment with a specific set of foreign entities. Reporting enhancements should include, but not be limited to, reforming the foreign emoluments waiver process for former military officials. In addition, Congress should close the loopholes, such as the Lobbying Disclosure Act (LDA) exemption, in the Foreign Agents Registration Act (FARA). These reforms would make the registration process more accountable and transparent, so it adequately protects national security interests.

**Implement stronger post-government employment restrictions for Congress and executive branch officials.** Congress should increase the post-government contact ban for members of Congress and staff in both the House and Senate. The current one-year ban in the House and two-year ban in the Senate are insufficient to prevent former members of Congress and senior staff from trading on relationships for future employment. Additionally, Congress should subject all executive branch senior officials to a similar cooling off period, and implement the same restrictions to the shadow lobbying activities that apply to former Department of Defense officials. Other pre-government and post-government employment rules, along the lines of those contained in President Joe Biden’s ethics executive order, should also be considered. For example, Congress might consider tightened recusal periods for officials coming into government from industries they will be regulating and expanded communications restrictions for outgoing officials. These reforms will better insulate federal policymaking from outsized industry influence and promote policy that puts the public interest first.

**Tighten lobbying requirements and close loopholes in the Lobbying Disclosure Act and Foreign Agents Registration Act.** Congress should update the Lobbying Disclosure Act (LDA) and Foreign Agents Registration Act (FARA) to reflect modern realities. For example, the Lobbying Disclosure Act should cover more lobbyists by lowering the time threshold that triggers registration and reporting as a lobbyist from jobs where 20% of an employee’s time is spent lobbying to 10%. The Foreign Agents Registration Act should also be modernized and brought into the digital world by revising the ways in which registration and associated materials are submitted and made accessible to the public. These reforms would ensure that the law reflects the full scope of this influence industry.
Enacting Federal Buying Reforms to Protect Taxpayer Dollars

By Scott Amey, general counsel

In fiscal year 2022, federal agencies spent over $620 billion on goods and services.\textsuperscript{76} The government operates under robust contracting regulations, but those regulations are riddled with loopholes. While small businesses are the backbone of the U.S. economy, the benefits of taxpayer-funded contracts rarely flow their way, as federal small business goals are a very small piece of the contracting pie.\textsuperscript{77} Projects are often assigned to large contractors, and too often they balloon over budget and fall behind schedule. To add insult to injury, the U.S. federal government — the world’s largest consumer — only recently started to do its part directing spending in ways that would benefit entrepreneurs and small business owners in underserved communities.\textsuperscript{78} POGO has long advocated for federal buying reforms. By addressing a few key problems, the 118th Congress has an opportunity to protect taxpayer dollars and better ensure that federal spending benefits us all.

**Bundled Requirements**

When it comes to federal government contracts, small businesses are left with the scraps after large contractors gorge at the trough. This inequity, which can have an impact on minority-, women-, and veteran-owned businesses, is caused when agencies bundle unrelated requirements together so that only a handful of large

\textsuperscript{76} “Advanced Search,” USASpending, data for fiscal year 2022, data searched January 24, 2023, \url{https://www.usaspending.gov/search/?hash=3344709d2de59d1c6c19104655195265}.


contractors are capable of meeting all of them. Large companies take advantage of a system that allows for bundling of requirements so only they can bid, and small contractors are left fighting over subcontracting opportunities. While there has been some government recognition that bundling might bring efficiencies, officials also know that it harms small businesses.

Despite attempts to limit contract bundling requirements, definitional limitations and provisions allowing for the practice still exist. For years, POGO has fought government efforts to supersize federal contracts and to shut small and mid-sized contractors out of the bidding process. Recently, POGO exposed examples of large companies receiving contracts from programs clearly set aside for small businesses. The federal government counted those dollars toward small business spending goals, despite small businesses not getting a dime of that money. Changes to protect small businesses and ensure that small business award totals are representative of only those contract dollars that go to genuine small businesses are long overdue.

“Commercial” Products and Services Definition

Another legacy clean contracting issue for POGO has been the problematic “commercial” products and services definition. It is nothing more than a way to rip off taxpayers. Once a product or service is deemed commercial, federal contractors are excused from providing any useful cost or pricing information to the awarding agency. The result is time wasted on insufficient market research and federal money

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81 Federal Acquisition Regulation, Subpart 2.101 (2022), https://www.acquisition.gov/far/part-2; Federal Acquisition Regulation, Subpart 7.107-3 [see note 80].
wasted on bad deals. Since the 1990s, POGO has urged Congress to redefine “commercial” items to mean products or services that are actually sold to the general public in like quantities. Currently, there are no requirements on contractors to provide agencies with certified cost or pricing information when the government is acquiring commercial products or services on a sole-source basis, even if the awarded contract contains no flexible pricing provisions. Without such information, there is zero assurance that costs or prices are fair and reasonable.

**Truth in Negotiations Act Provisions**

In another obvious shortcoming of current contracting regulations, contractors are generally not required to correct overpricing issues — or to provide mandatory refunds. Over time, changes to pricing disclosure laws and anti-price gouging remedies have riddled our procurement laws with exemptions and loopholes, forcing agencies to frequently buy products and services without competition to drive down prices or certified data ensuring prices are fair and reasonable. The current contracting process treats tough negotiations with companies as a cardinal sin to be avoided in all circumstances, leaving taxpayers footing much steeper bills than necessary. Remedies for defective pricing, including price adjustments (mostly in the form of refunds) happen infrequently, and only when contracts are subject to the

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89 Federal Acquisition Regulation, Subpart 15.402(a) (2022), [https://www.acquisition.gov/far/part-15#FAR_15_402](https://www.acquisition.gov/far/part-15#FAR_15_402).
Truth in Negotiations Act (TINA). They have become increasingly rare. In many procurements, the act’s mandatory refund provision is not triggered, and there is no mechanism to suspend a contractor from future government business or to classify a company as ineligible for contract awards should it fail to submit requested cost information. Without such mechanisms, companies will continue refusing to cooperate and will rake in excess profits.

Unfair Contract Negotiation

Yet another area where our contracting laws allow for unmitigated price gouging is the progress payment system for large contractors, which currently provides contractors 80% of incurred costs, a number that was raised to 90% during the COVID-19 pandemic, rather than payments based on achieving performance-based metrics.\(^9^0\) Simply put, this means the federal government is paying on a fixed timeline, regardless of whether contractors are meeting their output or quality obligations. Given constant program schedule delays and cost overruns from defense contractors, the Trump administration piloted a program to address this issue, but it was grounded quickly when companies “blasted the proposal.”\(^9^1\) The program provided incentives for contractors who satisfied certain conditions. These included meeting program goals and schedules 95% of the time in the previous fiscal year, providing the Pentagon accurate and timely certified cost and pricing data, complying with certain financial transparency requirements, and fulfilling small business subcontracting goals — including providing employment opportunities specifically for blind people and people with severe disabilities.\(^9^2\) In the absence of such incentives, taxpayers are


often stuck subsidizing poor performing contractors and receive too little too late for their money.

**Risky Investments**

Another long-standing problem is that the government frequently enlists risky contractors that are repeated law breakers, or contractors with known histories of poor performance. This is in part because contracting officers review only a limited list of criminal, civil, and administrative violations, one that doesn’t provide a complete responsibility record for contractors vying to receive federal taxpayer dollars.\(^9^3\) That information is important for our national security, but is not adequately collected and shared with contracting officers or the public.

The public deserves to know about anyone receiving federal funds, including information about organizations’ ownership structures and any history of their operating outside the law. Over a decade ago, POGO worked with Congress to create a system,\(^9^4\) the Federal Awardee Performance and Integrity Information System (FAPIIS), to track the performance and integrity records of those receiving taxpayer dollars.\(^9^5\) That system is old and tired, and it needs a makeover. Right now, requirements themselves don’t go far enough to adequately serve the purpose of the system.

A clean contracting reform agenda would go a long way in increasing competition, encouraging better deals, and ensuring the U.S. government is partnering with responsible companies and individuals. If the status quo remains, taxpayer dollars will be wasted, and we’ll continue to pay more than what contractors charge others in the private sector. Necessary reforms start with protecting small businesses and not allowing large companies to pilfer from programs set aside for small businesses. Agency officials also need better access to cost or pricing information that allows

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\(^9^3\) Federal Acquisition Regulation, Subpart 9.104-6(a) (2022), [https://www.acquisition.gov/far/part-9#FAR_9_104_6.](https://www.acquisition.gov/far/part-9#FAR_9_104_6)


them to negotiate fair deals. Finally, without improvements to contractor responsibility data, taxpayer dollars will go to risky entities, who may have a pattern of bad dealings or even pose a national security threat.

**Recommendations for Legislative Action**

**Better protect small businesses in the federal contracting process.** Congress should break apart supersized contracts by redefining the term “bundling” to remove the word “previously” in the contracting regulations.\(^96\) It should also pass laws that require agencies to break apart any contracts where two or more separate and distinct requirements for products or services are combined without justification.\(^97\) Unbundling requirements will attract more bidders to the table and result in better prices and performance. Breaking apart unrelated requirements will reduce the multiple layers of subcontracting, which can drive up costs while adding little value. Additionally, Congress should amend the law to ensure that agencies only get credit for the actual amount of contracting they conduct with small businesses, rather than getting full credit when substantial sums of first-tier subcontract dollars flow to large contractors.\(^98\) These reforms would make a dramatic difference in leveling the playing field for small businesses to compete in federal contracting.

**Enact clean contracting reforms to ensure fiscally responsible federal contracting.** A few key reforms would ensure our federal agencies have the information they need to make responsible contracting decisions. Congress should amend the law and require contracting regulations to limit when agencies can use the “commercial” acquisition process.\(^99\) Congress should also redefine a “commercial item” to mean “goods or services that are actually sold to the general public in like quantities,” the definition proposed by the Department of Defense over 10 years ago.\(^100\) Congress must make

\(^{96}\) Federal Acquisition Regulation, Subpart 7.107-3 [see note 80].
\(^{97}\) Federal Acquisition Regulations, Subparts 2.1 and 7.107-3 (2022), [https://www.acquisition.gov/far/part-2](https://www.acquisition.gov/far/part-2) [see note 80].
providing certified data the rule rather than the exception, even in commercial item procurements without competition. Mandating cost and pricing disclosures would increase the federal government’s leverage during negotiations and ensure agencies are entering fair deals. Congress must also lower the mandatory disclosure threshold for certified cost or pricing data. The current threshold of $2 million is far too high. Many sole-source contracts never reach that threshold, and therefore are never required to provide government officials with current, complete, and accurate cost and pricing information.

Apply strict penalties for noncompliance with federal contracting requirements. Congress must reverse the laws that have gutted the Truth in Negotiations Act, by creating and mandating noncompliance penalties for companies such as mandatory refunds or ineligibility for future government contracts. These penalties would compel companies to provide accurate data during contract negotiations or risk losing government business.

Incentivize fair contract negotiation with federal agencies. Congress should financially incentivize companies to negotiate more fairly with agencies by requiring payments only after the companies meet certain performance conditions and transparency standards. These standards should include providing agencies with accurate and timely certified cost and pricing data and fulfilling their small business subcontracting goals. Under such a program, companies would receive more of their incurred costs if they met those standards, which would result in better deals and improved performance.

Curb federal contracting with known bad actors and poor performers. Congress should improve the federal awardee responsibility and qualification information by requiring more transparent information about a company’s criminal, civil, and administrative histories, as well as its beneficial ownership structure.\footnote{41 U.S.C. § 2313(d)(3) (2022), \url{https://www.law.cornell.edu/uscode/text/41/2313#}. Congress must create an enforcement mechanism to ensure that contractors report this information, some of which is already required by law. Finally, the system to access this information must be more user-friendly, as the System for Award Management (SAM) is very difficult to use. These reforms would ensure our government isn’t
unknowingly contracting with companies that have demonstrated inferior performance or noncompliance.

**Recommendations for Executive Action**

**Track noncompliance with federal contracting requirements meant to encourage responsible spending.** Agencies should track when companies refuse to produce cost or pricing data as requested, and that information should be posted to a public database. Such a database would incentivize better behavior from companies seeking exclusive government contracts with the Pentagon, and help government officials weed out risky, less reliable companies.

