

UNIVERSITY *of* PENNSYLVANIA

JOURNAL *of* LAW & PUBLIC AFFAIRS

Vol. 7

December 2021

No. 1

EXECUTIVE ACCOUNTABILITY LEGISLATION FROM WATERGATE TO TRUMP—AND BEYOND

*Kimberly L. Wehle**
*Jackson Garrity***

In the wake of Watergate, Congress enacted a slew of legislative reforms aimed at plugging the myriad holes in transparency and oversight the scandal laid bare. These included the Federal Advisory Committee Act, important amendments to the Freedom of Information Act, the Inspector General Act, the Ethics in Government Act, the Federal Election Commission Act and creation of the Federal Election Commission, the National Emergencies Act, the Foreign Intelligence Surveillance Act and the Impoundment Control Act. Unlike President Richard Nixon, who resigned on the threat of impeachment, President Donald J. Trump was twice impeached for alleged abuses in office—and he was twice acquitted in the Senate. Arguably, the articles of impeachment did not fully capture his abuses of office, including those that culminated in the 482-page report of Special Counsel Robert Mueller regarding the 2016 Trump campaign’s cooperation with Russian intelligence to influence the election on Trump’s behalf. But that was just the beginning. Over the course of four years in office, Trump and his enablers in Congress managed to exploit gaps or lapses in the post-Watergate reform legislation while flouting numerous provisions of the Constitution that were not even the focus of Congress post-Watergate—including the Emoluments Clauses, the Advice and Consent Clause, and aspects of the Impeachment Clauses. The Trump years also underscored

*Kimberly Wehle is a Professor of Law at the University of Baltimore School of Law. Professor Wehle thanks Julianna Brightman, Brendan Duff, and Anaum Cheema for excellent research assistance.

**Jackson Garrity is a Dean’s Fellow, Program on Law and Government, American University Washington College of Law.

inadequacies in the Twenty-Fifth Amendment and the relatively ancient legislative process for tallying Electoral College votes. With Democrats now controlling both Houses of Congress, as well as the White House under President Joe Biden, it is imperative that the legislature step in once again to fill the separation of powers vacuum in the breach. To be sure, the Framers understood that power corrupts. Despite their expectation that only individuals of moral character and fidelity to the rule of law would ascend to the presidency, the structure of the Constitution itself underscores the foundational aim of accountability; thus, their most powerful creation—the Legislative Branch—must not sit idly by. Although this article does not (indeed, cannot) purport to lay out in any detail the model features of statutory reform measures, it does fill a significant gap in the legal literature: a review of the post-Watergate reform legislation and an assessment of how it fared through the Trump administration. The article also sketches out legislative priorities and needs as a preliminary benchmark for future research, analysis, and policy reform.

INTRODUCTION	39
I. WATERGATE HISTORICAL CONTEXT	41
II. POST-WATERGATE REFORMS.....	50
<i>A. Agency Transparency and Oversight Reforms</i>	50
1. Federal Advisory Committee Act.....	50
2. 1974 Amendments to the Freedom of Information Act.....	52
3. Foreign Intelligence Surveillance Act	55
<i>B. Measures to Limit Executive Powers</i>	58
1. 1974 FECA Amendments and the creation of the FEC.....	58
2. Impoundment Control Act.....	60
3. National Emergencies Act	62
<i>C. Watchdog Mechanisms</i>	63
1. Inspector General Act.....	63
2. Ethics in Government Act	68
III. THE TRUMP ADMINISTRATION	71
<i>A. Ukraine Impoundment Scandal</i>	71
<i>B. Special Counsel Investigation</i>	72
<i>C. Alleged FISA Abuses</i>	74
<i>D. Intimidation of Inspectors General</i>	76
1. Inspector General of National Intelligence.....	78
2. Principal Deputy Inspector General of Health & Human Services.....	81
3. Inspectors General of the State Department	83
4. Acting Inspector General of the Department of Defense	84
5. Acting Inspector General of the Department of Transportation.....	85

6. Inspector General of the Post Office	86
<i>E. Weaknesses in Federal Advisory Committee Act</i>	<i>86</i>
1. Open questions about the Trump White House’s Coronavirus Task Force	86
2. NDRC’s FACA objection to Cheney Energy Task Force	88
<i>F. Campaign Finance Violations</i>	<i>89</i>
1. Dismantling the FEC	89
2. Possible FECA violations	89
<i>G. National Emergencies Under Trump</i>	<i>91</i>
<i>H. Failures to Comply with Freedom of Information Act</i>	<i>93</i>
1. Persistent FOIA backlog	93
2. FOIA as applied to Trump in a private capacity	94
3. Important recent FOIA revelations	95
IV. SUGGESTIONS FOR REFORM	97
<i>A. Priorities for a Post-Trump Congress</i>	<i>97</i>
1. Strengthen Inspector General independence	98
2. Streamline FOIA	100
3. Improve FISA compliance	102
4. Strengthen special prosecutor independence	103
5. Reform FACA	103
6. Amend the FEC	104
<i>B. Additional Legislative Needs</i>	<i>104</i>
1. Legislatively implement the Twenty-Fifth Amendment	105
2. Pass the For the People Act	106
3. Amend the Electoral Count Act of 1887	107
4. Pass impeachment procedure legislation	108
5. Mandate compliance with the Advice and Consent Clause	109
6. Implement the Emoluments Clauses	109
7. Impose consequences for illegally impounded funds	110
8. Reform the National Emergencies Act	111
CONCLUSION	112

INTRODUCTION

In the Twentieth Century, when people thought of presidential scandal, the first administration that often came to mind was that of President Richard Nixon. After two impeachments and numerous criminal and civil investigations, President Donald J. Trump’s administration became the modern model of presidential scandal. Nixon famously resigned his office

rather than face likely impeachment over the Watergate scandal.¹ In response to the corruption laid bare by the Nixon administration, Congress embarked on a legislative mission that culminated in a series of statutory reforms to make the federal government more transparent and accountable, and thus deter future misconduct.² Congress must do the same—with even more vigor—in the wake of the Trump administration.

This article examines the post-Watergate reforms and the extent to which they have been effective, with a specific focus on the ways they were tested by the Trump administration. In doing so, it identifies weaknesses within current oversight laws and prescribes paths to reinforce the important protections they were designed to impose, albeit failingly. Part I provides a historical overview of the Nixon administration's clashes with democratic institutions to contextualize the post-Watergate oversight reforms.³ Part I also examines the abuses that were only discovered later, after the Watergate investigation.⁴

Part II details the key provisions of the post-Watergate statutes, adding information and context for how these pieces of legislation have evolved since their passage.⁵ Part II's first topic is agency transparency and oversight reforms.⁶ Implementation of the Federal Advisory Committee Act (FACA) and subsequent modifications are discussed within the context of the presidential administrations that created a demand for the legislative action.⁷ It then addresses the 1974 amendments to the Freedom of Information Act (FOIA), which sought to expedite the information disclosure process and limit exclusions to public oversight,⁸ as well as the rise of the Foreign Intelligence Surveillance Act (FISA), which was an attempt to limit surveillance on American citizens.⁹ Part II then addresses the statutory measures established to limit executive powers after Watergate.¹⁰ The article explores the objectives of the Federal Election Campaign Act (FECA), the Impoundment Control Act, and the National Emergencies Act, along with the

¹ See Rick Perlstein, *Watergate Scandal*, ENCYC. BRITANNICA (June 10, 2021), <https://www.britannica.com/event/Watergate-Scandal> [perma.cc/7RY7-3PEQ] (describing Nixon's resignation and the events motivating that decision).

² See SAM BERGER & ALEX TAUSANOVITCH, CTR. FOR AM. PROGRESS, *LESSONS FROM WATERGATE: PREPARING FOR POST-TRUMP REFORMS* 3–10 (2018) (chronicling the post-Watergate legislative reforms and explaining how these reforms aimed to create a more ethical and transparent government).

³ See *infra* Part I.

⁴ See *infra* Part I.C.

⁵ See *infra* Part II.

⁶ See *infra* Part II.A.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See *infra* Part II.B.

shortcomings of these three statutes as evidenced under the Trump administration.¹¹ Part II concludes with consideration of the watchdog mechanisms added in the aftermath of Watergate,¹² including the Inspector General Act and the Ethics in Government Act, as well as abuses by presidents notwithstanding these reforms, congressional failures to renew valuable legislation, and recent attempts to revive statutes that lapsed.¹³

Part III discusses Trump-era events that tested the post-Watergate reforms.¹⁴ The discussion covers the Ukraine “quid pro quo” scandal that led to his first impeachment, Special Counsel Robert Mueller’s investigation,¹⁵ the Trump campaign’s alleged FISA abuses,¹⁶ and the widespread and unprecedented removals and intimidation of Inspectors General.¹⁷ Part III also addresses whether the White House COVID-19 response task force led by Trump’s son-in-law Jared Kushner was subject to the mandatory disclosure requirements under FACA.¹⁸ Next, the article scrutinizes President Trump’s failure to appoint enough members to the Federal Election Commission (FEC) to enable enforcement of campaign finance and election laws, as well as his own possible violations of federal election law.¹⁹ Finally, the article describes President Trump’s use of the National Emergencies Act to push his promise to build a wall at the Southern border in contravention of Congress,²⁰ as well as the increased delays to the already sizeable FOIA backlog under the Trump administration.²¹

The article concludes with recommendations for how the post-Watergate reforms should be reinforced and supplemented with further oversight legislation.²²

I. WATERGATE HISTORICAL CONTEXT

The Nixon presidency shed light on deficiencies in American democratic institutions, and in doing so revealed an urgent need for increased

¹¹ *Id.*

¹² *See infra* Part II.C.

¹³ *Id.*

¹⁴ *See infra* Part III.

¹⁵ *See infra* Part III.A–B.

¹⁶ *See infra* Part III.C.

¹⁷ *See infra* Part III.D.

¹⁸ *See infra* Part III.E.i.

¹⁹ *See infra* Part III.F.i.

²⁰ *See infra* Part III.G.

²¹ *See infra* Part III.H.

²² *See infra* Conclusion.

congressional oversight of the Executive branch.²³ Perhaps the most famous instance of the Nixon administration's corruption occurred on October 20, 1973, through events that came to be known as the "Saturday Night Massacre."²⁴ That evening, Nixon ordered Attorney General Elliot Richardson to fire Archibald Cox, the Special Counsel appointed to investigate the suspicious break-in at the Watergate hotel.²⁵ Nixon directed Richardson to fire Cox to stifle his investigation involving taped private conversations between Nixon and the former Attorney General John Mitchell.²⁶ Richardson refused to fire Cox and resigned in protest — as did his deputy. Ultimately, Solicitor General Robert Bork agreed to fire Cox, but the departure of three high-level officials from the Department of Justice undermined Nixon's goal of ending the investigation.²⁷ Congress later came to the conclusion that a more independent investigative mechanism was needed to look into future Executive misconduct.²⁸

The Supreme Court's ruling on July 24th, 1974, sealed the fate of Nixon's presidency. The Court concluded that Nixon could not "withhold evidence that is demonstrably relevant in a criminal trial."²⁹ Nixon faced a criminal subpoena for his Oval Office recordings, and fought to keep the tapes secret.³⁰ A unanimous Court in *United States v. Nixon* rejected his claim of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," and found that the public interest in disclosure outweighed the president's generalized interest in secrecy.³¹ In response to the ruling, Nixon initially contended he did not have to obey the

²³ See Earl Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A. J. 550, 550–52 (1974) ("If anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we must open our public affairs to public scrutiny on every level of government.").

²⁴ Carl Levin & Elise J. Bean, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 1, 12 (1987) (citation omitted).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Benjamin J. Priester, Paul G. Rozelle & Mirah A. Horowitz, *The Independent Counsel Statute: A Legal History*, 62 L. & CONTEMP. PROBS. 5, 10 (1999). Ultimately, the Ethics in Government Act, discussed in detail in Part II, *infra*, was passed and established a mechanism for the Department of Justice to appoint independent counsels who had greater removal protections.

²⁹ See James M. Naughton, *Nixon Slide From Power: Backers Gave Final Push*, N.Y. TIMES, Aug. 12, 1974, at 51, <https://www.nytimes.com/1974/08/12/archives/nixon-slide-from-power-backers-gave-final-push-former-defenders.html> [perma.cc/N6BK-M597] (quoting the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974)).