**Curb federal contracting with known bad actors and poor performers.** The director of the Office of Management and Budget and the administrator of General Services Administration should improve the Federal Awardee Performance and Integrity Information System, which was recently integrated into the System for Award Management, based on the authority provided in 41 U.S.C. § 2313. The government should publicly provide more information about a company’s criminal, civil, and administrative histories, as well as mandatory rather than discretionary information about its beneficial ownership structure. Improvements to the current database would compile more robust information in the system for consultation by contracting officers, other contractors, and the general public. The result would be a more transparent and accountable contracting industry and better contract awards.

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102 General Services Administration, “FAPIIS has moved to SAM.gov,” Announcement, December 9, 2022, [https://www.fsd.gov/gsafsd_sp?id=kb_article_view&sysparm_article=KB0064176&sys_kb_id=21b1d46c1bff591406b09796bc4bcb55&spa=1](https://www.fsd.gov/gsafsd_sp?id=kb_article_view&sysparm_article=KB0064176&sys_kb_id=21b1d46c1bff591406b09796bc4bcb55&spa=1).

103 41 U.S.C. § 2313(d)(3) [see note 101].
Strengthening Oversight of the Inspectors General System

By Joanna Derman, policy analyst

Inspectors general are independent and nonpartisan watchdogs whose duty it is to combat waste, fraud, and abuse across the federal government. They play an instrumental role in ensuring that government officials are acting as responsible stewards of taxpayer dollars. Currently, there more than 70 statutory federal offices of inspector general, and a recent report estimated that they collectively identified approximately $75 billion in potential savings, which in fiscal year 2021 constituted an impressive approximate $22 return on every dollar invested in the system. An essential component of the success of an inspector general is their ability to fully examine the facts of an investigation. That is why it is so crucial that Congress equip these watchdogs with the tools and authorities they need to do their jobs effectively.

Authority of Inspectors General

Right now, most inspectors general can only compel the cooperation of current federal employees tied to an ongoing investigation, which means that individuals with relevant information can successfully evade answering questions by simply retiring or resigning from their posts. Other restrictions also hamper IG work.

For example, the Department of Justice Office of the Inspector General is precluded from investigating alleged misconduct by DOJ attorneys when it relates to the “exercise of the authority of an attorney to investigation, litigate, or provide legal advice.” Because the office that investigates these allegations is not independent or subject to the same transparency requirements that an IG is, the public and

defendants affected by a DOJ attorney’s misconduct may be kept in the dark about serious problems.\textsuperscript{107} Hamstringing inspectors general in this way does a disservice to the American people, especially considering the incredible power wielded by DOJ attorneys.

**Priorities Set by Congress**

When discussing with POGO the challenges facing the IG community, many inspectors general have cited semi-annual reporting (SAR) requirements as being overly burdensome, drawing focus away from the critical matters of accountability. These reporting requirements are statutorily set by Congress, and while recent legislation enacted in the National Defense Authorization Act for fiscal year 2023 provides a partial remedy by allowing watchdog offices to meet the requirements by linking to relevant information that has already been published online, more work must be done by Congress to ensure these reporting requirements encourage IGs to focus on big picture accountability issues within their agencies.

**The Integrity Committee**

Because the role of inspectors general is so important, one critical question is, “Who will ensure that IGs themselves are held accountable for misconduct or failing to do their jobs?” Just because an inspector general is independent does not mean they should not be subject to accountability. To the contrary: They should be held to the highest of ethical standards. This is the role of the Integrity Committee.

The Integrity Committee is one of the eight committees of the Council of the Inspectors General on Integrity and Efficiency, an interagency council within the executive branch. While the council is responsible for promoting effectiveness across all federal offices of inspector general, the Integrity Committee is the one body within


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it explicitly created by Congress, and the committee must report its findings to both Congress and the president.\textsuperscript{108}

The Integrity Committee is the last line of defense in preventing wrongdoing at the highest levels of these watchdog offices and restoring public trust if inspectors general or their senior staff commit wrongdoing. It is vested with the authority to receive, review, and refer for investigation any allegations of wrongdoing against inspectors general and covered senior-level IG office staff.

Given the critical nature of its work, it is encouraging to see recent efforts to improve the Integrity Committee’s ability to hold inspectors general accountable. In the National Defense Authorization Act for fiscal year 2023, lawmakers improved Integrity Committee accountability by requiring it to include additional information about certain problems, allegations, investigations, and recommendations in its reports to Congress.\textsuperscript{109} In October 2022, the Council of the Inspectors General on Integrity and Efficiency issued a new policy providing greater transparency into the committee’s internal processes and affording the public a better line of sight into what happens behind closed doors.\textsuperscript{110} The committee itself also released an addendum to their publicly available policies and procedures document, stating that they were now able to make “independent finding[s] of wrongdoing” against any inspector general or authorized person who fails to cooperate in an Integrity Committee investigation.\textsuperscript{111}

Despite these gains, one challenge the Integrity Committee faces is inconsistent funding. Right now, the committee depends on several different and constantly changing funding streams. This kind of unpredictability hinders the committee’s ability to meaningfully engage in strategic planning and contemplate what effective long-

term allocation of resources should be. The lack of a stable and reliable funding mechanism also precludes the committee from building up a bigger team of investigative staff, which can lead to existing investigators being spread too thin.

Additionally, the very composition of the Integrity Committee itself can undermine its effectiveness. Currently, the Integrity Committee consists of an FBI designee, the director of the Office of Government Ethics (or their designee), and four inspectors general who are appointed by the council’s chairperson every four years. This opens the door for potential conflicts of interest, or the appearance of a conflict of interest, since one of the committee’s primary duties is to investigate allegations of misconduct levied against their colleagues, friends, and other such members of the IG community.

It is critically important that inspectors general are themselves held to the highest ethical standard. Anything short of that jeopardizes the credibility of all offices of inspector general and undermines the ability of individual inspectors general to hold agencies and officials accountable for misconduct and wrongdoing.

**Recommendations for Legislative Action**

**Empower inspectors general with the tools they need to do their jobs effectively.** Congress should grant inspectors general subpoena authority to compel former agency officials and contractors to cooperate with IG investigations. This would provide inspectors general with the authority they need to fully and rigorously pursue lines of inquiry in important investigations. The inspector general for the Department of Defense — one of the few IGs who currently have this authority — has used it judiciously and sparingly. This reform would allow inspectors general across the government to close out more lines of inquiry in their investigations, ensuring greater accountability and transparency into wrongdoing.

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Empower the Department of Justice inspector general to investigate department attorney misconduct. Congress should remove the jurisdictional carve-out from Section 8E of the Inspector General Act of 1978 that prohibits the Department of Justice inspector general from investigating department attorneys. 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. 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.

Grant the Council of the Inspectors General on Integrity and Efficiency its own direct congressional appropriation. Instead of forcing the Integrity Committee to rely on the council’s piecemeal and unpredictable funding streams, Congress should provide the council with its own direct congressional appropriation. This would allow the committee to engage in more long-term strategic planning and to better plan to meet its own needs down the line.

Ensure effectiveness by evaluating semi-annual reporting requirements. Congress should work with offices of inspector general to review the requirements for statutorily mandated reporting, intended to track IGs’ progress and impact. Reporting requirements should focus on major or “big picture” issues rather than on more easily quantifiable, but arguably less useful, information such as how many audits an office conducts in a year. Reporting should include more qualitative data, such as impacts on public health and safety, civil rights, crime, and security, as well as emerging trends. This would rebalance the incentives for our agency watchdogs to aggressively go after major agency issues rather than to focus on small picture projects.

Recommendations for Executive Action

Change the composition of the Integrity Committee. The Council of the Inspectors General on Integrity and Efficiency should recruit a retired inspector general or retired deputy inspector general to join the Integrity Committee. This individual would add another layer of independence, which is critical to conducting meaningful oversight, to the Integrity Committee. They would also have the institutional knowledge and investigatory skills necessary to meaningfully contribute to the Integrity Committee.
Conduct a biennial audit of Integrity Committee investigations. The Government Accountability Office should conduct a biennial audit of Integrity Committee investigations. This would provide much needed transparency into the committee's internal investigative procedures, and would allow Congress and good government watchdogs to better identify weaknesses within the committee that must be reformed.
Protecting the Public from a Politicized Civil Service

By Joe Spielberger, policy counsel

Over the past several years, the public has identified federal government corruption as a major concern and a fundamental threat to democracy. In the fall of 2022, polling found that 68% of registered voters say the government “mainly works to benefit powerful elites” rather than “ordinary people.”

Two important ways government leaders can combat corruption are to strengthen whistleblower protections for federal employees and to protect against attempts to politicize the federal civil service. Whistleblowers are crucial in ensuring that our government is operating free of waste, fraud, and abuse of power. Stronger protections would enable employees to come forward and bring about better government accountability. And our merit-based civil service protects against corruption and illegality by ensuring our federal agencies are staffed with knowledgeable employees who have respect for the rule of law, rather than individuals whose primary qualification is unwavering loyalty to an individual or a political ideology.

Whistleblower Protections

Federal whistleblowers are the public’s eyes and ears within the government, uniquely positioned to expose corruption, illegal activity, waste of resources, and abuse of power within government agencies. They enable Congress and the public to better understand where corruption manifests, and to help ensure that corrupt government actors face accountability. Recent whistleblower disclosures have shed light on failures of U.S. Capitol Police surrounding January 6, and dangerous conditions in detention centers during the COVID-19 pandemic. While Congress has made

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important strides to pass bipartisan legislation enhancing whistleblower protections, these laws must be updated to meet current needs, so whistleblowers can safely come forward and make disclosures without putting themselves and their careers at risk.\textsuperscript{116} Especially given reports of up to $100 billion in fraudulent PPP loans, Congress must ensure that both federal employees and those who work for federal contractors and grant recipients are protected when they report corruption, waste, or fraud.\textsuperscript{117}

One issue Congress must address is that federal whistleblowers regularly become targets of retaliatory investigations, when agencies choose to attack the whistleblowing employee rather than address the corruption they’ve exposed.\textsuperscript{118} Retaliatory investigations can lead to serious consequences for whistleblowers. They raise the financial, emotional, and professional costs associated with blowing the whistle. But retaliation doesn’t just harm whistleblowers. Pursuing frivolous investigations also wastes limited agency resources.

In addition to updating the laws to close loopholes that make it difficult for whistleblowers to prevail in the face of retaliatory investigations, Congress must ensure that whistleblower protections are enforceable, to avoid giving whistleblowers a false sense of security. Most federal whistleblowers who face retaliation can take their claim before the Merit Systems Protection Board. However, whistleblowers prevail only a small fraction of the time before the protection board’s administrative judges, and for a time the single board member had a conflict of interest with one of the agencies in the Merit Systems Protection Board’s jurisdiction.\textsuperscript{119} Furthermore, the


\textsuperscript{119}Samantha Feinstein, Tom Devine, et al., Government Accountability Project, \textit{Are whistleblower laws working? A global study of whistleblower protection litigation}, 12, (2021)
Merit Systems Protection Board only recently regained a quorum after years of vacancies, and it now must adjudicate a backlog of thousands of cases.\(^{120}\) For these reasons, it is critical that whistleblowers be able to take their cases directly to court and to request a jury trial, to have a better chance of obtaining fair, timely relief.

Whistleblower protections must also be expanded. Though many have been granted additional whistleblower rights, federal employees — including military service members — face additional obstacles to blowing the whistle. Some government employees, including legislative and judiciary branch employees, have only limited protections and are excluded from many of the laws protecting other federal whistleblowers. Federal employees who do speak out have some security because of due process rights that currently protect them from being forced to obey illegal orders or allow unlawful policies to be enacted.\(^ {121}\) But if recent attempts to politicize the federal civil service are one day successful, that would likely change.

**Merit-Based Civil Service**

For over a century, Congress has passed laws to end the spoils system of the nineteenth century and create a professional nonpartisan civil service. It passed the Pendleton Act to begin establishing a merit-based federal workforce, the Hatch Act to better prevent partisan influence in the civil service, and the Civil Service Reform Act in the wake of the Watergate scandal to better protect federal civil servants.\(^ {122}\)

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However, there are growing efforts to undo all of this and inject more partisanship into the day-to-day operations of the federal government. Even as the public expresses legitimate concerns about government corruption, some are cynically exploiting those concerns to enact an extreme agenda that would worsen corruption. This agenda would replace honest public servants with people willing to circumvent the law to advance a political ideology, clearing the path toward a lawless federal government.\^123

During previous administrations, we learned about illegality within our government thanks to individuals who refused to obey unlawful orders or blew the whistle, and thereafter had their careers ended or curtailed.\^124 At the end of his term, President Donald Trump tried to make it easier to replace career employees who prioritized loyalty to the Constitution and the rule of law above the president’s political agenda. To do so, he signed an executive order to create a new category of federal worker in the excepted service, Schedule F.\^125 Employees reclassified into Schedule F would lose certain job protections, like the rights to file retaliation complaints and appeal punitive employment decisions. This would allow the president or a political appointee to fire a career employee on the spot for refusing an unlawful order, and to replace them with someone more compliant.

Reports and early analysis indicate that the executive order would likely have transferred tens of thousands of employees into Schedule F.\^126 This would greatly expand the president’s power to purge the civil service through mass firings and pack the government with staffers loyal to the president’s political agenda. Although Biden


rescinded this order, policymakers and political operatives continue to explore ways to resurrect Schedule F or otherwise embed more loyalists in federal agencies to expedite divisive policy changes, punish political enemies, and shield an administration from oversight and accountability.\textsuperscript{127}

If implemented, these changes could have a grave impact on the American way of life. One of the most important roles of civil servants is to ensure the nonpartisanship of basic government services and adjudication claims. Companies depend on the Federal Energy Regulatory Commission to give them fair rulings, and individuals depend on agencies like the Social Security Administration to decide their claims impartially. Americans’ ability to access Social Security, public health benefits, veterans’ benefits, and even their mail should not be determined or harmed by their political affiliation or party loyalty. Party loyalists in positions to impact those services, however, could impede service delivery, hinder agency responses, and destabilize the processes that millions of Americans rely on to get the help they need.

Transferring government employees into new positions with fewer rights does nothing to address hiring or disciplinary issues, nor does it improve management in federal agencies. As we work to create a federal government that provides for people’s critical needs and inspires public trust, we must ensure that our professional, merit-based civil service remains a powerful tool to protect against government corruption.

Government leaders must tackle the root causes of corruption, rather than attack the career public servants and federal whistleblowers who are committed to confronting it. We must protect the public from a politicized federal government, protect government employees who adhere to our laws, and ensure that the federal government acts to best serve the American people.

Recommendations for Legislative Action

Protect whistleblowers from common forms of retaliation. Congress should explicitly prohibit agencies from launching retaliatory investigations of whistleblowers by designating such investigations a prohibited personnel practice. This should include preventing any government employee from exposing a whistleblower’s identity without consent and independent enforcement of the right to anonymity when blowing the whistle using protected channels. These improvements would force agencies to investigate alleged corruption instead of the employees exposing it, and it would allow whistleblowers to safely expose wrongdoing without risk of becoming a target themselves.

Afford federal whistleblowers the right to jury trials. Congress should provide federal employees the same rights currently enjoyed by most public and private sector employees and allow them to file retaliation claims directly in court and request a jury trial. This would hasten relief for whistleblowers, reduce the current backlog of cases at the Merit Systems Protection Board, and encourage future whistleblowers to come forward, knowing that if they face retaliation they will have a fairer shot at being made whole.

Provide more equitable legal safeguards for intelligence community and military whistleblowers. Congress should establish an independent mechanism for providing due process relief for intelligence community and military whistleblowers, who face additional institutional hurdles to make lawful disclosures and protect themselves against retaliation. Congress should enhance enforceability of their rights by establishing and empowering independent adjudicators to provide appropriate and timely relief for whistleblowers facing retaliation. Congress should also amend the burden of proof standard for the Department of Defense in military whistleblower laws to align with the best practice burden of proof standards in most other public and private sector whistleblower laws, requiring the agency to show that it had a legitimate reason to take a challenged personnel action against a whistleblower. This would create parity between military and civilian whistleblowers and ensure service members have a fair chance to challenge illegal whistleblower retaliation. These changes will create real incentives for whistleblowers with access to some of our most sensitive government information to blow the whistle through proper channels.
Extend whistleblower protections to legislative and judicial branch employees. Congress should enact best practice whistleblower protections for congressional staff, other legislative branch employees, and employees of the judiciary. All federal employees should be entitled to the same protections to be able to safely disclose information to expose corruption, waste, fraud, and abuse, without risk to themselves or their careers. Enacting these protections would go a long way toward accomplishing this goal.

Improve whistleblower protections for federal contractors. Congress should close loopholes in the protections offered to federal contractors who blow the whistle on waste, fraud, or abuse in programs funded by the federal government. Specifically, Congress should close loopholes to ensure that sovereign immunity does not block entitled remedies for blowing the whistle on federally funded state and local misconduct. Congress should also clarify that whistleblower rights may not be waived by any pre-dispute arbitration agreement, and it should provide an affirmative defense against a civil or criminal litigation in retaliation for whistleblowing. These strengthened protections would close loopholes in contractor whistleblower laws, provide necessary updates for important contractors’ rights, and help align these rights with recognized best practices.

Protect and strengthen the merit-based civil service. Congress must pass legislation preventing an administration from reimplementing Schedule F or taking other actions that would politicize the civil service by stripping federal career employees of due process protections. Legislation should include a prohibition on transferring employees and positions out of the competitive service or to a different excepted service schedule without consent of the employee. It should also limit the number of such transfers during one four-year presidential term. Additionally, Congress should amend 5 U.S.C. § 7511(b)(2) to limit the authority of the president and the Office of Personnel Management to rescind employees’ appeal rights. It should also amend 5 U.S.C. §§ 3301-3302 to prohibit the president from modifying excepted service schedules established prior to January 1, 2020. Lastly, Congress should create a cause of action for employees who are involuntarily removed from the competitive service or transferred from one excepted service schedule to another. This would help protect the fundamental due process rights of career civil servants and prevent a corrupt partisan takeover of the federal civil service. These steps would help ensure
that the professional civil service remains loyal to the Constitution and rule of law above all else, and they would build the public’s trust that the government is serving the people fairly.

Ensure impartiality of administrative law judges. Finally, Congress should pass legislation to bring all administrative law judges back to the competitive civil service and codify judicial candidates’ vetting process. This would override Lucia v. Securities and Exchange Commission and protect judges’ impartiality regarding vital government programs.\(^\text{128}\) This would especially help ensure that adjudications of Social Security, disability, and public health benefits are not subject to malign political influence.

**Recommendations for Executive Action**

Increase oversight of retaliation against members of the military and intelligence community. The president should require Defense Department and intelligence community agency appointees to provide a written explanation to Congress and agency inspectors general when they decline to follow disciplinary recommendations after an agency employee violates the law by retaliating against a whistleblower. Agencies should require additional certifications against prohibited personnel practices. This will help reduce unlawful retaliation and reinforce expectations that workplaces remain free of whistleblower retaliation.

Establish new whistleblower data collection and reporting requirements. The administration should require agencies to collect and report anonymized data, including race, ethnicity, gender, sexual orientation, and more, from whistleblowers on a voluntary basis. Historically marginalized communities have faced employment discrimination in hiring decisions, disciplinary action, and termination.\(^\text{129}\) Especially


because whistleblowers prevail so infrequently in front of Merit Systems Protection Board judges, tracking this information will help identify bias in retaliation decisions and inform how agencies can better support all whistleblowers.

Implement additional safeguard of employee transfers. The president should require agencies to obtain approval from the Office of Personnel Management (OPM) for transfers of employees or positions out of the competitive service, or for transfers from one excepted service schedule to another. OPM should issue a new regulatory requirement that, before any transfer of individuals or groups of employees to excepted service positions, agencies must post notices in the Federal Register soliciting public comment. OPM should also issue a regulation preserving the Merit Systems Protection Board appeal rights of any employees transferred to positions that are the subject of determinations made pursuant to 5 U.S.C. § 7511(b)(2). This will reinforce merit-based hiring rules, reduce the number of political appointees who move into career positions, and help ensure that a president cannot fill the civil service with political loyalists.
Restoring Trust in Government Through Transparency and Public Access

By Sean Moulton, senior policy analyst

Throughout this report, we’ve written how public trust in government remains troublingly low. While politicians and government officials have never been the most trusted, years of stories about poorly managed pandemic programs, unfounded partisan bickering over election results, and a violent attack on the Capitol have taken their toll on an already tarnished reputation. The burden to earn back the public’s trust lies with the government. And the best way to do that is through improved transparency and engagement. POGO’s recommendations focus on three commonsense areas to start: better facilitating compliance with the Freedom of Information Act, increasing public access to government ethics records, and improving transparency around rulemaking.

The Freedom of Information Act

Now more than 50 years old, the Freedom of Information Act (FOIA), remains a fundamental tool for public transparency. Each year, hundreds of thousands use the law to request records. But the FOIA process is problematic, often working too slowly and resulting in limited record disclosure. A significant factor contributing to FOIA processing problems is the lack of adequate funding for the work. In the information age, both the government records themselves and the requests for them have grown significantly in both size and complexity. But agency FOIA budgets haven’t kept pace with those changes, resulting in growing backlogs and long delays.

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There are also several loopholes within the FOIA statute that cause unfortunate gaps in the federal FOIA policy. These are loopholes that only Congress can permanently fix. In 2016, for example, Congress added a “foreseeable harm” standard, allowing agencies to withhold requested records only if the agency “reasonably foresees that disclosure would harm an interest protected by the exemption.”\textsuperscript{134} While this addition is an improvement, the wording still allows agencies to claim foreseeable harm without specifying the actual harm they anticipate would result from providing the records. Such lax requirements almost certainly lead to a reflexive overuse of this exemption.

Another long-standing loophole leads to members of Congress being denied access to records under the transparency statute. The FOIA itself includes a provision that notes agencies cannot use the act to “withhold information from Congress.” However, since the word “Congress” is not defined within the law, the Department of Justice has interpreted the word to only apply to committees and the members of Congress who chair them.\textsuperscript{135} Under this definition, members of Congress who are not serving as committee chairs — even though their constitutional duty to oversee federal agencies requires access to records and the same requirements to protect sensitive information as agencies — can be denied the information they request under FOIA.

**Ethics Records Transparency**

All three branches of the federal government also suffer from a deficit of transparency with respect to government ethics records. Ethics rules require the creation of these records, which include financial disclosures, recusals, compliance records, and more, but they don't always require that the records be made accessible to the public.

Across the judicial, legislative, and executive branches, ethics records are far too difficult for the public to access. Recent reporting indicates that federal judges have routinely failed to comply with conflict-of-interest requirements, but it took an

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intensive investigation by the media to uncover these failures.\textsuperscript{136} Senior congressional staffers have failed to comply with requirements for disclosing financial transactions, but the two congressional ethics committees have sabotaged efforts by the public to access their financial disclosure reports.\textsuperscript{137} And the \textit{Wall Street Journal} has raised questions about top political appointees in the executive branch as well, after having had to file separate financial disclosure requests at dozens of agencies and encountering obstacles and delays.\textsuperscript{138}


While it may not be necessary for the government to post all ethics records for all employees online, the strong public interest in records from the most senior political appointees outweighs any privacy concerns. The public needs the ability to monitor whether our leaders are wielding their considerable power without conflicts of interest. Ethics rules cannot effectively promote public trust in government if the government insists on applying those rules out of public view.

Access to financial disclosures has long been a recognized need. These disclosures detail the financial interests held by policymakers and their senior staff. Access to executive branch employees’ conflict-of-interest waivers should also be a priority.\(^{139}\) These waivers excuse an official from complying with a criminal law designed to safeguard the government’s integrity — and sometimes the logic for granting the waivers can be questionable.\(^{140}\) But while the law makes conflict-of-interest waivers available to the public on request, there’s a catch: The government doesn’t inform the public when it issues them. As a practical matter, it is hard to request a copy of a waiver you don’t know exists.