³⁰ *Id.*

³¹ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

Court's order, stating it was within his constitutional right to flout it.³² But after his legal counsel, James St. Clair, advised him that doing so was a sure ticket to impeachment and conviction, Nixon issued a statement agreeing to comply.³³ And so began a fifteen-day series of events that would lead to Nixon's resignation.³⁴

The fact that Nixon resigned before impeachment proceedings began may lead one to believe he did so because he knew what he did was wrong, which may actually be the case. The contents of Nixon's conscience were known only to him. What certainly did play a significant role in his decision to resign was the lack of support from Congress, including members of his Republican party. Both the House and the Senate had a Democratic majority, and even though impeachment was highly likely, Nixon initially felt that he would secure the thirty-four Senate votes needed to avoid conviction and removal.³⁵ Nixon miscalculated the great magnitude of his June 23rd tapes. The recordings revealed that he tried to enlist CIA members to convince the FBI to collaborate with him and distort the evidence against him in the Watergate scandal.³⁶ Knowing that Nixon was not going to resign just because someone advised him to, St. Clair and other White House aides took it upon themselves to inform Nixon's closest allies about the contents of the tapes so that Nixon would have no choice but to realize that if impeachment proceedings went forward, not even those closest to him would be able to prevent his conviction and removal.³⁷

Whereas the House Judiciary Committee was dealing with circumstantial evidence and the testimony of John W. Dean, ousted White House counsel, in order to build a case against Nixon and his involvement in the Watergate break-in, the June 23rd recording transcript was the "smoking gun" that not even Nixon's staunchest supporters could overlook.³⁸ Apart from St. Clair, Nixon's Secretary of State, Henry Kissinger, advised Nixon that other countries would perceive the U.S. as a weak state if the impeachment trial went forward.³⁹ Amid the ongoing Cold War, the President needed to appear authoritative to ensure other countries would trust his word during times of diplomatic or military crisis.⁴⁰ St. Clair called a meeting of

³² Naughton, *supra* note 29 at 51.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Naughton, *supra* note 29 at 2, 12.

eight Republican Senate members and informed them of the contents of the tapes that were not yet released to the public.⁴¹ The members, who risked their credibility in preventing Nixon from being impeached, were enraged; they had wrongly believed there was no direct evidence linking Nixon to the scandal.⁴²

Shortly thereafter, the same members called for a private meeting with Nixon. They were advised by his Chief of Staff, Alexander Haig Jr., that when conducting this meeting, they should not be direct in telling Nixon to resign. Haig believed that Nixon was close to resigning, but if told to do it, he would do the complete opposite.⁴³ When they finally met with Nixon, the congressional caucus informed him that he lacked even half of the thirty-four votes he needed to avoid conviction and proceeded to list one by one the names of both Democrats and Republicans that would vote against him.⁴⁴ Nixon listened, and although his departure was inevitable because of the evidence stacked against him, some members of Congress mourned his departure. On the day of Nixon's resignation, forty members were invited to the White House so that Nixon could thank them for their loyalty and support and nearly all of them, including Nixon, wept.⁴⁵

The Saturday Night Massacre is perhaps the clearest example of how an exceedingly expansive view of Executive power could threaten American democracy, especially if there is no "smoking gun" proof like the June 23 transcripts that not even the staunchest supporter of the president could contest. Other examples of his threats to the rule of law nonetheless abound.

Nixon challenged Congress's sweeping authority over government spending through a coordinated effort to impound funds appropriated for federal agencies, including funding for water pollution funds.⁴⁶ Each year

⁴¹ *Id.* at 51.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Irwin R. Kramer, *The Impoundment Control Act of 1974: An Unconstitutional Solution to a Constitutional Problem*, 58 UMKC L. REV. 157, 162–63 (1990); see *Executive Impoundment of Appropriated Funds: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 3 (1971) (statement of Sen. Sam J. Ervin) (“[B]y impounding appropriated funds, the President is able to modify, reshape, or nullify completely laws passed by the legislative branch, thereby making legislative policy through executive power. Such an illegal exercise of the power of his office flies directly in the face of clear constitutional provisions to the contrary.”); see also Kevin Kosar, *So...this is Nixon's fault?*, POLITICO (Oct. 21, 2015), <https://www.politico.com/agenda/story/2015/10/richard-nixon-congressional-budget-control-act-history-000282/> [perma.cc/VTW8-SE99] (“The president had been antagonizing Congress by blaming it for budget deficits and inflation. John Ehrlichman, a top Nixon adviser, loudly denounced the ‘credit-card Congress,’ and likened it to a derelict relative who impoverished a family by running up

between 1971 and 1974, the Nixon administration impounded seventeen to twenty percent of all funds appropriated by Congress.⁴⁷ This was done to draw concessions on spending cuts⁴⁸ and was a direct challenge to Congress's spending power.⁴⁹ The effort raised fears in Congress that the President, through the Office of Management and Budget (OMB), "holds unprecedented control over the resources of the federal government."⁵⁰

Although the Constitution does not exclusively mention impoundment as a power vested with the Executive, the President has vast administrative powers in the realm of national security as commander-in-chief.⁵¹ In cases like *Cincinnati Soap Co. v. United States*, the Supreme Court held the legislature's power of the purse allows it to set an expenditure ceiling that confines the executive.⁵² Within those limits, the executive has power to control the expenditure of appropriated funds as the administrator of government.⁵³ As a result, presidential impoundments had never been contested in federal court in the context of national security.⁵⁴ Nixon tried to stretch this power and utilize it in the domestic realm.⁵⁵

The Supreme Court stepped in to check Nixon in *Train v. City of New York*,⁵⁶ the only modern impoundment case to reach the Court. In that case, the Court heard a challenge to Nixon's refusal to spend money appropriated

bills. Nixon upped the pressure by telling Congress to spend no more than \$250 billion, and by threatening to veto appropriations bills that exceeded this cap." "Impoundment" refers to the deliberate decision by a President to refuse to allow appropriated funds to be spent. *Id.*⁴⁷ Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1, 2 (1974). This constituted more funding than any other president in history.⁴⁸ See Kramer, *supra* note 46, at 162 (describing how Nixon used impoundments as a tool to "eliminate or severely curtail programs that he opposed").

⁴⁹ See Philip Joyce, *The Congressional Budget Office at Middle Age 2–3* (Hutchins Ctr. on Fiscal & Monetary Pol'y at Brookings, Working Paper No. 9, 2015), https://www.brookings.edu/wp-content/uploads/2016/06/PJ_WorkingPaper9_Feb11_Final.pdf [perma.cc/5XSK-TLDT] (sharing an account of the presidential impoundment strategy that reached its zenith during the Nixon administration as a "seven-year budget war" between the executive and legislative branches).

⁵⁰ See 119 CONG. REC. 19,435 (1973) (statement of Sen. James A. McClure) (entering Holmes Alexander's essay, *The Heavy Burden of the Federal Purse*, into the record to document the public's reaction to Sen. William Scott's proposal to transfer control of the Office of Management and Budget to Congress).

⁵¹ Roy E. Brownell II, *The Constitutional Status of the President's Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 24 (2001).

⁵² *Id.* at 24–25 (citing *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)).

⁵³ Brownell, *supra* note 51, at 24–25.

⁵⁴ *Id.* at 20.

⁵⁵ *Id.* at 46.

⁵⁶ 420 U.S. 35, 45–46 (1975).

under the Federal Water Pollution Control Act.⁵⁷ New York City sued, arguing that the language of the Act mandated that all money appropriated by Congress be spent.⁵⁸ Nixon responded that the Constitution granted the Executive unlimited discretion to spend funds.⁵⁹ The Court rejected Nixon's argument and held that the President cannot impound funds that Congress intended would be spent.⁶⁰ Yet there remained significant concern that a future President might again attempt to usurp Congress's power over the budget.

The concern was not unfounded. By 1973, Congress had enacted 470 statutes that gave the President "extraordinary powers, ordinarily exercised by the Congress."⁶¹ Because there is no general emergency powers provision in Article II of the Constitution, even the legislature must look at the statutes it has enacted to determine what exact powers it has delegated to the President.⁶² Among those powers was the ability to "seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; [and] restrict travel"⁶³ But as the Special Senate Committee on the Termination of the National Emergency Act indicated during the Nixon administration, no one

⁵⁷ *Id.* at 40–41. A particularly contentious instance of impoundment was Nixon's refusal to spend money appropriated for water pollution control funds. *See* Stanton, *supra* note 46, at n. 3 (describing the Senate's reaction to Nixon's impoundment of the water pollution control funds). The President claimed that the Federal Water Pollution Control Act Amendments of 1972, in mandating that all money appropriated by Congress under the Amendments for water pollution control be spent, had infringed on the Executive's Article II authority. *Id.* at 3. At the time, Senator Edward Muskie argued that Congress could not have been clearer regarding the way the money was to be spent, because the Federal Water Pollution Control Act amendments which appropriated them were passed overwhelmingly by both the House and Senate. *Id.* at 1–2 n.3 When the President initially vetoed the amendments, the veto was overridden immediately by both houses. *Id.* In light of that reality, Muskie argued, the President's impoundment of the water pollution control funds was particularly egregious. *Id.* ⁵⁸ *Train*, 420 U.S. at 40.

⁵⁹ *See* Stanton, *supra* note 47, at 3 (describing how Nixon argued that the mandate that required spending the full amount "conflicts with the allocation of executive power to the president made by Article II of the Constitution").

⁶⁰ *See Train*, 420 U.S. at 41 ("The sole issue before us is whether the 1972 Act permits the Administrator to allot to the States under § 205(a) less than the entire amounts authorized to be appropriated by § 207. We hold that the Act does not permit such action and affirm the Court of Appeals.").

⁶¹ S. REP. NO. 93-549, at III (1973).

⁶² *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (noting that the President's power to issue an executive order directing the seizure of corporate plants must stem from an act of Congress or the provisions of the Constitution).

⁶³ S. REP. NO. 93-549, *supra* note 61.

in either the Legislative or Executive branch knew how far those powers reached.⁶⁴

Nixon's expansive view of Executive power also put democracy to the test when he declared two national emergencies in order to give himself undefined, unprecedented powers. Nixon declared the first emergency to crush a strike by postal workers.⁶⁵ The second emergency was declared in response to the inflation crisis of 1971, when Nixon claimed he had unprecedented authority to impose import controls to control inflation.⁶⁶ Some scholars believe the Constitution also grants the President implied powers to seize undefined presidential authority in response to a national emergency, and at the time few parameters around that authority existed.⁶⁷ Yet Nixon's use of that authority, coupled with the abuses uncovered during the Watergate investigation, showed that safeguards were needed to prevent presidents from using emergency declarations to circumvent democratic procedures.

As Congress attempted to carry out investigations of the Nixon administration, it was stymied by bureaucratic delays that were enabled by what a House Report later characterized as "major deficiencies in the administration of the [FOIA]."⁶⁸ This interference revealed a serious need to reform FOIA so that Congress could force executive agencies to comply with Congressional oversight requests.⁶⁹

⁶⁴ *Id.* at IV.

⁶⁵ Stephanie Jurkowski, *Emergency Powers*, CORNELL LEGAL INST., https://www.law.cornell.edu/wex/emergency_powers [perma.cc/6FBT-3WUH] (July 2017).

⁶⁶ *Id.*

⁶⁷ *See id.* ("The Constitution does not expressly grant the President additional war powers or other powers in times of national emergency. However, many scholars think that the Framers implied these powers because the structural design of the Executive Branch enables it to act faster than the Legislative Branch. Nevertheless, because the Constitution remains silent on the issue, the Judiciary cannot grant these powers to the Executive Branch when it tries to wield them. The courts will only recognize a right of the Executive Branch to use emergency powers if Congress has granted such powers to the President."). Notably, because the Constitution is silent on what these powers are, there is no clear indication where their limits lie, and therefore they have been used in a variety of circumstances and have encompassed a range of specific functional powers. *See id.* (listing various national emergencies that presidents have declared in the past, including the 1933 banking crisis, the 1950 communism scare, the 1970 postal workers strike, and the 1971 inflation emergency).

⁶⁸ H.R. REP. NO. 93-876, at 122 (1974). A full database of the legislative history of FOIA and its subsequent Amendments is available at *FOIA Legislative History*, The National Security Archive, <https://nsarchive.gwu.edu/foia/foia-legislative-history> [perma.cc/8LUY-Q6VF] (last visited Oct. 18, 2021).

⁶⁹ Dan Lopez, Thomas Blanton, Meredith Fuchs & Barbara Elias, *Veto Battle 30 Years Ago Set Freedom of Information Norms*, The National Security Archive, GEO. WASH. UNIV. (Nov. 23, 2004), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm> [perma.cc/

The investigations also revealed unethical activities related to President Nixon's campaign funds, including the creation of a "slush fund" used for everything from funding illegal surveillance of political opponents to improvements on Nixon's summer homes.⁷⁰ Congress also uncovered the so-called "International Telephone and Telegraph Corporation (ITT) affair," in which a corporation allegedly donated \$400,000 to the Nixon campaign in order to get the Department of Justice (DOJ) to settle an antitrust lawsuit.⁷¹ These discoveries revealed a need for greater oversight of campaign financing.⁷²

The Watergate investigations also revealed that U.S. intelligence agencies had been turned inward on Nixon's political rivals.⁷³ This effort

59CQ-ET4L]. Ultimately, in response to these deficiencies, Congress passed the 1974 amendments to FOIA, discussed in detail in Part II, *infra*. Congress passed the amendments twice with a strong enough majority to override President Ford's initial veto. Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 76 (1992). President Ford believed judicial in camera review was unconstitutional because he believed that it was the role of the executive, not the judiciary, to properly determine whether investigative documents could safely be disclosed to the inquiring public. *Id.* at 78.

⁷⁰ John M. Crewdson, *Nixon's Taped Remarks on Apparent Slush Fund Called Key Evidence in Rebozo Inquiry*, N.Y. TIMES (Dec. 9, 1974), at 27, available at <https://www.nytimes.com/1974/12/09/archives/nixons-taped-remarks-onapparent-slush-fund-called-key-evidence-in.html> [perma.cc/Q73X-N76H].

⁷¹ Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, BRENNAN CTR. FOR JUST. (March 19, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/itt-affair-and-why-public-financing-matters-political-conventions> [perma.cc/VSL7-362X].

⁷² Ultimately, this resulted in the creation of the Federal Election Commission and other electoral regulatory reforms, discussed in detail in Part II, *infra*. See also Torres-Spelliscy, *supra* note 71 (explaining the DOJ's conduct during the ITT affair was illegal when it happened under the Tillman Act, and the incident was the impetus for the Tunney Act of 1974, "which requires anti-trust settlements go before a judge instead of being settled by the DOJ alone"). Bi-partisan legislation passed in 2014 rolled back certain public funding provisions of the post-Watergate election oversight reforms, but the Tunney Act remained in place. *Id.*

⁷³ U.S. Senate Hist. Off., *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm> [perma.cc/X8PF-97SQ] ("Despite these numerous challenges, the Church Committee investigated and identified a wide range of intelligence abuses by federal agencies, including the CIA, FBI, Internal Revenue Service, and National Security Agency. In the course of their work, investigators identified programs that had never before been known to the American public, including NSA's Projects SHAMROCK and MINARET, programs which monitored wire communications to and from the United States and shared some of that data with other intelligence agencies. Committee staff researched the FBI's long-running program of 'covert action designed to disrupt and discredit the activities of groups and individuals deemed a threat to the social order,' known as COINTELPRO. The FBI included among the program's many targets organizations such

included surveillance conducted by the FBI and CIA.⁷⁴ While Congress was concerned for years that these agencies would inappropriately surveil Americans,⁷⁵ the concerns came to a head during Watergate.⁷⁶ Nixon attempted to use his executive power under the guise of national security to create an “intelligence committee” to provide “better intelligence operations.”⁷⁷ Documents relating to this intelligence committee were classified as containing top secret content.⁷⁸ One mission undertaken by this committee was investigating who was responsible for publishing the Pentagon Papers that detailed U.S. involvement in Vietnam.⁷⁹ If Nixon had suspected certain individuals of committing espionage and revealing classified U.S. information, he could—in theory—have taken steps to have them federally indicted for having violated the 1917 Espionage Act.⁸⁰ Instead, he had intelligence officers burglarize the offices of certain suspects.⁸¹

Concerns related to federal advisory committees also arose and culminated in the passage of the Federal Advisory Committee Act, discussed in Part II, *infra*, before the investigations even ended.⁸² In sum, the Watergate

as the Southern Christian Leadership Conference, the anti-Vietnam War movement, and individuals such as Martin Luther King, Jr., as well as local, state, and federal elected officials.”).

⁷⁴ *Id.*

⁷⁵ Concerns about intelligence groups surveilling nonviolent activist groups can be found throughout the Congressional Record. *See* 117 CONG. REC. 13,982 (1971) (statement of Rep. James H. Scheuer) (entering Frank Donner, *The Theory and Practice of American Political Intelligence*, N.Y. REV. OF BOOKS (Apr. 22, 1971) into the Congressional Record) (“At an ever-increasing rate the activities of antiwar, anti-Establishment, civil rights, black militants, student, and youth groups are being recorded and compiled. Lists and dossiers are coded, computerized, stored, and made accessible to all branches of the intelligence network . . . political intelligence indiscriminately sweeps into its net the mild dissenters along with those drawn to violence.”). These groups spanned the American ideological spectrum. *See id.* (“peaceful, moderate, lawful organizations—from the NAACP to the Fellowship of Reconciliation—become intelligence targets on the theory that they are linked to communism or subversion.”).

⁷⁶ EDWARD C. LIU, CONG. RSCH. SERV., IF11451, FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA): AN OVERVIEW 1 (2021) (“Following revelations regarding widespread privacy violations by the federal government during the Watergate era, Congress enacted FISA to establish guidelines for government collection of foreign intelligence.”).

⁷⁷ CIA, INTELLIGENCE AGENCIES UNDER FIRE FOR WATERGATE ROLE 58 (2002), available at <https://www.cia.gov/readingroom/document/cia-rdp75b00380r000200010022-9> [perma.cc/6GRE-RBBP].

⁷⁸ *Id.* at 58.

⁷⁹ *Id.* at 59.

⁸⁰ 18 U.S.C. § 798 (1996).

⁸¹ CIA, *supra* note 77, at 59.

⁸² BERGER & TAUSANOVITCH, *supra* note 2.

investigations revealed a need for numerous new democratic safeguards to keep the executive and the agencies under its command in check.

II. POST-WATERGATE REFORMS

In response to the Nixon administration, Congress passed a series of reforms intended to create a more transparent and accountable government. The goal was to ensure that officials under the President's command could be held accountable when they abused or exceeded their authority. In pursuing this goal, Congress reinforced the external constitutional safeguards that allow Congress and the courts to check the Executive. Core to the concept of separated powers is the reality that the President has limited, implied powers, and may not run the Executive Branch with unconstrained discretion. This idea ran directly counter to President Nixon's own conception of presidential powers, which he believed to be unlimited.

The wide-ranging Watergate reforms may be separated into three broad categories. First, in response to clear obfuscation by federal agencies, Congress passed administrative oversight measures to increase agency transparency and accountability. Second, in order to expressly rebuff Nixon's undemocratic advocacy for a system dominated by the Executive branch, Congress passed measures to directly limit the authority of the President. Third, to ensure effective investigations within the administrative state and to ensure the President cannot unilaterally end investigations, Congress created watchdog mechanisms to investigate alleged wrongdoing.

A. Agency Transparency and Oversight Reforms

1. Federal Advisory Committee Act

One of the first steps Congress took while the Watergate investigations were still ongoing was to impose oversight measures on shadowy "advisory" committees through the Federal Advisory Committee Act (FACA). These advisory committees, typically comprised of individuals representing special interest groups, have been viewed by presidents and legislators across the political spectrum as a potentially corrupting force in administrative law.⁸³ The purpose of FACA was two-fold.⁸⁴ First, it was

⁸³ See WENDY GINSBERG & CASEY BURGAT, CONG. RSCH. SERV., R44253, FEDERAL ADVISORY COMMITTEES: AN INTRODUCTION AND OVERVIEW 17 (2016) (presenting the history of Congressional oversight of executive advisory committees, including legislation passed in 1842 and 1909).

⁸⁴ Kurtis A. Kemper, *Construction and Application of the Federal Advisory Committee Act*, 160 A.L.R. Fed. 483, (2000).

designed to reduce wasteful expenditure on advisory committees.⁸⁵ Second, it was aimed at making de facto presidential advisory committees more identifiable and accountable to the public.⁸⁶

FACA was intended to curb the influence of advisory committees⁸⁷ by imposing certain processes on federal advisory committees “to ensure that advice by the various advisory committees formed over the years is objective and accessible to the public.”⁸⁸ It prescribes standards for agencies to follow when they establish advisory committees, creates a way for Congress and the Executive to enforce those standards, places temporal limitations on the existence of a committee, provides guidelines to reduce the improper influence of advisory committees, requires a federal employee to be involved in advisory committee meetings, and makes advisory meetings and documents available to the public.⁸⁹

In the decades before FACA, advisory committee abuse and waste was well known to government officials and the general public.⁹⁰ Throughout the 1950s, DOJ laid out guidelines to curb the influence of private industries over the federal government. Executive Order No. 11007⁹¹ enforced much of the DOJ guidance for committees and set time limits. Circular No. A-63 was issued by the Bureau of Budget in 1964 and was later cited by the executive branch during Congressional hearings to show that there was no need for more legislation with regard to advisory committees.⁹²

While the House and Senate hammered out details on what would become FACA through the Spring of 1972, on June 5th, President Nixon signed Executive Order No. 11671⁹³ which instead vested OMB with oversight of advisory committees.⁹⁴ To the extent this was an attempt by Nixon to convince Congress that FACA was unnecessary, it was undercut by the arrest⁹⁵ of burglars in the Watergate Hotel twelve days later, and further

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ GINSBERG & BURGAT, *supra* note 83, at 3.

⁸⁸ Federal Advisory Committee Act (FACA) Management Overview, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/portal/content/104514> [perma.cc/ZYP8-TPZ5] (last updated January 28, 2018).

⁸⁹ Kemper, *supra* note 81.

⁹⁰ GINSBERG & BURGAT, *supra* note 83.

⁹¹ Exec. Order No. 11,007, 3 C.F.R. § 182 (1962).

⁹² GINSBERG & BURGAT, *supra* note 83.

⁹³ Exec. Order No. 11,671. 3 C.F.R. § 388 (1973).

⁹⁴ GINSBERG & BURGAT, *supra* note 83.

⁹⁵ *Document for June 17th: Security Officer's Log of the Watergate Office Building Showing Entry for June 17, 1972*, NAT'L ARCHIVES, <https://www.archives.gov/historical-docs/todays-doc/index.html?dod-date=617#:~:text=During%20the%20early%20hours%20of,the%20Democratic%20National%20Committee%20Headquarters> [perma.cc/P8A7-QK8C] (last visited Feb. 24, 2021).

on September 15, 1972,⁹⁶ when Nixon associates were indicted by a federal grand jury for the break-in. Congress passed FACA later in September, and President Nixon signed the Act in October.

FACA was tested in January of 2001, when President George W. Bush created the National Energy Policy Development Group (NEPDG),⁹⁷ and tapped Vice President Dick Cheney to run it. After the NEPDG published a report in May 2001,⁹⁸ the Sierra Club and Judicial Watch filed suit alleging that, because the committee met in private, with non-governmental employees, and documents that the committee produced were not made public, the committee violated FACA.⁹⁹ When the organizations requested discovery of the committee's documents, Cheney sought an order of mandamus to stop any discovery, which was at first denied. In 2005, after a remand by the Supreme Court, the D.C. Circuit Court of Appeals dismissed the case, concluding that the NEPDG was not covered by FACA because it was not an "advisory committee" within the meaning of the statute. No non-federal employees had a right to vote on committee matters or exercise veto powers, so those members had no duty to the public under FACA.¹⁰⁰ After the incident, the viability of FACA as a check on Executive branch corruption came into question.

2. 1974 Amendments to the Freedom of Information Act

Another measure Congress adopted to strengthen oversight was the passage of amendments to the Freedom of Information Act to promote transparency in government, in recognition that "if the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process."¹⁰¹ The amendments introduced a number of key reforms, including reforms intended to overcome "extraordinary delays" in the FOIA adjudication process by creating administrative timetables to control the review process.¹⁰² The reforms also

⁹⁶ Associated Press, *From Break-in to Pardon*, L.A. TIMES (June 8, 1997), at 29, available at <https://www.latimes.com/archives/la-xpm-1997-06-08-mn-1346-story.html> [perma.cc/EK4V-47C9].

⁹⁷ *In re Cheney*, 406 F.3d 723, 725 (D.C. Cir. 2005).

⁹⁸ NAT'L ENERGY POL'Y DEV. GROUP, NATIONAL ENERGY POLICY (2001).

⁹⁹ *Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Group*, 219 F. Supp. 2d 20, 29 (D.D.C. 2002)

¹⁰⁰ *In re Cheney*, 406 F.3d at 729.

¹⁰¹ H.R. REP. NO. 93-876, at 123 (1974).

¹⁰² *See e.g.*, S. REP. NO. 98-854, at 165 (1974) (noting the Supreme Court in *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1 (1974) held, in the Report's words, that "FOIA confers jurisdiction on the courts to enjoin administrative proceedings pending a judicial determination of the applicability of the Act to documents involved in those proceedings"). In the Senate Judiciary Committee Report on the proposed amendments, to

ensured agencies could not abuse FOIA's foreign policy exemption for inappropriate purposes by providing for *in camera* review of FOIA denials based on the exemption and by narrowing the exemption's applicability.¹⁰³

First, the amendments created procedural administrative timelines to force agencies to process FOIA requests at a reasonable pace.¹⁰⁴ As amended, FOIA provides that when an agency receives a request, it "must determine within twenty [working] days . . . whether to comply with such request."¹⁰⁵ The D.C. Circuit has held that

in order to make a 'determination' within the statutory time periods and thereby trigger the administrative exhaustion requirement, the agency need not actually produce the documents within the relevant time period . . . [b]ut the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents.¹⁰⁶

Additionally, Congress created mechanisms to ensure these timeframes were complied with, including sanctions on agencies that fail to comply.¹⁰⁷

Second, the amendments narrowed FOIA's foreign policy exemption to reduce the ability of agencies to shield documents from requests.¹⁰⁸ For example, the amendments narrowed the circumstances under which the exemption applies.¹⁰⁹ They also created a two-part test for administrative

Committee suggested that the amendments address this problem by expediting the timeframe upon which administrative determinations to withhold documents could be subject to judicial review. *Id.*

¹⁰³ H.R. REP. NO. 4960 (1973). This was a direct response to the Supreme Court's holding in *EPA v. Mink* that documents designated as "classified" on foreign policy grounds is an action delegated to agencies, not the courts. 410 U.S. 73, 81–82 (1973); S. REP. NO. 98-854, at 166 (1974). *In camera* review was included in the final amendments. *Id.* This reflects the desire by Congress to enhance judicial oversight over the FOIA process. *See id.*

¹⁰⁴ The agency has 20 days after receiving a FOIA request to determine whether to comply with such request and shall immediately notify the person making such request. 5 U.S.C. § 552(a)(6)(A).

¹⁰⁵ 5 U.S.C. § 552(a)(6)(A)(i).

¹⁰⁶ *Citizens for Resp. and Ethics in Washington v. Fed. Election Comm'n.*, 711 F.3d 180, 189 (D.C. Cir. 2013).

¹⁰⁷ 5 U.S.C. § 552(a)(F)(i).

¹⁰⁸ *Id.* § 552(b); *see also* U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 7 (2019), available at <https://www.justice.gov/oip/page/file/1248371/download> [perma.cc/L49D-JJ63] ("The 1974 FOIA amendments considerably narrowed the overall scope of the Act's law enforcement and national security exemptions, and also broadened many of its procedural provisions – such as those relating to fees, time limits, segregability, and in camera inspection by the courts.")

¹⁰⁹ *Attorney General's Memorandum on the 1974 Amendments to the FOIA*, U.S. DEP'T OF JUST. (1975), <https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia> [perma.cc/9TMQ-77HN] (last visited Nov. 21, 2021).

officers to apply when determining whether records can be withheld.¹¹⁰ This test permits the withholding of matters that are (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (2) are in fact properly classified pursuant to such Executive Order.¹¹¹

As with the foreign policy exemption, the 1974 amendments also narrowed the exemption for investigatory records compiled for law enforcement purposes.¹¹² The Act was amended to specify six potential harms that qualify a document for the exemption.¹¹³ Thus, after administrators determine a document is an investigatory document compiled for law enforcement purposes, they must ask whether releasing the document would result in one of those six specific harms.