These are not the only types of ethics records that should be more readily available. In the legislative branch, for example, the law requires the ethics committees to release blind trust agreements and related documents to the public on request, but the committees do not appear to have created an efficient means for requesting them.\(^{141}\)

In the executive branch, a wide range of ethics records (waivers, authorizations, approvals, recusals, agreements, determinations, certifications, compliance records, and more) are, at least theoretically, available to the public under the Freedom of Information Act.\(^{142}\) But the practical reality is that the public does not know when these documents are created and often meets resistance from federal officials or unreasonable delays when seeking copies.

The judicial branch, which is exempt from the Freedom of Information Act, has elected not to make all of its ethics records publicly available. For example, the Judicial Conference of the United States has authority to issue a type of document, called a “Certificate of Divestiture,” that grants tax relief to judges when they decide to divest assets that create conflicts of interest.\(^{143}\) The public has a need to monitor whether judges, who are free to decide to divest and repurchase assets at will, are abusing their access to this tax relief. Unlike the executive branch, which makes its Certificates


\section*{Rulemaking Transparency}

There are also important transparency issues related to rulemaking. Rulemaking is a critical function of government: Once laws are passed, it is through rules that agencies apply and enforce those laws. Currently, agencies draft initial rule proposals, which can then be reviewed by the Office of Information and Regulatory Affairs (OIRA).\footnote{This office must review all economically significant rules (rules that impact the economy by $100 million or more), as well as any rules deemed significant for policy reasons.} This review can result in recommendation of significant changes.

However, the public is often unaware of the changes demanded by this office because there is little to no transparency in the process. While President Bill Clinton’s still-active Executive Order 12866 established some clear transparency and reporting requirement for the Office of Information and Regulatory Affairs, those requirements have been applied very narrowly.\footnote{Executive Order 12866, 58 Fed. Reg. 51735 (October 4, 1993).} Congress should establish stronger statutory requirements to ensure the public is informed about the impact the Office of Information and Regulatory Affairs has on each rule it reviews.

Agencies are also required under the Administrative Procedures Act to allow the public to review and comment on rulemaking proposals, though the law sets no specific minimum timeframe for the comment period. For many rules, this process moves forward smoothly and productively. Agencies regularly offer the public 90 days to review the often-complicated rulemaking proposal and provide feedback to the agency. On occasion, however, agencies push forward on important and sometimes

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  \item This office must review all economically significant rules (rules that impact the economy by $100 million or more), as well as any rules deemed significant for policy reasons.
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even controversial rules with just a few days or no time at all for public comment. A rulemaking process that leaves no time for public engagement or organizing only further sows public distrust in our institutions.

**Recommendations for Legislative Action**

**Establish a Freedom of Information Act (FOIA) office line item in agency budgets.** A dedicated line item for FOIA work at each agency would allow Congress to better oversee the allocation of resources in the application of this law and specifically direct those agencies with processing problems to commit more resources to the work. This would ensure agencies are adequately funding the offices charged with meeting agency obligations under FOIA.

**Amend the language in several key provisions of the FOIA statute to strengthen access and eliminate unintended loopholes.** The foreseeable harm loophole should be closed with new language requiring agencies to identify a specific harm if they want to use an exemption, rather than claiming a general, unspecified foreseeable harm. The congressional access loophole should also be closed by clarifying that the statute itself prohibits agencies from using FOIA to withhold information from any members of Congress. Both of these changes would ensure that Congress’s original intent is imposed on agencies interpreting this language.

**Increase transparency with a government ethics records database.** Congress should require the supervising ethics offices in each branch of government to create online, searchable, and sortable public databases for ethics records of all elected or politically appointed federal officials. These databases should include all financial disclosures, certificates of divestiture, and other ethics-related records (including determinations, waivers, authorizations, approvals, recusals, agreements, certifications, compliance records, and more). To avoid disrupting government operations, they should not include records of individualized ethics advice or information that is classified or pertains to ongoing law enforcement matters.

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Set clear statutory transparency requirements for the Office of Information and Regulatory Affairs. These reporting requirements should be similar to those detailed in Executive Order 12866. But they should clarify that, as a part of the rulemaking process, agencies must make public all communications and documents exchanged between themselves and the Office of Information and Regulatory Affairs with regard to a rulemaking. Agencies must also make public any changes made to the rulemaking at the office’s suggestion. The new statutory requirements should also make clear that the Office of Information and Regulatory Affairs must disclose the names and affiliations of all people participating in meetings or other communications concerning rulemaking proposal reviews. This will finally allow meaningful transparency into a critical part of the agency rulemaking process.

Require a minimum of 60 days for public comment periods for rulemakings. Congress could include language that clarifies when agencies could use shorter public comment periods in the event of an emergency or other need. A minimum length for public comment periods ensures rules are made fairly and consistently, and they provide the opportunity for adequate public involvement.
Ushering in a New Generation of Accountable Defense Spending

By Geoff Wilson, director of the Center for Defense Information at POGO

Over the past eight years, U.S. defense spending has exploded, reaching a new high of some $847 billion for fiscal year 2023.148 This stunning figure comes just as the United States draws down from its longest war in history, and it follows a disastrous two years in which more Americans died from the effects of the COVID-19 pandemic than in all the wars that we have fought in the 20th and 21st centuries combined. The question is, “How much added national security are we getting for all this extra money?”

The absence of a good answer hasn’t quieted calls for more spending. The past two budget cycles have seen Congress add tens of billions of dollars to the annual defense budget. This isn’t in response to urgent requests from the Pentagon: Their own budget requests have been lower, and Pentagon officials have assured Congress that the base budget is enough to get the job done.149 Even so, some have already called to increase the size of the defense budget to more than $1 trillion a year.150 While many point to a rising China and a newly belligerent Russia to justify pumping even more money into the Department of Defense, this claim runs afoul of reality. The United States already spends more on its own military than the next nine nations combined, including our principal rivals Russia and China.151

There is without a doubt a tremendous amount of financial waste, fraud, and abuse within the military budget. Even more unfortunately, there seems to be little to no

urgency to efforts to improve oversight into this spending, either from Congress or the executive branch.

**Pentagon Audits**

Since 2015, the U.S. military budget has increased by more than $200 billion. For the vast majority of that time, however, from 2016 to the end of 2022, there was no permanent Pentagon inspector general. Given that part of a Defense Department inspector general’s role is to promote accountability, integrity, and efficiency within this largest portion of our yearly discretionary spending, it’s unsurprising that the Pentagon has been unable to pass a clean financial audit since it was mandated to do so by Congress in 2018. Crucially, the department hasn’t passed not because of poor performance, but because it simply cannot tell auditors where its money has gone and provide actual receipts. This is not a small-scale problem. The 2022 fiscal year Pentagon audit revealed that the Defense Department could not account for some 61% of its $3.5 trillion in total assets.¹⁵²

But even incomplete audits have proven telling, revealing millions in wasteful spending.¹⁵³ The scope and scale of these problems are massive, and their origin is systemic. In 2015, for instance, a department blue ribbon commission identified wasteful spending in the Pentagon’s overhead and administration budget. In the resulting report, it recommended changes to improve efficiency that could save the Department of Defense $125 billion, without laying off a single servicemember or civil servant.¹⁵⁴


¹⁵³ For instance, the partial results of the fiscal year 2018 audit revealed that the Navy had been leasing warehouse space for airplane parts that had not been in its property records. Upon inspection of the property, investigators discovered more than $126 million in aircraft parts, including parts for the F-14 Tomcat, which had not been in service for more than a decade. The upside was that the Navy was able to fill over $20 million in open orders for aircraft parts.

The Pentagon retroactively covered up the report.\textsuperscript{155}

**Weapons Innovation and Development**

There are almost certainly significant savings that could be had, or funds that are currently being wasted, that could be repurposed for critical needs or emerging threats — if only the Pentagon would exercise some fiscal discipline. The past 20 years of major weapons innovation and development from the Pentagon and its industry partners has been a litany of failures.

The F-35 Joint Strike Fighter, the littoral combat ship, the Zumwalt-class destroyer, and the Ford-class supercarrier have all been major and costly disappointments.\textsuperscript{156} After 20 years of embarrassing problems and shortcomings, the F-35 still has yet to enter full scale production. Meanwhile, the Navy’s three most recent major surface warship programs have been major failures, with littoral combat ships commissioned in 2020 already being slated for retirement due to significant problems with their powerplants and failures to develop follow-on weapons and systems for their hulls.\textsuperscript{157} Now, with congressional hearings on growing Chinese naval strength ringing in its ears, the Navy is hoping to catch up with 30-plus years of shipbuilding opportunity cost, which a recent Congressional Budget Office study notes will cost about 30% more money each year than the Navy has gotten annually over the past five years.\textsuperscript{158}

Much of this problem has been self-inflicted. Several of the most costly and ineffective weapons programs in recent memory have been put into production before their

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\textsuperscript{155} Whitlock and Woodward, “Pentagon buries evidence of $125 billion in bureaucratic waste” [see note 154].


designs were finalized or fully tested and evaluated by Pentagon performance controllers. Programs like the F-35, littoral combat ship, and Ground-Based Midcourse Defense system (meant to intercept enemy nuclear missiles) have all been produced and deployed before their blueprints were finalized, or their individual systems fully designed.\footnote{Dan Grazier, “$21 Billion Worth of F-35 Concurrency Orphans?” Project On Government Oversight, October 12, 2017, \url{https://www.pogo.org/analysis/2017/10/21-billion-worth-of-f-35-concurrency-orphans}; Dan Grazier, “The Littoral Combat Ship and the Folly of Concurrency,” Project On Government Oversight, July 17, 2020, \url{https://www.pogo.org/analysis/2020/07/the-littoral-combat-ship-and-the-folly-of-concurrency}; Mark Thompson, “How Not to Buy Weapons,” \textit{Time}, April 23, 2012, \url{https://nation.time.com/2012/04/23/how-not-to-buy-weapons/}.} This has, of course, led to significant cost overruns, program delays, and expensive retrofitting to keep the programs alive and even marginally combat-ready. With nearly all of the services calling for new systems as part of their return to “near-peer competition” over the next decade, the Navy will not be the only service asking to sink more money into new big-budget weapons. The United States is already set to spend nearly $2 trillion on its nuclear arsenal in the next 30 years to confront claims of growing Russian and Chinese nuclear capabilities, including on new Air Force ballistic missiles and strategic bombers and Navy ballistic missile submarines.\footnote{Bill Perry, Jerry Brown, and John Garamendi, “Spending $2 trillion on new nuclear weapons is a risk to more than just your wallet,” \textit{Insider}, July 7, 2021, \url{https://www.businessinsider.com/nuclear-modernization-plans-are-unnecessarily-costly-and-risky-2021-7}.} But if we are to truly meet this watershed moment in U.S. national security policy, we cannot do it with the same lack of accountability that we have seen over at least the past 20 years. Calls for more money must be met by increased efforts to ensure that that money is being spent accountably, and that the interests of American taxpayers and servicemembers are being met just as assuredly as the interests of shareholders of the military industrial complex.

**Unfunded Priorities Lists**

Congress should also be wary of the amount of increased funding it is giving to the Pentagon to meet so-called “unfunded priorities lists.” Since 2017, services have been mandated to report unfunded priorities to Congress no later than 10 days after the president submits a budget to Congress. These “priorities” bypass the regular internal priority setting and budgetary process of the Pentagon, and they allow
Congress space to arbitrarily increase defense spending for nonessential programs. Recent Pentagon budget increases that have come out of the House and Senate Armed Services Committees have almost gone entirely to fund things in these wish lists. In 2022, the Pentagon shocked many in the field by issuing a second unfunded priorities list just before a lame duck House and Senate leadership retreated behind closed doors to hash out the final Pentagon budget topline.\footnote{Julia Gledhill, “The Pentagon’s second unfunded priorities list is an accountability travesty. Congress should act,” \textit{Breaking Defense}, December 1, 2022, \url{https://breakingdefense.com/2022/12/the-pentagons-second-unfunded-priorities-list-is-an-accountability-travesty-congress-should-act/}.}

A desire for increased Pentagon accountability cuts across party lines. A poll taken on election night in 2022 found that a higher percentage of respondents strongly felt it was important for the Department of Defense to prioritize accountability in how it spends its money (76\%) than respondents who were asked whether it was important for the Department of Defense to prioritize accountability \textit{and combat readiness} (68\%).\footnote{“Findings Based on 2022 Election Omnibus Survey,” Project On Government Oversight, February 1, 2023, \url{https://www.pogo.org/document/2023/02/findings-based-on-2022-election-omnibus-survey}.} This data demonstrates that Americans care at least as much about the Pentagon being accountable in how it spends their tax dollars as it does about military forces maintaining combat readiness.