Documents withheld under the foreign policy and law enforcement exemptions may be reviewed *in camera* by a court to determine the propriety of the withholding under the substantive factors of the Act.¹¹⁴ This review is under a *de novo* standard.¹¹⁵ Any document, regardless of the exemption claimed, may be reviewed, even if it contains classified information. Upon inspection, any reasonably segregable portion of a record is to be provided after appropriate redactions are made.¹¹⁶ While this provides an important safeguard, *in camera* examination is not automatic.¹¹⁷ Before a court orders

¹¹⁰ 5 U.S.C. § 552(b)(1)(A)–(B).

¹¹¹ *Id.*; EDWARD H. LEVI, U.S. DEP'T OF JUST., MEMORANDUM FOR THE EXECUTIVE DEPARTMENT AND AGENCIES CONCERNING THE AMENDMENTS TO THE FREEDOM OF INFORMATION ACT (1975), available at <https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia> [<https://perma.cc/W7L8-27TR>].

¹¹² 5 U.S.C. § 552(b)(7).

¹¹³ The six circumstances under which a document may be withheld are if releasing the document would: (1) interfere with enforcement proceedings; (2) deprive a person of a right to a fair trial or an impartial adjudication; (3) constitute an unwarranted invasion of personal privacy; (4) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source; (5) disclose investigative techniques and procedures; and (6) endanger the life or physical safety of law enforcement personnel. *Id.*

¹¹⁴ *Id.* § 552(a)(4)(B).

¹¹⁵ *Id.*

¹¹⁶ The agency records sought by a FOIA plaintiff often consist of non-exempt factual information intertwined with exempt material. In response to such cases, Congress in 1974 amended the FOIA to provide that “any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt.” Lisa A. Krupicka, *Developments Under the Freedom of Information Act—1984*, 1985 DUKE L.J. 742, 787 (1985).

¹¹⁷ Although courts have recognized persuasive policy reasons to adopt a *per se* rule that *in camera* review will be granted, they have declined to do so because such a *per se* rule would

inspection, the agency must be given an opportunity to establish that the documents are clearly exempt.¹¹⁸ Since 1974, courts have almost always ruled in favor of the agency after conducting review.¹¹⁹ Commentators have argued that courts' deference to agencies regarding foreign policy information misreads the history of the FOIA, and deference is not an adequate reflection of the responsibilities assigned to the courts in reviewing FOIA cases.¹²⁰

3. Foreign Intelligence Surveillance Act

An additional agency oversight measure Congress passed in 1978 was the Foreign Intelligence Surveillance Act (FISA), which limited electronic surveillance of Americans to circumstances in which agencies were collecting foreign intelligence.¹²¹ Senator Ted Kennedy, one of the law's proponents, explained the legislature's motivations for FISA, stating that "the full Senate at long last has the opportunity to place foreign intelligence electronic surveillance under the rule of law . . . The abuses of recent history sanctioned in the name of national security . . . highlight the need for more effective statutory controls and congressional oversight."¹²² These abuses

contravene the clear grant by Congress of broad discretion to trial judges. *See* *Ctr. for Auto Safety v. EPA*, 731 F.2d 16 (D.C. Cir. 1984) (declining to adopt a *per se* rule requiring the court to conduct an *in camera* review of documents claimed to be exempted per Exemption 5 of FOIA and noting that such a rule would oppose Congressional intention to afford trial judges broad discretion on the issue).

¹¹⁸ S. REP. No. 98-854, at 166 (1974).

¹¹⁹ *See* Deyling, *supra* note 69, at 90 ("If weighed at all, plaintiff's evidence is never strong enough to overcome what has become a de facto presumption of government victory once reasonably specific government affidavits are filed.").

¹²⁰ *Id.* ("This article contends that one reason plaintiffs seldom persuade courts to order the government to release 'secret' information is that judicial treatment of these cases fails to fully implement the reforms Congress intended when it passed the 1974 amendments. Rather than expanding the scope of judicial inquiry into the procedural and substantive legality of withholding information, opinions issued both before and after the 1974 amendments have established a lenient standard of review in FOIA national security cases. That standard, in essence, will validate any 'reasonable' executive agency decision to withhold such information.").

¹²¹ *See* EDWARD C. LIU, CONG. RSCH. SERV., IF11451, FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA): AN OVERVIEW 1 (2021) ("FISA defines '[f]oreign intelligence information' as information relating to a foreign power or that generally concerns the ability of the United States to protect against international terrorism or a potential attack by a foreign power or agent of a foreign power. Though Congress initially limited FISA to regulating government use of electronic surveillance, Congress subsequently amended FISA to regulate other intelligence-gathering practices, such as physical searches, the use of pen registers and trap and trace devices and compelling the production of certain types of business records.") (citation omitted).

¹²² 124 CONG. REC. 10,887 (1978) (statement of Sen. Edward "Ted" Kennedy).

included use of warrantless electronic and physical surveillance on anti-war protestors, a member of Congress, and Dr. Martin Luther King Jr.—all made public after Watergate.¹²³

The Department of Justice has further explained that “[t]hrough FISA, Congress sought to provide judicial and congressional oversight of foreign intelligence surveillance activities while maintaining the secrecy necessary to effectively monitor national security threats. FISA was initially enacted in 1978 and sets out procedures for physical and electronic surveillance and collection of foreign intelligence information.”¹²⁴ FISA has been amended to address “electronic surveillance, pen registers, trap and trace devices, physical searches, and business records.”¹²⁵

FISA also provides a framework to monitor electronic surveillance by federal agencies and safeguard against abuse.¹²⁶ It contains several important provisions. First, it provides procedural safeguards with which agencies must comply.¹²⁷ Second, it establishes a special court—known as Foreign Intelligence Surveillance Court (FISC)—for purposes of FISA oversight and review.¹²⁸ The FISC is composed of federal judges appointed by the Chief Justice of the U.S. Supreme Court. Third, it creates a probable cause standard of proof for courts to apply in evaluating applications for FISA warrants.¹²⁹ Fourth, it forbids the covert surveillance of American citizens under the Act.¹³⁰

FISA allows agencies only to surveil “agents of a foreign power.”¹³¹ The criteria to determine whether someone is an agent of a foreign power vary depending on whether an individual is an American citizen.¹³² For noncitizens, an “agent of a foreign power” includes not only foreign

¹²³ James G. McAdams, *Foreign Intelligence Surveillance Act, An Overview*, FED. L. ENFORCEMENT TRAINING CTR., 4–5, https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf [perma.cc/387G-CLSF] (last visited Feb. 24, 2021).

¹²⁴ BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., *THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 (FISA)* (2013), <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1286> [perma.cc/Y6AL-64VC].

¹²⁵ *Id.*

¹²⁶ *See, e.g.*, Cedric Logan, *The FISA Wall and Federal Investigations*, 4 N.Y.U. J.L. & LIBERTY 209, 219–21 (2011) (discussing the FISA framework’s safeguards against abuse by governmental electronic surveillance, known commonly as “The Wall.”).

¹²⁷ 50 U.S.C. §§ 1801–1813.

¹²⁸ *Id.* §§ 1801–1885(c).

¹²⁹ *Id.* § 1805(a)(2).

¹³⁰ *Id.* § 1802(a)(1).

¹³¹ *Id.* § 1802(a)(1)(A).

¹³² *See* ELIZABETH GOITEIN & FAIZA PATEL, *WHAT WENT WRONG WITH THE FISA COURT* 17 (2015) (stating that the criteria to determine whether someone is an agent of a foreign power varies depending on the citizenship status of the potential agent).

governments, but also “factions of foreign nations; entities that foreign governments control; international terrorist groups; foreign-based political organizations; and foreign entities engaged in the proliferation of weapons of mass destruction.”¹³³ By contrast, an American qualifies as an “agent of a foreign power” only if they have some connection to criminal activity.¹³⁴ This was meant to protect Americans from surveillance based only on tenuous connections to foreign entities. Congress did not anticipate this would create significant roadblocks to legitimate surveillance because it anticipated that most of the persons under surveillance would be violating the criminal espionage laws.¹³⁵

Furthermore, FISA only permits surveillance of agents of foreign entities for the purpose of obtaining “foreign intelligence information.” Congress specifically narrowed the definition of foreign intelligence information to exclude information such as the opinions of congressional members on foreign relations.¹³⁶ To that end, FISA requires a showing that any surveillance of a United States “person” is “necessary,” not just relevant, to the conduct of foreign affairs.¹³⁷

Through the 1990s there was an effort to make sure that the “primary purpose” of FISA surveillance was securing foreign intelligence as opposed to a criminal investigation.¹³⁸ This “primary purpose” standard created a “wall” between the foreign intelligence investigations done with FISA surveillance and criminal investigations done by other law enforcement agencies.¹³⁹

The terrorist attacks of September 11, 2001, and the subsequent passage of the USA PATRIOT Act diminished both the “wall” and the “primary purpose” standard. In November of 2002, the U.S. Foreign Intelligence Surveillance Court of Review (FISCR)—the appellate court charged with reviewing decisions the FISC—met for its first time ever and overturned the FISC’s holding that the counterintelligence branches of the FBI and DOJ could not share FISA information with the criminal prosecution

¹³³ *Id.* at 22.

¹³⁴ *Id.*

¹³⁵ S. REP. NO. 95-701, at 21 (1978).

¹³⁶ See GOITEIN & PATEL, *supra* note 132, at 17 (“Senators were concerned that the definition of ‘foreign intelligence information’ in an early draft of the bill was too broad because it went beyond national security to include information on ‘the conduct of the foreign affairs of the United States.’ One Senator wrote to the Chair of the Intelligence Committee pointing out that the views of members of Congress could ‘easily be classified as information ‘‘essential to the conduct of the foreign affairs of the United States,’’ suggesting that Congress itself could be surveilled under FISA.”).

¹³⁷ *Id.*

¹³⁸ McAdams, *supra* note 123, at 4–5.

¹³⁹ *Id.* at 5.

branches of the agencies.¹⁴⁰ In overturning the FISC, the FISCR cited the congressional intent behind the PATRIOT Act that law enforcement and foreign intelligence officials better collaborate to prevent future terrorist attacks.¹⁴¹ The PATRIOT Act also changed the standard for FISA surveillance from the “primary purpose” standard to a standard “that a significant purpose of the surveillance is to obtain foreign intelligence information”¹⁴²—a much lower bar to clear.

B. Measures to Limit Executive Powers

1. 1974 FECA Amendments and the creation of the FEC

The Watergate investigations uncovered a number of shady uses by the Nixon campaign of campaign contributions. Scholars have explained “[t]he 1974 amendments to the Federal Election Campaign Act (FECA) responded directly to the abuses of the 1972 campaign.”¹⁴³ The goal of the amendments was to preserve the ability of ordinary citizens to make contributions to their preferred candidates, but eliminate the ability of corporations and wealthy individuals to have a disproportionate influence over the political process.¹⁴⁴ The legislature considered radical reforms to American campaign finance, including the introduction of a public campaign finance system.¹⁴⁵ However, the legislature dropped that idea in favor of a model in which private contributions were preserved, with limits enforced by a centralized body, the FEC.¹⁴⁶ This model represented a compromise between the most hardcore campaign finance reform advocates and moderate colleagues. The compromise preserved private contributions in exchange for increased spending limits for House and Senate campaigns and an FEC model in which the Commission was composed of a multi-member, bipartisan,

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 7–8.

¹⁴² 50 U.S.C. § 1804(a)(6)(B).

¹⁴³ BERGER & TAUSANOVITCH, *supra* note 2, at 7; *see also* Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?* 49 CATH. U. L. REV. 133, 134 (2000) (noting that the legislative record before Congress when it passed the 1974 Amendments “was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions,” and that “[r]evelations of huge contributions from the dairy industry, a number of corporations (illegally) and ambassadors and potential ambassadors . . . dramatize[d] . . . the widespread concerns over the problem of undue influence”) (citing *Buckley v. Valeo*, 519 F.2d 821, 839-40 (D.C. Cir. 1975)).

¹⁴⁴ 120 CONG. REC. 10,342 (1974).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

supervisory board.¹⁴⁷ The new limits set campaign contribution caps at \$1,000 from individuals and \$5,000 from political action committees (PACs).¹⁴⁸ They also limited individual expenditures on behalf of candidates to \$1,000, though this provision was later ruled unconstitutional in *Citizens United v. Federal Election Commission*.¹⁴⁹ Additionally, limits were placed on the amount campaigns were permitted to spend on races.¹⁵⁰

While the new campaign limits were strong, they would not be effective unless they were paired with an enforcement mechanism.¹⁵¹ The FEC consists of six presidentially appointed and Senate confirmed commissioners, as well as one non-voting staffer from both the House and the Senate.¹⁵² Commissioners serve for six years and no more than three may belong to the same political party at one time.¹⁵³ Their terms are staggered so two commissioners are supposed to be appointed every two years.¹⁵⁴ While many decisions made by the Commission require a mere majority vote to take effect, the most important decisions require four votes.¹⁵⁵ This means that a quorum is required for the Commission to initiate civil enforcement actions

¹⁴⁷ See *Campaign Financing Reform*, 32 CONG. Q. WKLY. REP. 2691 (Oct. 5, 1974) (explaining the terms of the compromise in detail); see also Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 362–63 (1995) (“The compromise passed both chambers and became law, representing the greatest reform in the electoral process since the passage of the Seventeenth Amendment.”).

¹⁴⁸ 52 U.S.C. § 30116.

¹⁴⁹ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 357 (2010) (“Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government’s interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question.”). In *Citizens United*, the Supreme Court famously held that corporate monetary expenditures for “express advocacy” in favor of a political candidate are equivalent to speech, and therefore are protected under the First Amendment. While some contribution limits in the original FECA text are constitutional because they further an important government interest in preventing corruption (such as direct contributions to candidates), others were held unconstitutional bars on protected speech. *Id.* at 340 (“[P]olitical speech must prevail against laws that would suppress it [whether] by design or inadvertence. Laws [that burden political] speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”).

¹⁵⁰ 52 U.S.C. § 30116(b).

¹⁵¹ See *Mission and History*, FED. ELECTION COMM’N, <https://www.fec.gov/about/mission-and-history/> [perma.cc/696Y-49XD] (last visited Apr. 12, 2020) (“[W]ithout a central administrative authority, the campaign finance laws were difficult to enforce. Following reports of serious financial abuses in the 1972 presidential campaign, Congress amended the Federal Election Campaign Act in 1974 to set limits . . . The 1974 amendments also established an independent agency, the FEC. The FEC opened its doors in 1975.”).

¹⁵² 52 U.S.C. § 30106.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* § 30106, 30107(6)–(9).

for FECA violations, investigate potential FECA violations, issue advisory opinions, or issue rules.¹⁵⁶ Without a quorum sitting on the FEC, FECA is effectively unenforceable.

2. Impoundment Control Act

Congress passed the Impoundment Control Act (ICA) in 1974, following the Supreme Court's decision in *Train*,¹⁵⁷ discussed in Part I, *supra*, to place express limits on the Executive's authority to impound funds.¹⁵⁸ Congress's motivating concern was a President substituting his own policy judgment for express statutory prerogatives set by Congress.¹⁵⁹ When President Nixon impounded the water pollution control funds at issue in *Train*, he did so based on policy preferences that had been expressly rejected when Congress overrode his veto. This circumvention of the veto was the root of Congress's concerns, rather than Richard Nixon's specific motivations. Thus, the objective of the Act was to assure that the practice of impounding funds does not become a mechanism for furthering the President's policy agenda at the expense of Congress's agenda.¹⁶⁰

¹⁵⁶ *Id.*

¹⁵⁷ According to the House Budget Committee website, "Congress passed the ICA in response to President Nixon's executive overreach—his Administration refused to release Congressionally appropriated funds for certain programs he opposed. While the U.S. Constitution broadly grants Congress the power of the purse, the President—through the White House Office of Management and Budget (OMB) and executive agencies—is responsible for the actual spending of funds. The ICA created a process the President must follow if he or she seeks to delay or cancel funding that Congress has provided." *The Impoundment Control Act of 1974: What Is It? Why Does It Matter?*, H. COMM. ON THE BUDGET (Oct. 23, 2019) <https://budget.house.gov/publications/report/impoundment-control-act-1974-what-it-why-does-it-matter> [perma.cc/Z3VC-AR6W] [hereinafter H. COMM. ON THE BUDGET].

¹⁵⁸ See U.S. GOV'T ACCOUNTABILITY OFF., B-331564, OFFICE OF MANAGEMENT AND BUDGET—WITHHOLDING OF UKRAINE SECURITY ASSISTANCE 5 (2016). (discussing the direct limits expressed upon the Executive's authority to impound funds).

¹⁵⁹ Thus, it doesn't matter if withholding the aid was for proper or corrupt reasons. It doesn't matter what the reasons are at all. Congress specifically passed this law because it didn't believe the President was a good person to be making this decision. See e.g., H. COMM. ON THE BUDGET, *supra* note 157 (explaining Congress' concern that President Nixon had usurped the constitutional role of Congress by substituting his policy judgment for that of the legislature).

¹⁶⁰ See generally H.R. REP. NO. 100-313, at 66–67 (1987). See also S. REP. NO. 93-688, at 75 (1974); GOV'T ACCOUNTABILITY OFF., *supra* note 158, at 5 ("The Constitution grants the President no unilateral authority to withhold funds from obligation. See B-135564, July 26, 1973. Instead, Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances as expressly provided in the ICA. See 2 U.S.C. §§ 681–688.").

To prevent a rogue president from withholding funds, the ICA imposes strict procedures which the president must follow to impound funds.¹⁶¹ The Act operates on the premise that the president is required to obligate funds appropriated by Congress, unless otherwise authorized.¹⁶² Before an impoundment can occur, the president must send a “special message” specifying “the amount of budget authority which he proposes to be rescinded or which is to be so reserved” and “the reasons why the budget authority should be rescinded or is to be so reserved.”¹⁶³

Impoundments may take two forms: deferrals and rescissions.¹⁶⁴ A deferral is a temporary withholding of funds. A deferral may not last longer than the end of the fiscal year in which the President communicates a message of the impoundment to Congress.¹⁶⁵ There are only three specific circumstances in which the President may defer funding for a program.¹⁶⁶ Furthermore, whether a deferral can actually occur ultimately depends on whether Congress approves of the deferral after being notified of the president’s special message.¹⁶⁷

Rescissions are permanent cancellations of funds.¹⁶⁸ As with a deferral, the president must send a special message to Congress to trigger a rescission.¹⁶⁹ However, the special message requesting a rescission must explain the proposed rescission, the reasons for it, and its budgetary, economic, and programmatic effects.¹⁷⁰ Like a deferral, Congress must approve a rescission. However, upon delivery of the special message, the president may withhold funding for up to forty-five legislative days.¹⁷¹ If a law approving the rescission is not enacted at the end of that timeframe, the money must be released.¹⁷² The special messages accompanying a request

¹⁶¹ Allan Lichtman, *What Law Did Donald Trump Break?*, THE HILL (Jan. 23, 2020), <https://thehill.com/opinion/white-house/479547-what-law-did-donald-trump-break> [perma.cc/TPR8-LA85].

¹⁶² See GOV’T ACCOUNTABILITY OFF., *supra* note 158, at 5 (“An appropriations act is a law like any other; therefore, unless Congress has enacted a law providing otherwise, the President must take care to ensure that appropriations are prudently obligated during their period of availability.”).

¹⁶³ 2 U.S.C. § 683(a).

¹⁶⁴ See H. COMM. ON THE BUDGET, *supra* note 157 (stating impoundments may take two forms of either deferrals or recessions).

¹⁶⁵ 2 U.S.C. § 684.

¹⁶⁶ Those three circumstances are: when providing for contingencies; achieving budgetary savings made possible through improved operational efficiency; and as specifically provided by law. *Id.* § 684.

¹⁶⁷ *Id.* § 683(b).

¹⁶⁸ *Id.* § 683.

¹⁶⁹ *Id.* § 683(a).

¹⁷⁰ *Id.* § 683(a)(1)–(5); H. COMM. ON THE BUDGET, *supra* note 157.

¹⁷¹ 2 U.S.C. § 683(b).

¹⁷² H. COMM. ON THE BUDGET, *supra* note 157.

for impoundment, regardless of whether it is a deferral or rescission, must provide detailed and specific reasoning to justify the withholding, as set out in the ICA.¹⁷³

However, if funds are impounded in violation of the ICA, the enforcement mechanism to free those funds is weak. The Act authorizes the Comptroller General to initiate a civil action against any party preventing the allocation of funds,¹⁷⁴ but there are no specific penalties imposed on agencies. In modern times, this has proven to be a flaw in the Act's efficacy.

In addition to the prohibition on executive impoundments, the Act also created the Congressional Budget Office—a nonpartisan, independent legislative agency that estimates the effects of legislation on the federal budget.¹⁷⁵ It also directed the congressional budget committees to project spending for the next fiscal year.¹⁷⁶

3. National Emergencies Act

Enacted in 1976, the National Emergencies Act (NEA) created a formal process which the President must follow to declare a state of emergency,¹⁷⁷ including publishing notice of the emergency in the Federal Register and transmitting notice directly to Congress.¹⁷⁸ Once an emergency is declared, it may last up to one year, unless the President takes formal action to continue it.¹⁷⁹ Under this scenario, Congress retains authority to terminate the emergency after the one year mark.¹⁸⁰ The Act also requires the President to report which emergency powers he intends to utilize during the emergency, and what expenditures will be made in exercise of those authorities.¹⁸¹

¹⁷³ 2 U.S.C. §§ 683–84.

¹⁷⁴ *Id.* § 687.

¹⁷⁵ See *A Short Primer on the Congressional Budget Office*, COMM. FOR A RESPONSIBLE FED. BUDGET (Feb. 14, 2018), <https://www.crbf.org/blogs/short-primer-congressional-budget-office> [perma.cc/3T58-WPEZ] (“Generally, CBO ‘scores’ the cost of legislation by estimating the effect it might have on revenue and spending relative to the CBO baseline. For example, if a program was projected to cost \$100 billion over ten years under CBO’s baseline and would cost \$90 billion under new legislation, that legislation would be scored as saving \$10 billion.”).

¹⁷⁶ See Joyce, *supra* note 49, at 3 (stating that the Committee was to “propose procedures for improving congressional control over budgetary outlay and receipt totals and to assure full coordination of an overall view of each year’s budgetary outlays with an overall view of the anticipated revenue for that fiscal year”).

¹⁷⁷ 50 U.S.C. § 1631.

¹⁷⁸ *Id.* §§ 1621, 1631.

¹⁷⁹ *Id.* § 1601.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* § 1641.

There are currently just over thirty active national emergencies, ranging in age from the 1979 sanctions on Iran to President Trump's order to redirect military funds to build a border wall.¹⁸² The vast majority of active emergencies are economic sanctions on foreign nations controlled by the International Emergency Economic Powers Act (IEEPA).¹⁸³ Although the NEA requires both Houses of Congress to convene to discuss ending emergencies declared by the President within six months of their declaration,¹⁸⁴ neither House has actually held meetings.¹⁸⁵

C. Watchdog Mechanisms

1. Inspector General Act

In addition to transparency safeguards, Congress created offices of inspectors general in various agencies to serve as internal agency watchdogs. The concept of an "Inspector General" (IG) existed since the 1950s.¹⁸⁶ However, the Watergate investigations uncovered mismanagement of administrative programs and weaknesses within internal investigative units.¹⁸⁷ The Inspector General Act of 1978 (IGA) was put in place "as a means of ensuring integrity and accountability in the Executive Branch."¹⁸⁸ It created offices of inspectors general (OIGs) at twelve federal agencies, later expanded to 73.¹⁸⁹ The law¹⁹⁰ empowers OIGs to audit and investigate

¹⁸² Kathy Gilsinan, *In 1995, the U.S. Declared a State of Emergency. It Never Ended*, THE ATLANTIC (Jan. 23, 2019), https://www.theatlantic.com/international/archive/2019/01/trump-renews-24-year-old-terrorism-state-emergency/581050/?utm_medium=offsite&utm_source=yahoo&utm_campaign=yahoo-non-hosted [perma.cc/B54Y-9V8E].

¹⁸³ ANDREW BOYLE, BRENNAN CTR. FOR JUST., CHECKING THE PRESIDENT'S SANCTION POWERS (2021), <https://www.brennancenter.org/sites/default/files/2021-06/BCJ-128%20IEEPA%20report.pdf> [perma.cc/CL9V-TCQX] (documenting that the IEEPA was the sole or primary authority for 65 of 71 emergency declarations since 1976).

¹⁸⁴ 50 U.S.C. § 1622(b).

¹⁸⁵ Chris Edelson, *An Expert on National Emergencies Explains Whether Trump Declaring One Over the Southern Border is Legal*, BUS. INSIDER (Feb. 15, 2019), <https://www.businessinsider.com/congress-has-the-power-to-end-a-national-emergency-2019-1> [perma.cc/GX6C-79WH]; Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE (Dec. 8, 2017), <https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency> [perma.cc/3L28-3KZX].

¹⁸⁶ KATHRYN A. FRANCIS, CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 1 (2019).

¹⁸⁷ *Id.* at 1.

¹⁸⁸ *About the OIG*, SOC. SECURITY ADMIN. OFF. OF INSPECTOR GEN., <https://oig.ssa.gov/about-oig> [perma.cc/5769-9GYM] (last visited June 30, 2018) [hereinafter *About the OIG*].

¹⁸⁹ MORTON ROSENBERG, THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING 103 (2009), available at <https://archive.constitutionproject.org/wp-content/uploads/2017/05/Chapter-9.pdf>. [perma.cc/GK9T-BQAN].

¹⁹⁰ See 5 U.S.C. Appx. 3 (vesting Inspectors General with authority to oversee agencies).

agencies, to report the results of these investigations to Congress, and to make recommendations to resolve problems that are uncovered.¹⁹¹ The legislative history of the Act provides further insight into its general purpose. Congress believed expanding IGs to more agencies would address the issues made clear by Watergate. Congress also believed that IGs needed to be independent to fulfill their purpose.¹⁹²

The IGA directs IGs to serve three statutory purposes.¹⁹³ First, IGs are expected “to conduct and supervise audits and investigations relating to programs and operations of” the agencies in which their office resides. Second, they should “provide leadership and coordination,” and recommendations designed to promote “economy, efficiency, and effectiveness in the administration of, and to prevent and detect fraud and abuse in,” administrative programs.¹⁹⁴ Third, IGs are expected “to provide a means for keeping the head of the [host agency] and the Congress fully and currently informed about problems and deficiencies relating to the administration of” agency programs and operations.¹⁹⁵

The IGA further empowers IGs to accomplish these purposes through substantive provisions. First, it authorizes specific OIGs in key federal departments. Originally, the Act applied to twelve agencies: the Department of Agriculture, the Department of Commerce, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, the Department of Transportation, the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans’ Administration. Over time, OIGs have been established in many other agencies throughout the federal government.¹⁹⁶

Second, the Act contains appointment and removal procedures to insulate IGs from political pressure. An IG is appointed by the President with the advice and consent of the Senate, and may be removed by the President, or transferred elsewhere within the agency.¹⁹⁷ An agency head or subordinate may not prevent or prohibit an IG investigation, but the Act does not otherwise provide protection for IGs.¹⁹⁸ The President may remove an IG and

¹⁹¹ *About the OIG*, *supra* note 188.