**Recommendations for Legislative Action**

\textbf{Stop congressional plus ups of the defense budget until the Pentagon can pass an audit.} Until the Department of Defense can account for its assets and pass an audit, Congress should refrain from appropriating funding beyond what the Pentagon requests as part of its base budget. This will serve as a powerful incentive for the department to finally complete an audit, and it will likely help identify areas of significant cost savings or additional resources that Congress or the department can reallocate to better serve the department’s mission.

\textbf{Stop concurrent development.} Congress must insist on a “fly before you buy” mentality, and it should refuse to move any new system into production before it has been fully designed, thoroughly tested, and signed off on. Many of the weapons we buy in the 118th Congress will be in our arsenals for at least the next 30 years. Congress should ensure that they are reliable and combat-ready, and that they will

not require significant overhauls early in their service lives because production began before they were fully developed.

**Reduce wasteful national security spending.** Congress should identify and cut programs that do not make our national security strategy more effective. Significant savings should be sought by reducing Pentagon administration and overhead and streamlining “back-office” operations. Further savings should include authorizing new base realignment and closure reviews for the military bases at home and overseas, as well as the Department of Energy’s federal labs. Finally, Congress should take a hard look at what sorts of weapons and systems are proving effective in global conflicts today, rather than sinking more money into overly complex systems like the F-35, which continue to fail to meet promised capabilities. In a time of fiscal uncertainty and rapidly changing understandings of how a war with a “near-peer” adversary would be fought, lawmakers should double down on reliable and combat-tested capabilities. Programs like the *Ford*-class supercarrier, B-21, and F-35 should be canceled in favor of producing systems that work and are in demand now. Taking these actions would increase military readiness, increase programmatic effectiveness, and reduce the overall burden on the American taxpayer.

**Curb unfunded priorities list requirements.** Legislators should do away with the fiscal year 2017 mandate to require extrabudgetary "unfunded priorities lists," and require services to make their budgets without banking on extra funding for programs the agency has chosen not to prioritize in its own budget. Should services still wish to provide such lists to Congress, they should be required to recommend cost offsets from elsewhere within their base budget so that lawmakers can weigh the relative importance of these priorities.
Preventing Abuse of National Security and Policing Powers

By Sarah Turberville, director, and Katherine Hawkins, senior legal analyst, The Constitution Project at POGO

There are several federal agencies and practices within the United States that pose a grave threat to the functioning of a free society. In 2020, we witnessed the president politicize use of federal law enforcement and military forces by sending them into several U.S. cities to surveil and suppress those protesting police violence — forces who later committed acts of violence against demonstrators.¹⁶³ A future administration could use the same legal loopholes to deploy federal forces against the will of local and state governments to quash dissent and to punish perceived political enemies. Some of these forces — like agents of Customs and Border Protection — operate with impunity, and do not even adhere to basic constitutional precepts that govern the conduct of other law enforcement agencies in the country.¹⁶⁴ Without legal guardrails, such forces could easily morph into an internal state security service armed with weapons and massive tools of surveillance.

**Customs and Border Protection**

Housed within the Department of Homeland Security, U.S. Customs and Border Protection (CBP) is the largest law enforcement agency in the country — and its reach is extraordinary. Federal regulations permit Border Patrol to operate in an incredibly expansive stretch of U.S. territory: 100 air miles from any land or maritime border.¹⁶⁵

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¹⁶⁵ For Border Patrol permission to conduct warrantless stops and searches “within a reasonable distance from any external boundary,” see 8 U.S.C. § 1357 (2022).
This means that over two-thirds of Americans live in the “border zone” and can be subject to stops at checkpoints based on no suspicion whatsoever.\textsuperscript{166} Border Patrol's “roving patrols” can even stop individuals beyond the 100-mile zone based on vague suspicions about immigration status.\textsuperscript{167} Just as CBP has expanded its physical jurisdiction, it has also expanded its use of warrantless searches by searching and storing the contents of up to 10,000 travelers' electronic devices.\textsuperscript{168} This expanded jurisdiction was on full display in the summer of 2020 when CBP agents were deployed to Portland, Oregon, to reportedly respond to civil unrest, but did so by arresting protestors, using excessive force, and detaining individuals in unmarked vans with tinted windows. In many cases, these agents did not display their names, identification numbers, or agency affiliation on their uniforms.\textsuperscript{169}

Oversight of CBP is diffuse, inconsistent, and insufficiently focused on the paramilitary nature of the agency. Particularly troubling is the refusal of the Supreme Court to rein in CBP actions that violate constitutional rights. In addition to the policies outlined above, which contravene Fourth Amendment protections against unreasonable searches and seizures, the Supreme Court has carved out numerous exceptions to constitutional rights if those rights have been violated by CBP, greenlighting racial profiling and suspicionless stops throughout the interior of the U.S. without so much


\textsuperscript{167}For stops by Border Patrol based on reasonable suspicion of an immigration violation and permitting the race of the person stopped as a factor in determining reasonable suspicion, see U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975).


\footnotesize
\url{https://www.law.cornell.edu/uscode/text/8/1357}; For a definition of “reasonable distance” as 100 air miles, see 8 C.F.R. § 287.1 (2023), \url{https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.1}. 


\url{https://www.washingtonpost.com/technology/2022/09/15/government-surveillance-database-dhs/}.


\url{https://www.law.cornell.edu/uscode/text/8/1357}; For a definition of “reasonable distance” as 100 air miles, see 8 C.F.R. § 287.1 (2023), \url{https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.1}. 


\url{https://www.washingtonpost.com/technology/2022/09/15/government-surveillance-database-dhs/}.


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as requiring reasonable grounds for such searches. When Border Patrol's conduct leads to abuses and killings of civilians, the Supreme Court has interpreted the Constitution and federal law in a manner to prevent victims from being able to get their foot in the courthouse door for redress.

The court's refusal is just one contributor to a pervasive sense of impunity within CBP. Sources of this impunity are myriad, but Congress and the executive branch must address its structural, legal, and bureaucratic dimensions. Another key contributor to CBP impunity is the agency’s internal mechanisms to address complaints and impose discipline, which are opaque and ineffective. Complaints are shuffled around, victims may not even receive acknowledgment that their allegations will be investigated, and discipline is generally inconsistent and often reduced.

Congress’s investigation into the “I am 10-15” Facebook group is a case in point: 60 CBP officers were found to have committed misconduct by posting racist, violent, threatening, and sexually degrading images on a Facebook group. After the agency’s Discipline Review Board recommended penalties, that discipline was “significantly reduced” for nearly all of the officers. This included 18 agents who were recommended to be fired due to serious misconduct, but whose discipline was reduced to a suspension. Of the 60 agents that CBP determined engaged in misconduct, the investigation found that 57 continued to work with migrants. Notably, CBP stonewalled congressional oversight related to the “I am 10-15” Facebook group for nearly 18 months, and it was not until a new administration was in office that CBP

174 *Border Patrol Agents in Secret Facebook Group Faced Few Consequences for Misconduct*, 1, 8 [see note 173].
began to turn relevant and unredacted materials over to the House Oversight Committee. This shows how political agendas add another layer of difficulty to overseeing CBP and other law enforcement agencies.

Even independent but internal oversight avenues fall woefully short when it comes to CBP. As POGO's own reporting has revealed, the Department of Homeland Security inspector general whitewashed a report that noted 30 instances in which DHS law enforcement agencies found employees had engaged in domestic violence, but then allowed those employees to continue carrying their government-issued weapons.175 Another report, which was never published by the inspector general's office, included a survey in which more than 10,000 individuals working in DHS law enforcement said they’d experienced sexual misconduct or harassment in their work. Such misconduct is cause for grave concern about how such officers comport themselves when dealing with migrants with little supervision and in remote locations.

The integrity problems plaguing CBP are not new, although they do appear to have gotten worse in recent years. In 2015 and 2016, two internal Department of Homeland Security reports warned that the rapid growth of CBP without a focus on accountability and discipline mechanisms has led to serious criminal and integrity problems within the agency. The panel stressed that CBP is “vulnerable to a corruption scandal that could potentially threaten the security of our nation” and that “[t]he CBP discipline system is broken.”176

The panel recommended that CBP’s sworn law enforcement officers be exempted from collective bargaining based on their role in national security — a recommendation that has been disregarded, even as the executive branch designated CBP a “security agency” for the purpose of withholding information about agents in response to

Freedom of Information Act requests.\textsuperscript{177} Meanwhile, Congress has approved dramatic increases in CBP’s budget without any guarantee that agents will carry out their work humanely and in comportment with constitutional safeguards.\textsuperscript{178} The blank check for CBP impunity must end.

**Domestic Military and National Guard Deployment**

Customs and Border Protection is only one agency with the potential to become a domestic police force deployed by the president. It is also essential that Congress prevent the misuse of the military and National Guard within the United States. During the summer of 2020, protesters in Washington were menaced by a National Guard helicopter hovering below the city’s roofline and slamming them with tropical-storm force winds.\textsuperscript{179} The Trump administration requested deployment, and states sent over 3,000 National Guard troops to Washington without the mayor’s consent.\textsuperscript{180}

Furthermore, Washington’s unique position as a district rather than a state has had serious implications for the deployment of the DC National Guard in response to an active insurrection on the U.S. Capitol, which sits within the district. The city’s mayor was unable to deploy the DC National Guard to suppress an attack on Congress, and the Joint Chiefs of Staff needed to send a letter to the military affirming that the peaceful transfer of power to a duly elected president would occur on schedule.\textsuperscript{181}


Perhaps most alarming of all, as noted by former Acting Secretary of Defense Christopher Miller, there was concern within the Department of Defense that the president “would invoke the Insurrection Act to politicize the military in an anti-democratic manner” in the wake of the 2020 election and in the lead up to the January 6 attack on the Capitol.\footnote{Hearing on Unexplained Delays and Unanswered Questions: Hearing before House Committee on Oversight and Reform, 117th Cong., 1 (May 12, 2021), (testimony of Christopher C. Miller, former acting secretary of defense), \url{https://www.congress.gov/117/meeting/house/112524/witnesses/HHRG-117-GO00-Wstate-MillerC-20210512.pdf}.} Congress must act to guard against similar or worse abuses or threats of abuse of power in the future.

**Government Surveillance**

Finally, we must remain vigilant against pervasive surveillance by the government — whether by local, state, or federal authorities. Despite the Fourth Amendment’s safeguard against government searches and seizures, our laws have not kept pace with the proliferation of tools deployed by the state to surveil its citizens. Surveillance methods continue to target and disproportionately affect communities of color, as well as disfavored groups, individuals, and dissidents.\footnote{Alvaro Bedoya, “The Color of Surveillance,” \textit{Slate}, January 18, 2016, \url{https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html}.}

Perhaps most troubling is the sheer volume of information that government agencies can collect on individual Americans without ever securing a warrant.\footnote{In 2018, the Supreme Court’s decision in Carpenter v. United States seemed to curtail the government’s ability to track individuals using their historical cell phone data without a warrant. But law enforcement agencies have identified and exploited gaping loopholes to this ruling, and today few limits exist to rein in excessive government surveillance.} The government can track any individual’s movements — down to the finest details about what doctor they visit or where they worship — by simply purchasing this information from a data broker.\footnote{Jake Laperruque, “Geofence Warrants: The Last Piece of the Location Privacy Puzzle,” Project On Government Oversight, August 25, 2021, \url{https://www.pogo.org/analysis/2021/08/geofence-warrants-the-last-piece-of-the-location-privacy-puzzle}.} This allows any number of agencies to develop an accurate and detailed picture of an individual’s daily movements and activities. Without a warrant,
they can set up a “stingray,” gathering data from all phones in a specific area to identify anyone who was in that area during a given period. They can also use “geofences” to pinpoint a specific phone and rewind a person’s movements through a city to find other spaces to search, like their home and car.\(^{186}\) And they can and do use emerging technologies — drones, face recognition, license plate readers, automated video analytics — to conduct location tracking without cellphone data.

Federal law enforcement also frequently uses surveillance technology in secret, hiding it from defendants and thereby amplifying risk of error, abuse, and the deprivation of due process rights (including rights to a fair trial, effective counsel, and adversarial testing).

Such pervasive surveillance is simply incompatible with democratic governance. Facial recognition and location tracking are particularly intrusive, as they gather highly sensitive information and intimate details about people’s lives. One need only look to the summer of 2020, when the Department of Homeland Security deployed drones, helicopters, and airplanes to surveil protests against police brutality in 15 cities across the country, to see how easily such technology could be used to chill free expression and exert social control.\(^{187}\)

Some technology — like face recognition — is also often prone to error based on algorithm quality, manner of use, and circumstance of images scanned.\(^{188}\) Face recognition is particularly bad at accurately identifying women and people of color, creating an intolerable risk of misidentification within a system that is already disproportionately harmful to Black and Brown people. This risk is amplified when this technology is used to scan large crowds exercising First Amendment rights, where there is increased risk of selective enforcement of minor charges. For example,


Baltimore police used it to target those protesting the police killing of Freddie Gray for arrest on minor and unrelated charges.\(^{189}\)

And it’s not just law enforcement use that is worrying. Last year, the Internal Revenue Service attempted to require face recognition for users to access some tax information online. While the agency abandoned the ill-advised plan, we must be vigilant to ensure the government does not resort to biometric identification for use of other basic government services, like employment benefits. We cannot rely on private companies to safeguard rights and rebuff efforts by the government to coerce them to hand over sensitive data about Americans’ private lives.

**Unregulated Technology**

In some instances, it is the practices of technology companies that create threats to the rights and safety of others. Companies like Clearview AI, for example, scrape billions of images from social media without the consent of users to create a catalogue that can then be sold to law enforcement. Other companies engage in these same dangerous practices, but sell their wares to consumers — increasing the risk such tools will land in the hands of stalkers, harassers, doxxers, and vigilantes.\(^ {190}\)

Entities like the Federal Trade Commission already possess the authority to regulate deceptive and unfair practices by private companies, many of which collect troves of location data from unwitting users and sell it to law enforcement as an end run around the Fourth Amendment. In many instances, location information collected from individuals is highly sensitive, yet a company’s claims to consumers about data security are deceptive in nature.\(^ {191}\) In fact, consumers may not even realize that their


online paper trail can be bought by data brokers who then analyze and sell it to other third parties, including the government.\textsuperscript{192}

It is imperative that Congress and the administration create strong limits on use of surveillance technology to preserve democratic society, close loopholes that allow the government to circumvent constitutional safeguards, and create strong regulation to prevent abuse by private vendors.

**Recommendations for Legislative Action**

**Repeal or amend 40 U.S.C. §1315.** Our constitutional system leaves general policing to states and localities. To adhere to the Constitution, Congress must prevent any use of federal law enforcement as an internal security service, which requires repeal of the provision used to justify the abusive use of CBP personnel in Portland. To the extent that there is a need for additional resources to protect federal property, federal protective services should rely on assistance from state and local governments, or federal agencies who have relevant jurisdiction.

**Amend 8 U.S.C. § 1357(a) to require immigration officers to have “reasonable grounds” in the exercise of powers without warrant.** Section 8 U.S.C. § 1357(a) grants immigration officials (including CBP as well as Immigration and Customs Enforcement (ICE)) the authority to interrogate, without a warrant, any “person believed to be an alien,” without the “reasonable grounds” requirement generally applied to other law enforcement. This sanctions racial profiling and violations of the Fourth Amendment, and requiring “reasonable grounds” for the exercise of powers will counteract those pernicious violations.

**Prohibit warrantless data collection by Customs and Border Protection.** Congress should prohibit agents from searching or copying the digital contents of electronic devices at the border without probable cause or a warrant (with limited emergency exceptions). This would ensure basic Fourth Amendment protections to anyone who encounters CBP agents at the border.

\textsuperscript{192} Martinez, “Police Quietly Obtain Private Location Data” [see note 186].
Enact legislation to prevent the president from misusing the National Guard or active duty military within the United States. There are several steps Congress can take to guard against the commander in chief’s improper use of power against domestic political opponents. First, Congress should give the mayor of Washington, DC, the same authority over the District of Columbia National Guard that governors of U.S. states and territories, including Puerto Rico, Guam, and the U.S. Virgin Islands, have over their local National Guards. Second, Congress should make clear that governors cannot deploy their states’ National Guards to other states and localities without the approval of the receiving state’s chief executive. Third, Congress should overhaul the Insurrection Act to guard against abusive deployment of the active-duty military within the United States, while preserving the ability to use federal troops in a true crisis. These reforms would provide a necessary check against the abuse of these military forces domestically.

Protect the constitutionally guaranteed privacy rights of the U.S. public. The Constitution’s Fourth Amendment and other due process rights are essential to the rule of law. Reform must ensure that those rights are not undermined by technological advances or workarounds. 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 and prohibit its sale to law enforcement or private individuals. These reforms will better protect individuals from unconstitutional encroachments.

Enact comprehensive rules on face recognition surveillance. Congress should codify rules on when and how face recognition surveillance may be used by law enforcement. These rules should include requiring judicial warrants, limiting the use of the technologies to investigations involving serious crimes, establishing 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

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abused against criminal defendants and will limit the government’s ability to use the technologies to stockpile sensitive information in overbroad or improper ways. Law enforcement should be prohibited from accessing facial recognition data from sources that were obtained without informed consent.

**Recommendations for Executive Action**

**Limit checkpoints and shrink the “border zone.”** The Department of Homeland Security should limit, and ultimately phase out, interior checkpoints. DHS should also assess, *sector by sector*, what constitutes a “reasonable distance” from the border for CBP to operate, based on the factors listed in the current regulation, an approach with broader utility for immigration enforcement.\(^{195}\) The use of permanent, suspicionless checkpoints well into the interior of the United States is inconsistent with the Fourth Amendment and the fundamental right to travel within the country.\(^{196}\) These reforms will ensure these policies reflect and respect those foundational principles.

**Ban racial and religious profiling by Customs and Border Protection.** In 2014, the Justice Department banned federal law enforcement agencies from engaging in profiling on the basis of race, ethnicity, religion, sexual orientation, or gender.\(^{197}\) Over the then-attorney general’s objections, the policy made exceptions to allow consideration of race and ethnicity for activities “in the vicinity of the border,” as well as in national security investigations.\(^{198}\) Those exceptions should be removed.

**Strengthen transparency of the Department of Homeland Security’s complaint, investigation, and discipline process.** DHS should create a process for the timely disclosure of video footage from CBP officers’ and agents’ body cameras, dashboard cameras, and cameras within detention facilities. This should include provisions for

\(^{195}\) 8 C.F.R. § 287.1 [see note 165].


release to individuals whose encounters with agents are recorded (as well as to their family members and legal representatives) and redaction and release to the general public. It should also promptly and proactively release internal investigations and reviews into incidents by CBP’s Use of Force Review Board and CBP’s Office of Professional Responsibility, as well as any deaths in custody. This will better enable accountability for bad actors abusing their power within the agency.

Require CBP to collect and affirmatively disclose detailed information about each stop, search, seizure, use of force, or arrest by its agents. The administration should direct the collection and reporting of information about CBP stops, including the basis and duration of the stop; identifying characteristics of the individual stopped or searched; any arrests, complaints, or uses of force; and the badge number of any officer present. Many state and local jurisdictions collect comparable data in an effort to enforce limits on racial profiling. CBP should be required to collect detailed information on, and publicly release quarterly summaries of,

- the number and location of checkpoints used by Border Patrol;
- the number of stops by roving patrols or at checkpoints, vehicle chases, secondary inspections, arrests, and incursions into private property by CBP; and
- the number of individuals detained by CBP, and the length of their detention.

Empower vigorous oversight of CBP within the executive branch. This includes removing Department of Homeland Security Inspector General Joseph Cuffari, who has demonstrated a clear lack of independence, authorizing the Justice Department to investigate any patterns of deprivation of constitutional rights at CBP, and creating a civilian oversight board over CBP.

Correct the improper contradiction between CBP's designation as a “security agency” and the recognition of its union. If CBP's national security mission qualifies it for expanding resources and shields its agents from being identified in responses to Freedom of Information Act requests, then the National Labor Relations Act provides that its workers should not be represented by unions. If agency staff are eligible for union membership, CBP should not receive special exemptions based on its national security role.

Regulate commercial surveillance products through relevant federal agencies. The administration should bring enforcement actions against surveillance vendors that engage in deceptive practices, as well as those that discriminate against protected classes. This will create a powerful incentive for these vendors to consider constitutional rights in the design, marketing, and use of their products.

Increase transparency around the impact of national security activities, including surveillance, on the rights of the U.S. public. The president should direct law enforcement agencies to disclose relevant information to the public about how federal 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 affected by each type of surveillance activity, especially warrantless surveillance under Section 702 of the Foreign Intelligence Surveillance Act (FISA). By increasing transparency in these ways, 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.

Limit the government's ability to classify its unlawful actions. Executive Order 13526, governing national security classification, should be revised to limit excessive secrecy, particularly in cases where classification is used to hide evidence of crimes or other violations of U.S. law, or serious human rights violations. Such reforms would allow the specter of accountability to serve as a deterrent against such wrongdoing.
Promoting Humane Treatment by and Accountability for Government Officials

By Sarah Turberville, director, Katherine Hawkins, senior legal analyst, and David Janovsky, policy analyst, The Constitution Project at POGO

Two years after the largest protests against racism and police violence in our nation’s history, too many of our leaders have abandoned the idea of fundamental reform. But the problems that sparked the protests have not gone away. The number of police killings continues to creep upward. The number of deaths in federal, state, and local custody also seems to be increasing as conditions deteriorate — although the lack of accurate data about these deaths makes this difficult to track.

Misconduct, Impunity, and Qualified Immunity

While there have been convictions or charges in a few high-profile cases, like the murder of George Floyd and the killing of Breonna Taylor, it remains far too difficult to hold officials criminally or civilly liable when they violate civilians' rights. The federal statute that criminalizes civil rights violations by law enforcement officers, 18 U.S.C. § 242, requires prosecutors to prove officers' subjective state of mind — a hurdle that does not exist in most criminal cases.

In civil cases, the judicially...
created “qualified immunity” doctrine requires plaintiffs to demonstrate that a police officer has been held accountable in nearly identical circumstances. The Justice Department rarely seeks criminal charges for police brutality. Victims of abuse by federal officials are at an additional disadvantage. The primary statute used in civil suits against state officials for constitutional violations, 42 U.S.C. § 1983, does not apply to federal officers, and the Supreme Court has continued to reject all attempts to sue government actors directly under the Constitution.\textsuperscript{204}

**Data on Deaths in Custody and Use of Force**

The government has a constitutional obligation to protect the health and safety of the people in its custody. There is no question that it fails to do so far too often. For years, high-profile police killings have generated outrage and galvanized protestors, while extensive efforts by researchers have hinted at the scale of the problem of deaths in custody and excessive use of force. But there is still no comprehensive, authoritative, and detailed set of information about these incidents, because the government has failed to implement the programs designed to produce those datasets. Without that data, policymakers are missing a key tool to understand and prevent deaths in custody and excessive force.