¹⁹² FRANCIS, *supra* note 186, at 21.

¹⁹³ 5 U.S.C. Appx. 3 § 2(1)–(3).

¹⁹⁴ *Id.* § 2(2).

¹⁹⁵ *Id.* § 2(3).

¹⁹⁶ A full directory of the 73 federal inspectors general is available at *Inspectors General Directory*, COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, <https://www.ignet.gov/content/inspectors-general-directory> [perma.cc/6YCB-6MKP] (last visited Oct. 31, 2021).

¹⁹⁷ 5 U.S.C. Appx. 3 § 3.

¹⁹⁸ *Id.* § 3(a).

need only transmit a message to Congress communicating the reason for removal at least thirty days prior to it occurring.¹⁹⁹

Third, the Act imposes substantive duties on Inspectors General.²⁰⁰ These duties include overseeing audits and investigations relating to the programs and operations of the host agency;²⁰¹ making recommendations to Congress in semiannual reports for the prevention and detection of fraud and abuse;²⁰² supervising activities carried out or financed by the host agency for the purpose of promoting agency efficiency or preventing and detecting fraud and abuse;²⁰³ overseeing relationships between the host agency and other federal, state, and local agencies, and nongovernmental entities regarding agency programs;²⁰⁴ and keeping both the agency head and Congress “fully and currently informed” concerning fraud, abuse, and other serious problems.²⁰⁵

Fourth, the Act empowers IGs to conduct independent internal investigations.²⁰⁶ It guarantees timely access to agency records,²⁰⁷ authority to interview agency officials under oath,²⁰⁸ prompt access to the agency head,²⁰⁹ authority to appoint his/her own subordinates,²¹⁰ and authority to enter into contracts for the purposes of carrying out investigations.²¹¹ Because IGs report to both agency heads and Congress, they are well positioned to advise both parties on how to improve program administration and congressional oversight.²¹²

The Congressional Research Service notes “Congress has substantially amended the IG Act three times since its enactment The amendments generally aimed to expand the number of statutory IGs and

¹⁹⁹ *Id.* § 3(b).

²⁰⁰ *Id.* § 4(a)(1)–(5).

²⁰¹ *Id.* § 4(a)(1).

²⁰² *Id.* §§ 4(a)(2), 5.

²⁰³ *Id.* § 4(a)(3).

²⁰⁴ *Id.* § 4(a)(4).

²⁰⁵ *Id.* § 4(a)(5).

²⁰⁶ *Id.* § 6(a)(1).

²⁰⁷ *Id.*

²⁰⁸ *See Id.* § 6(a)(5) (stating that the Inspector General can have “direct and prompt access” to agency officials).

²⁰⁹ *Id.* § 6(a)(6).

²¹⁰ *Id.* § 6(a)(7).

²¹¹ *Id.* § 6(a)(9).

²¹² *See* FRANCIS, *supra* note 186, at 1 (explaining that “to execute their missions, IGs lead offices of inspector general (OIGs) that conduct various reviews of agency programs and operations—including audits, investigations, inspections, and evaluations—and provide findings and recommendations to improve them. IGs possess several authorities to carry out their respective missions, such as the ability to independently hire staff, access relevant agency records and information, and report findings and recommendations directly to Congress”).

enhance their independence, transparency, and accountability.”²¹³ These many amendments reflect the continuing need for Inspectors General throughout government and the lingering barriers to effective oversight.

In 1988, Congress amended the Act to create additional IGs in the Department of Justice, Department of Treasury, and the Federal Emergency Management Administration.²¹⁴ It also brought IGs who pre-dated the original Act, such as the Inspector General for the Department of Energy, into conformity with the Act.²¹⁵ Furthermore, it separated the process for appropriating money to OIGs from the process used for the host agency.²¹⁶

In 2008, Congress passed the Inspector General Reform Act in response to several incidents that revealed issues with IGs’ independence. For example, Department of State Inspector General Howard Krongard allegedly interfered with numerous ongoing investigations to protect the State Department and White House from embarrassment during the George W. Bush administration.²¹⁷ The Inspector General Reform Act established the Council of Inspectors General on Integrity and Efficiency (CIGIE). This is “an independent entity established within the executive branch to address integrity, economy and effectiveness issues that transcend individual Government agencies and aid in the establishment of a professional, well-trained and highly skilled workforce in the Offices of Inspectors General

²¹³ *Id.* Those amendments were the IGA Amendments of 1988, the IG Reform Act of 2008, and the IG Empowerment Act of 2016. Pub. L. 100-504; Pub. L. 110-409; Pub. L. 114-317.

²¹⁴ *See generally* Inspector General Act Amendments of 1988, Pub. L. No. 100-504, § 102(a), 102 Stat. 2515, 2515 (stating the Amendments and the date they were ratified).

²¹⁵ FRANCIS, *supra* note 186, at 3; Pub. L. No. 100-504, § 102(a).

²¹⁶ FRANCIS, *supra* note 188, at 34.

²¹⁷ *See* “Improving Government Accountability Act,” H. REP. NO.110-354, H. COMM. ON OVERSIGHT & GOVERNMENT REFORM, 110 Cong. 1st. Session, at 9 (2007) (“According to current and former employees of the Office of Inspector General, Mr. Krongard’s strong affinity with State Department leadership, support for the current administration, and partisan political ties have led him to halt investigations, censor reports, and refuse to cooperate with law enforcement agencies.”). The House Committee on Oversight and Government Reform pointed to multiple other instances of Bush Administration inspectors general either abusing their authority or being pressured by political officials to do so. These incidents were seen as a sign that IGs themselves needed to be overseen. Thus, the CIGIE was formed to allow IGs to oversee their own peers. *See id.* at 9 (enumerating the various other instances of abuse of authority or political pressure on inspectors general prior to 2007 during the Bush Administration).

(OIG).”²¹⁸ CIGIE coordinates and oversees IGs across federal agencies.²¹⁹ The Inspector General Reform Act also strengthened IG independence in a number of ways, including additional budgetary independence.²²⁰

On December 16, 2016, perhaps due to concerns related to the incoming Trump administration, President Barack Obama signed the Inspector General Empowerment Act into law.²²¹ “Among its provisions, the IG Empowerment Act confirms that IGs are entitled to full and prompt access to agency records, thereby eliminating any doubt about whether agencies are legally authorized to disclose potentially sensitive information to IGs.”²²² This was intended to make it easier for IGs to conduct audits, reviews, and investigations in an independent manner. Additionally, it directed CIGIE to resolve jurisdictional disputes between IGs.²²³ The Act further required IGs to submit any documents containing recommendations for corrective action to agency heads and congressional committees.”²²⁴ All of these changes were intended to bolster the independence and efficacy of IGs across the federal government.

In general, violations of the IGA relate to two distinct situations. First are situations in which an agency unreasonably refuses to comply with an IG investigation. Agencies are mandated to make information available to IGs in a timely fashion and to comply with lawfully issued subpoenas.²²⁵ The Attorney General promulgates regulations governing the enforcement of these authorities.²²⁶ Because of this, it is DOJ, and not individual IG offices,

²¹⁸ *Council of the Inspectors General on Integrity and Efficiency*, OVERSIGHT.GOV, <https://oversight.gov/inspectors-general/council-inspectors-general-integrity-and-efficiency> [perma.cc/QA5P-3W2M] (last visited Apr. 12, 2020) (“The statutory mandate of the Integrity Committee (IC) of CIGIE is to receive, review, and refer for investigation allegations of wrongdoing made against Covered Persons, and to ensure the fair, consistent, timely, and impartial disposition of allegations that fall within the IC’s statutory mandate.”).

²¹⁹ *See id.* (explaining that the CIGIE was established to address integrity, economy, and effectiveness issues that help oversee the successful functioning of the OIG).; *see also* FRANCIS, *supra* note 186, at 13 (discussing how the OIG is governed and managed).

²²⁰ *Id.* at 14.

²²¹ *IG Act History*, OVERSIGHT.GOV, <https://www.ignet.gov/content/ig-act-history> [perma.cc/R96-WSVE] (last visited Apr. 12, 2020).

²²² *Id.*

²²³ *Id.*

²²⁴ FRANCIS, *supra* note 186, at 3.

²²⁵ 5 U.S.C. Appx. 3 § 6.

²²⁶ *See id.* § 6I(4) (stating that the Attorney General shall promulgate guidelines to govern law enforcement powers); *see also* ATTORNEY GENERAL GUIDELINES FOR OFFICES OF INSPECTORS GENERAL WITH STATUTORY LAW ENFORCEMENT AUTHORITY, OFFICE OF THE ATTORNEY GENERAL, U.S. DEP’T. OF JUSTICE (2005), available at <https://www.ignet.gov/sites/default/files/files/agleguidelines.pdf> (describing that the Attorney General promulgates regulations pursuant to the Inspector General Act of 1978 and its Amendments) [perma.cc/V8S2-2FK5].

that actually enforce IGs' investigative authorities.²²⁷ This means that DOJ may make arrests when an IG identifies a criminal offense, and may initiate civil action against anyone who defies a lawfully obtained subpoena or records request.

Second are situations in which an official retaliates against whistleblowers who notify IGs of ongoing problems. Agencies may not retaliate against whistleblowers who bring complaints to an inspector general.²²⁸ The IGA does not itself provide a mechanism to enforce whistleblower protections. However, the Whistleblower Protection Act of 1989 created formal enforcement authorities an inspector general may exercise in response to an apparent reprisal.²²⁹

2. Ethics in Government Act

The Ethics in Government Act, sometimes referred to as the independent counsel law, is another watchdog statute passed in response to problems within the Nixon administration. It was intended to eliminate corruption in the federal government by requiring government officials to disclose information regarding their financial interests,²³⁰ restricting the ability of government officials to move into regulated industries after leaving the government,²³¹ and creating an Office of Ethics in the Civil Service Commission to oversee the administration of the law.²³² This was in response to concerns that too many members of the civil service were leaving government jobs and entering regulated industries, which created the appearance of a corrupt administrative state.²³³

The Act is best known for creating the position of "special counsel," later re-identified in 1988 as an "independent counsel," within the Department of Justice.²³⁴ The independent counsel position served as

²²⁷ *Id.*

²²⁸ 5 U.S.C. Appx. 3 § 7. This does not apply to whistleblowers who knew or should have known that their complaint was premised on false information. *Id.*

²²⁹ *Id.*

²³⁰ CONG. REC. S. 13,329 (May 3, 1977).

²³¹ *Id.*

²³² *Id.* ("The provisions of the Act would strike a careful balance between the rights of these individuals to their privacy and the right of the American people to know that their public officials are free from conflicts of interest.").

²³³ See CONG. REC. H30,419 (1978) ("[W]hat this is doing really is preventing an employee from going back to the agency in which he served in a responsible position with some kind of business with that same agency."); see also CONG. REC. S13,329 (1977) ("This approach will eliminate all appearance of high-level interference in sensitive investigations and prosecutions. The American people must be assured that no one, regardless of position, is above the law.").

²³⁴ Levin & Bean, *supra* note 24, at 14.

independent prosecutor insulated from pressure by the President, whose role is to investigate allegations of misconduct by high-level political officials.²³⁵ The independent counsel was not a standing position, but instead was temporarily appointed by the Attorney General once certain conditions were met.²³⁶ In this way, the Act provided a framework under which the Attorney General may decide whether an independent counsel should be appointed, rather than requiring one be appointed at all times.²³⁷

Congress's goal was "to establish 'a neutral procedure for resolving the conflict of interest that arises when the Attorney General must decide whether to pursue allegations of wrongdoing leveled against . . . [his] close political associates.'"²³⁸ Recognizing damage done by Watergate to the public's trust in government, President Carter strongly supported the independent counsel provisions of the Act, saying they would "eliminate all appearance of high-level interference in sensitive investigations and prosecutions. The American people must be assured that no one, regardless of position, is above the law."²³⁹ In 1989, the Supreme Court upheld the constitutionality of the statute against Article II challenges in *Morrison v. Olson*.²⁴⁰

However, in 1999, Congress allowed the independent counsel provisions of the Act to sunset.²⁴¹ This was likely because, as the law was originally designed, the decision of whether to appoint an independent counsel was left entirely to the Attorney General, and the influence Congress had to initiate investigations was "very limited."²⁴²

Notably, the law has previously been allowed to expire in the past only to be resuscitated later, as happened in 1994 when Congress renewed the law (which had expired in 1992) to appoint Ken Starr to investigate

²³⁵ Priester et al., *supra* note 28, at 8-9.

²³⁶ *See id.* at 21 (describing the historical development for the conditions required to appoint an independent counsel).

²³⁷ *See id.* at 30 (stating that the conditions and procedures set forth in the act are designed to give an Attorney General discretion to screen matters that do not require investigation by an independent counsel).

²³⁸ *Dellums v. Smith*, 797 F.2d 817, 820 (9th Cir. 1986) (quoting *Banzhaf v. Smith*, 737 F.2d 1167, 1168 and citing *Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before Subcomm. on Oversight of Gov't Mgt. of the Sen. Comm. on Governmental Affs.*, 97th Cong. 1-3 (1981) (statement of Sen. Cohen); *see also* Priester et al., *supra* note 28, at 8. ("Can the Attorney General and the Department of Justice ("DOJ") be trusted to investigate and prosecute criminal wrongdoing by the President or persons close to him? The Act demonstrates that our political leaders have concluded that the answer is 'no.'").

²³⁹ CONG. REC. S13,329 (1977).

²⁴⁰ 487 U.S. 654, 692 (1988).

²⁴¹ JACK MASKELL, CONG. RSCH. SERV., R43112, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 2 (2013).