In 2014, Congress reauthorized the Death in Custody Reporting Act (DCRA), which requires the Justice Department to gather information about deaths in the criminal legal system at the federal, state, and local levels. But after eight years, the department has next to nothing to show for its efforts. Recent audits found that the Justice Department’s data on state and local deaths in fiscal year 2021 missed nearly 1,000 deaths that were already in the public record — to say nothing of deaths that have gone unreported.\textsuperscript{205}

Despite a Senate Permanent Subcommittee on Investigations hearing on the department’s failures, and an executive order instructing the department to improve


its implementation of the DCRA, the department still does not have an adequate plan in place. In fact, it has taken the baffling position that the text of the DCRA actually prevents it from implementing the law.\textsuperscript{206} In reality, the department’s intransigence is the main factor standing in the way.\textsuperscript{207}

Death in custody data captures only a portion of law enforcement violence. Data collection for non-fatal use of force incidents is also severely lacking. For instance, the FBI collects use-of-force data, but unlike its crime data reporting program, participation is voluntary.\textsuperscript{208} As of 2022, only about 8,500 out of the nation’s over-18,000 agencies contributed data on use of force, and homicide data reported by law enforcement agencies significantly undercounts police shootings.\textsuperscript{209} The Justice Department must fully implement the law, and Congress should also require similar reporting on use of force.

**Civil and Constitutional Rights and Rights Abuses**

The Justice Department’s inability or unwillingness to enforce the DCRA is only one part of a larger pattern of failure by the department to protect individual rights.\textsuperscript{210} The department systemically fails to consider the ramifications of its litigation positions for individual rights, leading it to default to defending the constitutionality and legality of executive action, regardless of the merits of the case.


\textsuperscript{210} Katherine Hawkins, “The Injustice Department,” Project On Government Oversight, March 17, 2022, \url{https://www.pogo.org/analysis/2022/03/the-injustice-department}. 
This is particularly harmful given the Supreme Court’s hostility to the rights of criminal defendants, incarcerated people, victims of police brutality, and non-citizens. The Justice Department’s Civil Rights Division, the unit charged with investigating law enforcement misconduct and violations of the rights of incarcerated people, receives a small fraction of the personnel and resources needed to accomplish its mission. The Justice Department also takes the position that the division lacks the authority to investigate whether federal law enforcement agencies are engaged in a pattern or practice of rights violations.

**Recommendations for Legislative Action**

**End impunity for federal law enforcement misconduct.** Congress should amend 42 U.S.C. § 1983 to authorize lawsuits against federal officials who violate constitutional rights in the same way the law currently authorizes suits against state and local officials. Violations of constitutional rights should have a remedy, and there is no reason federal officials should be held to a lower standard than state officials.

**Make use-of-force data reporting mandatory.** Congress should make the existing FBI program requiring reporting on use-of-force data mandatory, and it should ensure that any data collection program collects use-of-force data from local, state, and federal law enforcement agencies. Unlike other FBI data reporting programs, the FBI use-of-force reporting program is currently voluntary, and it has low participation. This data is needed to allow policymakers to better understand the scope of this problem so they can craft responsive solutions.

**Increase the size and budget of the Justice Department’s Civil Rights Division.** Congress should dramatically increase the amount of funding appropriated for the Civil Rights Division of the Justice Department. It is responsible for enforcing a wide range of anti-discrimination laws, protecting voting rights, enforcing the federal statutes criminalizing civil rights violations and hate crimes, and overseeing a vast number of state and local law enforcement agencies, jails, and prisons. Congress should adjust funding to ensure that the size and staffing of the department is adequate to meet this critical mission.
Abolish qualified immunity, and authorize lawsuits against state, local, and municipal government agencies for rights violations. Congress should pass legislation that creates an effective path for an individual cause of action when constitutional rights are violated. It should eliminate the judicially created doctrine of “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 virtually identical misconduct. In addition to allowing recovery against individual officials, Congress should also authorize lawsuits against their employers, to create incentives to end patterns of rights violations. This reform will pave the way for tangible accountability when government actors violate the rights of individuals.

Strengthen the criminal prohibition against law enforcement misconduct. Congress should amend 18 U.S.C. § 242 to allow conviction of an official who deprives an individual of their rights “intentionally or recklessly,” instead of only “willfully.” The current text, which forces prosecutors to prove an officer was subjectively aware that they were violating the Constitution, leads to systematic under-prosecution of law enforcement misconduct. This reform, and aggressive prosecution of misconduct, will serve as a long needed and powerful deterrent to law enforcement abuse of power.

Recommendations for Executive Action

Fully implement the Death in Custody Reporting Act. The Justice Department must improve its collection and analysis of death-in-custody data by using the full authority it possesses under the Death in Custody Reporting Act. At a minimum, the Justice Department must improve its data collection instruments, data should be regularly audited, the statutory penalty should be levied against noncompliant jurisdictions, and anonymized data should be made public in an accessible format. Comprehensive, detailed data is essential to enable informed, effective policy reforms to reduce deaths in custody.

Improve use-of-force data collection. The Justice Department should encourage and assist law enforcement agencies' participation in the FBI's use-of-force data reporting program. This would improve the quality and completeness of federal data.
Authorize investigations into whether federal law enforcement agencies or federal detention centers are engaged in a pattern or practice of rights violations. The president should issue an executive order authorizing the Justice Department’s Civil Rights Division to investigate credible allegations of a pattern or practice of constitutional violations by federal law enforcement, or in federal detention facilities. Repeated and ongoing abuses cannot be sufficiently addressed through investigation of individual officers. When cases of systemic abuse are substantiated by the department, it can bring public accountability to the offending agency and enable it to better conduct its mission and comport with the Constitution.

Instruct the Department of Justice to consider protection of constitutional rights in forming litigation strategy. The attorney general should explicitly instruct the civil division, the solicitor general’s office, and U.S. attorneys’ offices to consider the effects of the department’s litigation position on individual rights, and seek to preserve constitutional rights just as aggressively as it seeks to preserve executive authority.
Empowering Congress to Better Serve Its Constituencies

By Joanna Derman, policy analyst

The Constitution vests members of Congress with the power to legislate on behalf of their constituents, and it subjects these lawmakers to elections every two years in the House and every six years in the Senate. This structure, founded on the principle of fair and representative democracy, was meant to ensure that Congress is directly accountable to the public.

Unfortunately, Congress is more and more estranged from the needs of the very people it is supposed to represent, with the highest congressional approval rating for 2022 hovering around a lackluster 23%.  

The American people deserve a Congress that is willing and able to proactively root out corruption, self-dealing, and conflicts of interest. But lawmakers of both political parties have repeatedly failed to live up to the public's trust, which not only results in a less effective, less efficient federal government, but also weakens our democratic institutions. The increasingly partisan bifurcation of Congress only further contributes to legislative gridlock.

Given the actions by some lawmakers, these abysmal approval ratings come as no surprise. Conflicts of interest call into question who, exactly, members are working to serve, and public mistrust is exacerbated by regular instances of the alleged misuse of campaign funds and excessively cozy relationships with powerful special interests.


Breaches of official rules and special interest influence are often paired with instances of unethical personal indiscretions, adding more credence to the public's dim view of Congress and its members.\textsuperscript{214} Despite its charge to work directly on behalf of the public, far too much of Congress's work remains in shadow.

This is made evident by the fact that congressional resources are inaccessible to entire swaths of the public. Historically, this has been a problem even in the most literal sense: The Capitol Hill complex does not even have pick-up and drop-off points compliant with the Americans with Disabilities Act. Issues of transparency and accessibility extend to Congress's digital infrastructure. For example, Congress does not consistently offer closed captions and audio description for publicly streamed legislative proceedings such as committee hearings and floor speeches. Nor does it consistently post documents in machine readable, accessible formats.

Furthermore, Congress has not meaningfully modernized its systems to keep pace with the needs of constituents in the 21st century. All too often, legislative branch activity is seen as an impenetrable mystery, navigable only by members of Congress, their staff, and well-resourced lobbyists who are familiar with archaic forms of record keeping and unintuitive archival practices. Differences of opinion on legislation are worked out behind closed doors, often by leadership, and rank and file members receive updated text sometimes just minutes before being expected to take a vote. Not only does this hurt members' abilities to understand, let alone influence, legislation, this unnecessary complexity alienates constituents, and it ultimately undermines robust civic participation. Modern infrastructure could make it easy for constituents to track and monitor congressional activity. Without it, there is little opportunity for the

public to understand where those they've elected to represent them are making progress and where there is still need for additional reform.

**Bipartisan Hearings**

When the public does see Congress, it’s through hearings — and these hearings only highlight dysfunction and partisan bickering at the highest levels. One of the ways this manifests in the Senate is that committee leadership handpicks witnesses who will espouse their views on relevant hearing topics. While it is understandable that leadership would want to select witnesses whose personal ideologies align with their own, current Senate rules unfortunately undermine the credibility of these witnesses by failing to subject them to rigorous qualification requirements ensuring that they do not have conflicts of interest with respect to foreign governments or associated entities. If lawmakers seek to conduct productive congressional hearings, they should strengthen the integrity of Senate witnesses.

Additionally, staffers — especially new staffers — often lack the experience and proper resources needed to ensure that congressional hearings are as bipartisan in nature as possible. This is a problem, because bipartisan hearings, as opposed to overly politicized hearings, make for more effective, fact-based, and responsible lawmaking.

**Representative Staffing**

Additionally, congressional office staffing does not truly represent the diverse makeup of congressional districts, creating a representation gap that only widens the divide between constituent needs and lawmakers’ policy decisions. Members of racial and ethnic monitory groups, veterans, and people with disabilities continue to fight for equal representation in the halls of Congress. While recent Congresses have been more racially and ethnically diverse than in the past, the legislative branch is still far from reflecting the diversity of the United States. But the lack of diversity among staff — especially at the highest levels — is alarming.\(^\text{215}\)

One reason for this is because current salaries for junior Hill staff can be so low that many turn to family for support to live and work in Washington. Coupled with the persistent wealth and income inequality between white communities and Black, Indigenous, and Latine communities, low salaries directly contribute to the lack of diversity on Capitol Hill. Applicants who come from these communities and who are also low-wealth and low-income do not have the family support many colleagues rely on to make low salaries work and get a foot in the door.

Without addressing barriers to even applying for staff positions, Congress will continue to struggle in gaining and retaining diverse staff, since insufficient salaries can cut out qualified candidates from low income households. Congress should be striving to be a place where diversity of all kinds is reflected in hiring — racial, socioeconomic, gender, and religious diversity are all necessary for our lawmakers and the public to benefit from legislation crafted with these different perspectives reflected in the process. Low pay drives job dissatisfaction and higher turnover rates, which ultimately impairs members' ability to do their jobs effectively and efficiently.

Furthermore, personal offices and congressional committees have maintained a high barrier to professional entry at even the internship level. They often require successful candidates to relocate to Washington, DC, to pursue an internship, which can preclude individuals from a more diverse range of socioeconomic backgrounds from taking advantage of the opportunity to learn about Congress’s inner workings, and position themselves well to become hired as full-time employees.

**Congressional Funding**

Part of the problem in addressing these issues is that Congress simply does not give itself enough funding. While in recent years the House significantly plussed up its Member Representational Allowance, which dictates each member’s office budget, the Senate has yet to give itself a similarly meaningful increase in funding.\(^{216}\) There will never be a politically expedient time for the legislative branch to allocate itself more

resources, but failure to do so will only result in continued and worsening hampering of Congress's ability to serve its constituents.

Congress must improve its systems to better serve the American public. Bringing internal infrastructure and processes into the 21st century will help promote transparency, hold lawmakers accountable, and restore public trust in democratic institutions.

**Recommendations for Legislative Action**

**Enhance accountability and transparency for members of Congress.** Congress should include requiring additional reporting and disclosure around the use of Member Representational Allowance (MRA) funds for travel and other purposes. Furthermore, Congress should take steps to require that all financial disclosures and other similar required disclosures be filed electronically in machine readable formats. This would allow for better and more accessible record keeping, which would in turn allow the public to track members’ use of public resources more effectively.

**Expand access to and insight into Congress's own internal procedures.** Congress should ensure that accessible electronic copies of legislation that will be considered in committee, known as the “manager’s mark,” are uploaded to congressional websites no later than 48 hours before a committee hearing occurs. Similarly, Congress should centralize and publicize a database that, in real time, compiles amendments that lawmakers have filed prior to their consideration in committee or the floor.