²⁴² *Id.* at 3.

Whitewater.²⁴³ In 2016, Representative Michael Turner (R–OH) introduced the Independent Counsel Reauthorization Act of 2016 to reauthorize the Ethics in Government Act for a five-year period.²⁴⁴ Importantly, the Independent Counsel Reauthorization Act would have expressly authorized investigations of the President himself. However, the bill was abandoned.²⁴⁵

Because the Ethics in Government Act expired, the Department of Justice on July 9, 1999 issued replacement regulations for appointing a special counsel.²⁴⁶ “The regulations set forth a three-part analysis for determining whether to appoint a special counsel.”²⁴⁷ First, the Attorney General must determine that “criminal investigation of a person or matter is warranted.”²⁴⁸ Second, he or she must determine whether investigation or prosecution of the person or matter by a U.S. Attorney’s Office or a Justice Department litigating division would present either “a conflict of interest for the Department” or “other extraordinary circumstances.”²⁴⁹ Finally, the Attorney General must determine whether “it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”²⁵⁰

One criticism of the regulatory special counsel oversight mechanisms is that investigations tend to languish and sometimes bore into issues that are beyond the scope of their original purpose.²⁵¹ Jurisdictional boundaries of investigations are supposed to be set by the Attorney General, who may grant “original” jurisdiction to the special counsel, and who may expand that jurisdiction.²⁵² Whether jurisdiction will be expanded is therefore based on

²⁴³ *Id.* (“It is possible, in theory, that Congress could reauthorize the independent counsel law, or provisions of law somewhat similar to the former independent counsel law, to instruct the Attorney General to seek the appointment of an ‘independent counsel’ under certain circumstances.”).

²⁴⁴ Independent Counsel Reauthorization Act, H.R. 5271, 114th Cong. (2016).

²⁴⁵ See CONG. RSCH. SERV. SUMMARY: H.R. 5271—114TH CONGRESS (2015–2016), <https://www.congress.gov/bill/114th-congress/house-bill/5271?r=2&s=1> [perma.cc/N2WT-9LUB] (last visited Nov. 6, 2021) (maintaining a bill tracker that indicates no action has been taken by Congress since the initial introduction of H.R. 5271).

²⁴⁶ See 28 C.F.R. Part 600.

²⁴⁷ *Special Counsel Act of 1999: Hearing Before the Subcomm. on Com. and Admin. L. of the H. Comm. on the Judiciary*, 106th Cong. 55 (1999) (Prepared Testimony of Dick Thornburgh, Mark H. Tuohey III & Michael Davidson). A reprinting of the testimony is available at <https://www.brookings.edu/testimonies/attorney-generals-special-counsel-regulations/> [perma.cc/26WU-QFPU].

²⁴⁸ 28 C.F.R. § 600.1.

²⁴⁹ *Id.* § 600.1(a).

²⁵⁰ *Id.* § 600.1(b).

²⁵¹ Thornburgh et al., *supra* note 247.

²⁵² 28 C.F.R. § 600.4.

the judgment of DOJ, and not necessarily a political entity. Regardless, experts from all ends of the political spectrum have criticized the scope of independent and special counsel investigations, including Democrats' criticism of the sprawling Whitewater investigation²⁵³ and Republicans' criticism of Robert Mueller's "Russiagate" inquiry.²⁵⁴

III. THE TRUMP ADMINISTRATION

From the onset of Donald Trump's presidency in 2017, his administration pushed the limits of presidential power. With a Republican majority in the Senate backing them, subordinate officials within his administration—including Attorney General William Barr, and personal attorneys Jay Sekulow and Rudy Giuliani—articulated legal arguments supporting President Trump's assertions of broad executive authority and overall immunity from oversight. More than any other president in contemporary history, Trump articulated a conception of potentially unlimited presidential power. In the aftermath, Congress must step in to act again.

A. Ukraine Impoundment Scandal

In advancing his vision of presidential power, President Trump tested many of the post-Watergate oversight laws. For example, the Impoundment Control Act was central to Congress's 2019–2020 impeachment inquiry and trial. In the summer of 2019, President Trump ordered OMB to impound money Congress had appropriated to the Department of Defense to Ukraine as military aid.²⁵⁵ In the special message delivered to Congress, OMB stated it had withheld the funds "to allow for an interagency process to determine the best use of such funds."²⁵⁶

²⁵³ See David A. Graham, *From Whitewater to Benghazi: A Clinton-Scandal Primer*, ATLANTIC (Nov. 6, 2016), <https://www.theatlantic.com/politics/archive/2016/11/tracking-the-clinton-controversies-from-whitewater-to-benghazi/396182/> [perma.cc/WEV6-Y9RG] ("The canonical case is Whitewater, a failed real-estate investment Bill and Hillary Clinton made in 1978. Although no inquiry ever produced evidence of wrongdoing, investigations ultimately led to President Clinton's impeachment for perjury and obstruction of justice.").

²⁵⁴ See Deroy Murdock, *Mueller Sticks the Final Shiv in Russiagate*, NAT'L REV. (July 26, 2019), <https://www.nationalreview.com/2019/07/mueller-sticks-the-final-shiv-in-the-russia-gate-hoax/> [perma.cc/J2GP-Z3DX] ("[T]he substance of Mueller's statements shot holes into his own report, like Al Capone emptying a machine gun.").

²⁵⁵ See H. COMM. ON THE BUDGET, *supra* note 157, at 1.

²⁵⁶ *Id.* at 4.

The Government Accountability Office determined that Trump's action violated the ICA²⁵⁷ because the reason for the impoundment, "to determine the best use of such funds," squarely prioritized Trump's preferences over those of Congress, and the impoundment was not approved as a rescission or deferral.²⁵⁸ This was the clearest example since Nixon's impoundment of federal water pollution control funds of a president challenging Congress's spending power and policy judgment—the exact thing Congress intended to prevent by passing the ICA.²⁵⁹

In response to the investigations, the House of Representatives ultimately submitted articles of impeachment to the Senate. However, the Senate acquitted Trump.²⁶⁰ Additionally, there have been no repercussions for OMB resulting from the incident.

B. Special Counsel Investigation

Prior to the Ukraine impoundment and impeachment proceedings, the Trump administration had already faced investigations over alleged wrongdoings. The most prominent, sometimes referred to as the "Russiagate" or "Mueller" probe, was an investigation initiated by the Department of Justice in response to allegations that President Trump's campaign violated federal law by collaborating with Russian agents to undermine the integrity of the 2016 Presidential election. The investigation was led by Robert Mueller, a special counsel appointed under DOJ regulations. The investigation revealed lingering weaknesses in the special counsel mechanism as it currently exists.

²⁵⁷ Olivia Beavers & Rebecca Klar, *GAO Finds Trump Administration Broke Law by Withholding Aid*, THE HILL (Jan. 16, 2020), <https://thehill.com/homenews/administration/478557-gao-finds-trump-administration-broke-law-by-withholding-aid-from> [perma.cc/X2X3-V68Q].

²⁵⁸ See GOV'T ACCOUNTABILITY OFF., *supra* note 158, at 1. ("Faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law. OMB withheld funds for a policy reason, which is not permitted under the Impoundment Control Act Therefore, we conclude that OMB violated the ICA.").

²⁵⁹ In some ways, it is difficult to assess whether Trump's actions were more egregious than Nixon's impoundment of the water pollution control funds. Trump's actions were clearly motivated by his political interests (impugning his opponents, in particular his rival for the presidency, Joe Biden). In contrast, Nixon's impoundments were largely an effort to enforce policy preferences in ways that circumnavigated constitutional checks on executive powers. Thus, while Trump's decision seems appallingly partisan to many commentators, arguably it is not as clear an affront to the power of Congress as Nixon's decision to defy a law passed over his own veto.

²⁶⁰ Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html> [perma.cc/66CW-NLUS].

The investigation began in May 2017 and Mueller submitted his final report to Congress in March 2019.²⁶¹ Despite no formal charges being recommended against the President, conservatives were widely upset with how the investigation was conducted. Echoing critics of prior investigations, including Ken Starr’s probe into Bill Clinton’s extramarital affair, Republicans criticized Mueller for wading into issues beyond his original jurisdiction. Furthermore, based on an expansive theory of Executive power, a line of critiques has gone so far as to challenge the idea of a special counsel as unconstitutional. These critics argue “[u]nder the Constitution, it is beyond the power of Congress to limit or impose conditions on any president’s authority to remove a political appointee within the Justice Department or any other department in the executive branch.”²⁶² By this logic, special counsels may be removed because they are a wholly subordinate officer of the Executive, and therefore the Legislative branch of government has no authority to dictate when or for what reason the counsel may be fired.²⁶³

This argument came only from Trump’s most ardent supporters, and as noted previously, it is squarely undermined by the Supreme Court’s decision in *Morrison v. Olson*,²⁶⁴ which upheld the Ethics in Government Act against a separation of powers challenge. A law passed by a coordinate branch of constitutional government—versus an enforcement arm answerable to the president—is surely a more legally sound means of

²⁶¹ ROBERT S. MUELLER III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019), available at <https://www.justice.gov/archives/sco/file/1373816/download> [perma.cc/5KUN-ZYPX] [hereinafter MUELLER REPORT].

²⁶² Hans A. von Spakovsky, *Trump has the Constitutional Authority to Fire Mueller—Here’s Why*, HERITAGE FOUND. (Apr. 23, 2018), <https://www.heritage.org/the-constitution/commentary/trump-has-the-constitutional-authority-fire-mueller-heres-why> [perma.cc/5KUN-ZYPX].

²⁶³ *See id.* (“Under Article II, Section 2 of the Constitution, the president is given the authority to appoint . . . “Ambassadors, other public Ministers, and Consuls, Judges of the supreme Court, and all other Officers of the United States.” Congress is also allowed, by law, to “vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” . . . All of these officials—with the exception of judges and certain other officers (for example, the heads of federal agencies such as the Federal Election Commission and the Securities and Exchange Commission) serve at the pleasure of the president. That means they can be removed by the president for any reason or no reason. The fact that a Cabinet official may appoint political subordinates—such as a special counsel—does not take away the authority of the president to remove those subordinates.”).

²⁶⁴ *See Morrison*, 487 U.S. at 659–60 (“This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C §§ 49, 591 *et seq.* (1982 ed., Supp. V). We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President’s authority under Article II in violation of the constitutional principle of separation of powers.”).

establishing a special counsel apparatus than a policy created by DOJ. There have been attempts by lawmakers to strengthen, rather than undermine, the special counsel oversight mechanism—which at present is purely regulatory, not statutory—but those bills have gone nowhere.

For example, Rep. Michael Turner introduced the Independent Counsel Reauthorization Act in 2016 to renew the expired provisions of the Ethics in Government Act related to independent counsels.²⁶⁵ The bill also would have expressly authorized the investigation of a sitting President.²⁶⁶ Furthermore, in 2017, Republican Senator Thom Tillis introduced the Special Counsel Integrity Act.²⁶⁷ Under this bill, only the Attorney General could discipline or remove a special counsel. The bill further provides that a special counsel can be removed only for “misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause.” The special counsel would have had to be notified in writing of the “specific reason” for his removal, and the special counsel would have been given the right to file a lawsuit contesting removal. However, this bill was abandoned in 2018.

C. Alleged FISA Abuses

The Mueller probe of Russian influence in the 2016 presidential election was facilitated by FISA, under which the FBI and Robert Mueller obtained warrants to surveil foreign agents suspected of illegally collaborating with the Trump campaign. Through FISA warrants, DOJ investigators uncovered a trove of information regarding improper contacts between Trump officials and Russian-affiliated agents.²⁶⁸

Indeed, FISA was a central point of tension over the investigation between Trump administration supporters and opponents even before the special counsel was appointed.²⁶⁹ Trump supporters alleged that, prior to the 2016 election, the FBI improperly obtained FISA warrants to spy on campaign officials, and that the DOJ’s pre-election investigation into President Trump’s campaign was a politically motivated “hit-job” spurred by partisans within DOJ.²⁷⁰

²⁶⁵ Independent Counsel Reauthorization Act, H.R. 5271, 114th Cong. (2016).

²⁶⁶ *Id.*

²⁶⁷ Special Counsel Integrity Act, S. 1741, 115th Cong. (2017).

²⁶⁸ MUELLER REPORT, *supra* note 261, at 13, 183.

²⁶⁹ *Myths and Facts on Russia Inquiry Origins*, CITIZENS FOR RESP. & ETHICS IN WASH., <https://www.citizensforethics.org/myths-and-facts-russia-inquiry-origins/> [perma.cc/P722-5LT6] (last visited Feb. 24, 2021) (“FBI FISA applications on former Trump campaign advisor Carter Page are evidence of a political conspiracy against the Trump campaign.”).

²⁷⁰ See, e.g., John Malcom, *The Facts Currently Known About Nunes Memo, FBI Bias Accusations*, HERITAGE FOUND.: COMMENTARY (Feb. 5, 2018), <https://www.heritage.org/crime-and-justice/commentary/the-facts-currently-known-about-nunes-memo-fbi-bias-accusations> [perma.cc/KDA5-B9P6].