**Promote accessibility of the Capitol grounds and other congressional resources.** Congress should establish designated zones near accessible building entrances on the Capitol grounds for dropping off and picking up individuals with disabilities. These zones should comply with the requirements outlined in the Americans with Disabilities Act. Also, Congress should improve the accessibility of its official websites, which, for example, could include consistently integrating closed captions for video recordings of congressional hearings, floor speeches, and other business.

**Permanently adopt virtual resources for constituents.** Congress responded to the COVID-19 pandemic by temporarily providing staff, fellows, and interns the option to conduct normal business on a virtual basis. While many offices have already returned to pre-COVID requirements that stipulate personnel must be physically present in the
workplace, Congress as a whole should consider permanently offering internships and select fellowships remotely. Virtual programs should comply with necessary cybersecurity protocols and background checks.

**Strengthen integrity of congressional hearings.** While the House has already enacted internal rules governing who can act as a congressional witness, the same standards have not yet been adopted by the Senate. The Senate should enact similar congressional witness standards as the House, such as requiring individuals who testify to provide a thorough accounting of financial and professional relationships with foreign governments and associated entities that could compromise the integrity of their testimony. Both chambers should go one step further and include an enforcement mechanism to ensure that potential witnesses comply with these standards.

**Increase resources for members of Congress and congressional staff.** Congress should increase its own budget by appropriating larger sums of money to fast-track technological modernization efforts, improve staff resources, and address accessibility concerns. Though each congressional office has the discretion to portion out salaries to individual staffers in a manner of their choosing, lawmakers should be mindful to do so in a way that is consistent with the principles of diversity, equity, and inclusion.

**Increase diversity of congressional staff.** Congress should track and monitor the demographic characteristics of congressional staff in both the House and the Senate with the goal of adopting policies that facilitate hiring and retaining a more diverse workforce — particularly in more senior positions. While representation for racial and ethnic minority groups and veterans has increased on the Hill, offices still too often do not reflect the makeup of the districts or states they serve.

**Offer bipartisan oversight workshops.** Congress should provide lawmakers and their staffs comprehensive resources about how to conduct impartial, fact-based, and bipartisan oversight. We recommend the Chief Administrative Officer works with the Congressional Staff Academy, the Congressional Leadership Academy, and organizations like POGO to provide workshops, trainings, and certifications focused on oversight authorities and best practices for applying them. This would promote effective congressional investigations that lead to lasting policy change, and increase civility between political parties.
Promoting an Inclusive Democracy that Rejects Authoritarianism

By Sarah Turberville, director, and David Janovsky, policy analyst, The Constitution Project at POGO

An ethical, accountable government that safeguards rights is only possible if our government is truly representative of the people it serves. Corruption and abuse of power thrive when people do not believe their votes matter or if they believe their votes won’t be counted. Voter suppression has long been a tool the powerful have used to prevent being held to account: As we’ve written before, “it rigs the rules for those who fear losing the game.”

Those in power have successfully manipulated and exploited our constitutional system to diminish equal and fair representation and to subvert elections in their effort to entrench power. And the January 6 insurrection showed that some elected officials themselves have been willing to undermine democratic governance.

Voting and Elections

A vicious cycle of gerrymandering in and by state legislatures has skewed representation in the House of Representatives. Due to the composition of the Senate, representation in that chamber is already inherently disproportionate to population. This imbalance is amplified using the filibuster, which allows senators representing a small minority of the country to block legislation supported by a large majority of the population. Finally, in two of the last six elections, the electoral college

has operated in a manner that has handed over the presidential election to the candidate without the most votes.

Voters could naturally seek to elect officials willing to reform our system to protect our democracy. However, state legislatures across the country have engaged in a full assault on access to voting and in efforts to subvert the election once votes are cast. The Supreme Court has increasingly blocked enforcement of the Voting Rights Act. 220 Efforts to protect voting rights in Congress have been stymied by the Senate filibuster. 221 Some state constitutions do contain more sweeping protections of the right to vote, but the Supreme Court may be poised to strike those down, or allow gerrymandered, partisan state legislatures to overrule them. 222

Lies about the 2020 election have taken hold among a small but dangerous segment of the population, resulting in the election of at least 179 election deniers to public office in 2022. 223 (Fortunately, many other candidates for state-wide office who ran on election denial in 2022 failed.) Those lies about the 2020 election contributed in large part to the January 6 attack on the United States Capitol complex, the goal of which was to stop the certification of the 2020 election results so that Donald Trump could remain president. 224

In the wake of the Civil War, the 40th Congress recognized that elections won’t always be enough of a check to ensure that individuals who seek to disrupt our democracy through violence are kept out of office. In response, it amended the Constitution to include a section clarifying that individuals who have previously taken an oath to

support and defend the Constitution but who go on to participate in an insurrection or rebellion against the government, or give aid and comfort to the enemies of the United States, are disqualified from holding public office again in the future unless a supermajority of Congress waives that disqualification. Individuals who previously took an oath of office but participated in or aided the January 6 attack acted either knowing that claims of election fraud were false or in the absence of any credible evidence of election fraud, and they pose a threat to our democracy.

False claims of election fraud have also led to a drastic increase in threats and harassment against election workers, which the federal government has hesitated to address with the necessary urgency. The Department of Homeland Security reportedly shelved plans to protect election workers out of fears of appearing partisan, and a Justice Department task force to investigate criminal threats against election officials had brought only eight cases as of November 2022, despite receiving orders of magnitudes more reports of threats against election workers.

All of this combines to both undermine the very foundation of our democracy — free and fair elections — and to make legislative change to create a more effective and accountable government more difficult to achieve.

225 U.S. Constitution amend. XIV, § 3.
226 House Select Committee to Investigate the January 6th Attack, Final Report, 106 and 373-379 [see note 224].
The Supreme Court

This problem also lays bare how the Supreme Court has become too powerful in our system. The lifetime tenure for Supreme Court appointments incentivizes a harmful level of chicanery in the appointment process. Too few hold these enormously powerful positions for too long, enabling the political branches to entrench their control on the levers of power far longer than the democratic process would permit them to do so in other branches. The unpredictable nature of Supreme Court appointments has also led to a lopsided selection process over the last 60 years, so that while each party has occupied the White House for roughly the same amount of time, Republican presidents have been able to appoint two-thirds of current Supreme Court justices.

A bare majority of five people on the court who hold their positions for life can overturn laws duly passed by Congress or interpret laws to give them little meaning. The length and power of positions on the nation’s high court incentivizes partisans to seek hardened idealogues for appointment. On a simple majority vote, the Senate can pack the Supreme Court with partisans; however, due to the filibuster, Congress can only respond to the court’s decision-making by mounting a supermajority to pass new laws.

The Office of Legal Counsel

Congress’s inability to pass legislation, combined with the partisan capture of the courts, means that unilateral executive action is very often the only available means for beneficial policy change. This increases an already problematic trend towards expansion of executive power. Another force behind this expansion of power is the Office of Legal Counsel (OLC), an opaque but powerful part of the Department of Justice. While the OLC’s supposed mission is to provide the executive branch with the “best view of the law” on tough questions, even if that means blocking a proposed

action, in reality the office frequently rubber-stamps illegal and unconstitutional policies.\textsuperscript{230}

Under administrations of both parties, the OLC has consistently undermined constitutional protections and the separation of powers, approving torture, warrantless surveillance, and drone strikes against U.S. citizens, as well as indiscriminate stonewalling of congressional oversight.\textsuperscript{231} Much of this work is done in secret, as OLC claims it is exempt from transparency requirements.\textsuperscript{232} Reining in the office's tendency to expand presidential power and bringing more transparency to its work will help address this fundamental imbalance.\textsuperscript{233}

In short, our system has become wildly out of balance, to the detriment of the public's faith in our institutions and our government's ability to conduct its affairs ethically, accountably, and in a manner that safeguards constitutional rights and principles. Transformative reform is necessary to ensure our democracy endures and that our government functions effectively, proceeds accountably, and respects constitutional principles.


Recommendations for Legislative Action

Protect the right to vote. Congress should pass legislation that affirmatively protects the right to vote and to have one's vote fairly counted. Congress should consider alternative vehicles, including a constitutional amendment to guarantee the right to vote, or legislation that would explicitly ban unequal treatment based on the political party administering elections.

Enact legislation that creates a set term for Supreme Court justices. Congress should pass legislation that limits a justice's Supreme Court tenure to 18 years and then allows them to transition to senior status or to active service on a lower Article III court afterwards, respecting the Constitution's lifetime appointment provision. This single, 18-year term would bolster the court's democratic legitimacy and create more predictability, allowing each president to appoint two Supreme Court justices during a single term (assuming the number of justices remains at nine).

Expand and restructure the Supreme Court. Congress should enact legislation to increase the number of justices on the Supreme Court and require randomly selected panels to hear cases. This would increase the likelihood of interested justices being compelled to persuade others of their views, especially when the interested justice is not chosen to hear a case, and justices would likely need to moderate positions in order gain a majority consensus in a given case. The ability of the political branches to appoint specific individuals to the Supreme Court with the aim solidifying a specific voting block could also be reduced, serving to reduce the friction of Supreme Court selection. The court would necessarily need to be enlarged to enable it to sit in panels sufficiently randomized to serve these ends. This reform would disrupt static voting blocks and promote compromise and moderation on the Supreme Court.

Enforce the disqualification clause where relevant. Congress should exercise its authority over its members to ensure that constitutionally disqualified individuals are not serving as lawmakers. The Constitution grants each chamber of Congress the exclusive power to judge the qualifications of its members, which includes the power to refuse to seat or to expel members under the disqualification clause.

Create a comprehensive federal enforcement scheme for the disqualification clause. Congress should expand the reach of existing federal law that can be used to remove
disqualified officials from elected or appointed office so that the Justice Department and qualified individuals can bring enforcement actions against any federal official who engaged in insurrection or provided aid and comfort to enemies of the United States. This would ensure that the constitutional provision to keep insurrectionists out of public office is fully enforceable.

**Require the Department of Justice to publicly post Office of Legal Counsel opinions.** The Office of Legal Counsel’s legal interpretations are treated as binding within the executive branch, and Congress and the public have the right to know the legal basis for executive branch actions. Congress should require OLC to publish all final, non-classified legal interpretations from OLC, along with an index containing as much information on classified opinions as possible. This would better enable congressional oversight of this opaque but powerful office, and it could serve to deter its more radical legal interpretations.

**Create a Congressional Office of Legal Counsel.** Unlike the executive branch, Congress does not have an authoritative source of legal analysis in defense of its institutional prerogatives. This puts it at a consistent disadvantage in disputes with the executive branch. Congress should create its own version of the Office of Legal Counsel, either by creating a new office or empowering each chamber’s counsels to work together. This would ensure more balance between the branches of government by empowering Congress to promulgate respected, persuasive legal opinions about its own authorities.

**Recommendations for Executive Action**

Help protect election workers against harassment, and prioritize investigation and prosecution of crimes against election workers. The administration should redouble its efforts to protect election workers against violent threats and harassment in the lead up to the 2024 elections. The Department of Justice should issue clearer guidance to FBI field offices and state and local governments about what federal

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criminal laws may be applicable to threats and harassment of election officials, and what constitutes a “true threat” as opposed to First Amendment-protected speech. The Department of Homeland Security should provide support to election officials seeking protection against doxxing, threats, and harassment. This would help ensure the safety of our election workers and the nonpartisan administration of our elections moving forward.

**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. While the office has recently disavowed a handful of harmful opinions, it has also taken the misguided stance that it will not proactively review its past work.\(^{235}\) This is not a neutral position: It leaves untold dangerous legal positions in place within the executive branch, where they are considered binding. Identifying and rescinding legal opinions that take unjustifiable positions will strengthen the rule of law and promote trust in essential public institutions while simultaneously safeguarding integral constitutional principles.

Enforce the disqualification clause where relevant. Federal law empowers the attorney general and the U.S. attorney in the District of Columbia to bring *quo warranto* actions against government officials in DC who violate the disqualification clause. Strict enforcement of this constitutional provision serves to protect our institutions from threats against democracy that come from within.