In early 2018, in response to Republican criticism, the DOJ Inspector General conducted investigations into DOJ abuse of FISA warrant applications.²⁷¹ The Department of Justice allowed the IG “extraordinary” to the FISA warrant applications filed in relation to the 2016 Russia-Trump investigation.²⁷² The investigation resulted in the discovery of texts between two FBI agents²⁷³ that indicated they held political views adverse to the President, and that they appeared to desire to incriminate him through the investigation.²⁷⁴

The IG did not conclude that any laws or internal policies had been broken, but did recommend changes to the FBI’s and the DOJ’s data retention policies to ensure similar issues could be investigated more easily in the future.²⁷⁵ The relevance of these findings are disputed by partisans on both sides. According to Senator John Cornyn, “the inspector general detailed a number of truly disturbing and alarming facts about how this investigation was conducted, especially when it comes to the Foreign Intelligence Surveillance Act, otherwise known as FISA.”²⁷⁶ However, other commentators have contested that the investigation did not turn up anything of great substance.²⁷⁷

In response to the tension surrounding the Russia investigation, Republicans introduced the Inspector General Access Act.²⁷⁸ This Act would grant the Inspector General of the Department of Justice authority to investigate DOJ prosecutors when those prosecutors are suspected of

²⁷¹ 165 CONG. REC. 204 (2019) (statement of Sen. John Cornyn) [hereinafter Cornyn]. It should be noted here that this investigation may have been related to the introduction by four Republican Senators of the “Inspector General Access Act,” which is discussed in the “Inspector General Act of 1978” section of this document, *infra* note 278 and accompanying text. The Inspector General is currently precluded from investigating allegations of misconduct by DOJ prosecutors, but not FBI agents. Therefore, the Inspector General’s inquiry into abuse of FISA warrants was limited solely to FBI agents who were involved. The Inspector General Access Act would allow prosecutors to be investigated as well.

²⁷² Josh Delk, *DOJ Agrees to Allow ‘Extraordinary’ Access to FISA Applications*, THE HILL (Apr. 6, 2018), <https://thehill.com/homenews/house/382056-doj-offers-extraordinary-accommodation-allowing-intel-committee-access-to-fisa> [perma.cc/X76B-PL73].

²⁷³ The two agents were Peter Strzok and Lisa Page, FBI agents who were involved in the 2016 inquiry into the Trump campaign’s contacts with Russia.

²⁷⁴ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REPORT OF INVESTIGATION: RECOVERY OF TEXT MESSAGES FROM CERTAIN FBI MOBILE DEVICES 8 (2018), <https://oig.justice.gov/reports/2018/i-2018-003523.pdf> [perma.cc/2UWQ-FL2Y].

²⁷⁵ *Id.* at 11.

²⁷⁶ Cornyn, *supra* note 271.

²⁷⁷ Devlin Barrett, Matt Zapotosky, Karoun Demirjian & Ellen Nakashima, *FBI was Justified in Opening Trump Campaign Probe, but Case Plagued by Serious Failures*, WASH. POST (Dec. 9, 2019), https://www.washingtonpost.com/national-security/inspector-general-report-trump-russia-investigation/2019/12/09/d5940d88-184c-11ea-a659-7d69641c6ff7_story.html [perma.cc/BG28-ZAX9].

²⁷⁸ Inspector General Access Act of 2019, H.R. 202, 116th Cong. (2019).

wrongdoing.²⁷⁹ Theoretically, this would ensure that DOJ prosecutors face consequences if they abuse the FISA process to obtain politically motivated warrants, as Republicans argued was the case with the 2016 investigation. To date, the legislation has not passed, but Senator Dick Durbin has introduced a revised 2021 version of the bill that is currently moving through the Senate Judiciary Committee.²⁸⁰

D. Intimidation of Inspectors General

After his first impeachment trial, President Trump appeared emboldened to flex his power by flouting other post-Watergate reforms in increasingly aggressive ways. For example, between April 3 and May 15, 2020, the administration dismissed five Inspectors General in what the Washington Post declared a “slow-motion Friday night massacre.”²⁸¹ Those IGs were: Michael Atkinson, IG for the Intelligence Community; Christi Grimm, Acting IG for the Department of Health & Human Services (HHS); Steve Linick, IG for the Department of State; Glenn Fine, Acting IG for the Department of Defense, and Mitch Behm, Acting IG for the Department of Transportation.²⁸²

Despite the obvious way these firings undermined the independence of IGs, there is little in the Inspector General Act (IGA) that practically prevents a politically motivated reprisal. The IGA allows the President to remove an IG so long as the President appropriately reports the removal to Congress “not later than 30 days before the removal or transfer.”²⁸³

The limits of the President’s removal power have not been clearly defined, and at least one Obama era case highlights this problem, *Walpin v. Corporation for National & Community Service*.²⁸⁴ In 2009, President Obama fired Gerald Walpin, the Inspector General for the Corporation for

²⁷⁹ *Id.*

²⁸⁰ Inspector General Access Act of 2021, S. 426, 117th Cong. (2021).

²⁸¹ Aaron Blake, *Trump’s Slow-Motion Friday Night Massacre of Inspectors General*, WASH. POST, (May 18, 2020), <https://www.washingtonpost.com/politics/2020/05/16/trumps-slow-moving-friday-night-massacre-inspectors-general/> [perma.cc/Y69U-Y6D5]. The period was characterized by a pattern of the administration announcing departures on Friday evenings, prompting accusations that the administration was attempting to hide the moves from public scrutiny. *See id.* (“The Friday news dump—also known as the Friday *night* news dump—is a political trick with plenty of precedent. Wait till the vast majority of the news business clocks out for on the week and announce something you’d rather they not cover as much.”).

²⁸² *Id.*

²⁸³ 5 U.S.C. Appx. 3 § 3(b).

²⁸⁴ 718 F. Supp. 2d 18 (D.D.C. June 17, 2018).

National and Community Service (CNCS).²⁸⁵ The reason Obama provided to Congress for the firing was the President no longer had “the fullest confidence in” Walpin.²⁸⁶ Walpin sued the Obama administration, claiming the firing was intended to stifle Walpin’s investigation into former NBA player and Mayor of Sacramento Kevin Johnson, a high-profile supporter of Obama.²⁸⁷ The United States District Court for the District of Columbia dismissed the suit.²⁸⁸ The court stated that the requirement in the statute that the President give Congress his reasons for removal was too vague for the courts to assess whether Obama’s claim that he had lost confidence in Walpin was sufficient to support the removal.²⁸⁹

Furthermore, like an independent counsel under the Ethics in Government Act, IGs are officers within the Executive branch, and therefore the ability of Congress to enforce IG independence measures is somewhat limited. Though the precise extent to which Congress can impose “for-cause removal protections” is not yet clear, two cases—*Morrison v. Olson*²⁹⁰ and *Seila Law v. Consumer Financial Protection Bureau*²⁹¹—provide some guidance. Both explore the constitutional limits on Congress’s authority to provide for-cause removal protections to insulate agency officials from executive pressure. As explained above, *Morrison* affirmed the constitutionality of the statutory independent counsel mechanism with respect to appointment,²⁹² concluding that the Attorney General can be vested with exclusive authority to appoint an independent counsel. That case was refined by *Seila Law*, which challenged the constitutionality of the removal protections provided to the director of the Consumer Financial Protection Bureau (CFPB)—an independent official protected by for-cause removal in

²⁸⁵ *See id.* at 19–20 (explaining that President Obama’s special counsel requested Walpin’s resignation and had him placed on administrative leave before informing both Houses of Congress that he was “exercising [his] power as President to remove [Mr. Walpin] from office . . .”).

²⁸⁶ *Id.* at 20.

²⁸⁷ Josh Gerstein, *Former Watchdog Walpin Loses Suit Over Firing*, POLITICO (June 18, 2010), <https://www.politico.com/blogs/under-the-radar/2010/06/former-watchdog-walpin-loses-suit-over-firing-027625> [perma.cc/FPE9-E636].

²⁸⁸ *Walpin*, 718 F. Supp. 2d at 25.

²⁸⁹ *See id.* at 22–24 (“While Walpin complains that the President’s rationale was insufficient, Walpin fails to show how the IGRA provides any sort of criteria that would allow a court to make that determination.”).

²⁹⁰ *Morrison*, 487 U.S. at 663 (1998).

²⁹¹ *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020).

²⁹² 487 U.S. at 675–76 (“We do not mean to say that Congress’ power to provide for interbranch appointments of ‘inferior officers’ is unlimited In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court. We thus disagree with the Court of Appeals’ conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers.”).

a way similar to independent counsels.²⁹³ The Supreme Court held that the for-cause removal protections ascribed to the CFPB director were unconstitutional because the act vested an official other than the President with authority to execute the laws of Congress, and in doing so stole power assigned by the Constitution to the Executive.²⁹⁴

The constitutionality of inspectors general *per se* has not reached the U.S. Supreme Court. In light of *Morrison*, however, the current law suggests that some limits on the President's ability to fire an IG are legal, particularly given the inclusion of statutory language and evidence of legislative intent indicating a desire by Congress to create an office independent from the Executive. The IGA says: "Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."²⁹⁵

What follows is a discussion of each of the firings that took place under President Trump from April 3rd to May 15th, 2020.

1. Inspector General of National Intelligence

The afternoon of Friday, April 3, 2020, President Trump fired Michael Atkinson, the IG of the Intelligence Community.²⁹⁶ In his message to Congress, he claimed he had lost confidence in Atkinson,²⁹⁷ in language that was similar to that used by President Obama when he dismissed the IG

²⁹³ 140 S. Ct. at 2191–92.

²⁹⁴ *Id.* at 2192 ("We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will."). *Cf.* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–95 (2010) (leaving in place two exceptions to the President's unrestricted removal power representing the outermost constitutional limits of permissible congressional restriction on the removal power: (1) multimember expert agencies that do not wield substantial executive power and (2) inferior officers with limited duties and no policymaking or administrative authority).

²⁹⁵ 5 U.S.C. Appx. 3 § 3(a).

²⁹⁶ Natasha Bertrand & Andrew Desiderio, *Trump Fires Intelligence Community Watchdog Who Defied Him on Whistleblower Complaint*, POLITICO (Apr. 4, 2020), <https://www.politico.com/news/2020/04/03/trump-fires-intelligence-community-inspector-general-164287> [perma.cc/ZHH4-UA5F].

²⁹⁷ Letter from President Donald Trump to Richard Burr, Chairman, S. Select Comm. on Intelligence, WHITE HOUSE (Apr. 3, 2020) ("As is the case with regard to other positions where I, the President, have the power of appointment, by and with the advice and consent of the Senate, it is vital that I have the fullest confidence in the appointees serving as Inspectors General. That is no longer the case with regard to [Michael Atkinson].").

of CNCS. However, Trump publicly disclosed that Atkinson was fired because he investigated a whistleblower complaint.²⁹⁸ The complaint alleged the President had improperly impounded Department of Defense foreign military aid to Ukraine, and conditioned release on Ukraine's announcement of a corruption investigation into the President's political rival, Joe Biden.²⁹⁹

Following his firing, Atkinson released a defiant statement urging his fellow IGs throughout the federal government to continue to fulfill their oversight duties and encouraging whistleblowers to continue to report wrongdoing.³⁰⁰ As Atkinson noted in his statement, his firing is likely to have a chilling effect on inspectors general throughout the federal system.

The firing of Atkinson probably cannot be classified as a prohibition against the investigation he carried out. Instead, it was a retaliation for his decision to initiate the investigation. This retaliatory measure did not prevent Atkinson's investigation, but it did send a chilling message to IGs at other agencies. That message: Do not initiate investigations that will embarrass the administration.³⁰¹ This incident made clear that protections of independence

²⁹⁸ Andrew Desiderio, *Trump Defends Firing 'Terrible' Intel Community Watchdog as Republicans Question Sacking*, POLITICO (Apr. 4, 2020), <https://www.politico.com/news/2020/04/04/chuck-grassley-intel-community-watchdog-firing-164831> [perma.cc/Z48D-SC82]

²⁹⁹ Jonathan Landay, "Republicans Want Hunter Biden, Whistleblower to Testify in Open Hearings," REUTERS (Nov. 9, 2020), <https://www.reuters.com/article/us-usa-trump-impachment/republicans-want-hunter-biden-whistleblower-to-testify-in-open-hearings-idUSKBN1XJ0FK> [perma.cc/5RZK-NVX7].

³⁰⁰ See Statement of Michael K. Atkinson, Inspector General of the Intelligence Community, on His Removal from Office (Apr. 5, 2020), available at <https://int.nyt.com/data/documenthelper/6865-atkinson-statement-on-removal/339e56bc31e7c607c4b9/optimized/full.pdf#page=1> [perma.cc/FSG6-C8VR] ("Finally, a message for any government employee or contractor who believes they have learned of or observed unethical, wasteful, or illegal behavior in the federal government. The American people deserve an honest and effective government. They are counting on you to use authorized channels to bravely speak up . . . I have faith that my colleagues in Inspectors General Offices throughout the federal government will continue to operate effective and independent whistleblower programs, and that they will continue to do everything in their power to protect the rights of whistleblowers. Please do not allow recent events to silence your voices.")

³⁰¹ In the wake of Atkinson's firing, the President practically declared open season on Inspectors General who carry out their statutory duties. See *Trump Attacks W.H.O. and Ousts Watchdog for Pandemic Fund*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/07/world/coronavirus-updates-news-live.html> [perma.cc/XGQ9-4SSK] (discussing Trump's public rebukes of various Inspectors General throughout the government); Brianna Ehley & Alice Miranda Ollstein, *Trump Blasts HHS Watchdog for Report on Hospital Shortages*, POLITICO (Apr. 6, 2020), <https://www.politico.com/news/2020/04/06/worst-to-come-3-in-4-us-hospitals-now-facing-covid-19-167853> [perma.cc/JP6W-Y65R] ("President Donald Trump on Monday blasted his health department's watchdog for a new report revealing supply shortages and testing delays at hospitals responding to the coronavirus crisis, claiming the findings were inaccurate and politically motivated.");

pre-investigation are not sufficient to allow IGs to do their job and additional protections are needed to ensure that IGs can carry out their missions without fear of reprisal.

An additional weakness in the Act is the inability of the IG of the Department of Justice to investigate misconduct by DOJ attorneys, which prevented the IG from initiating an investigation into alleged abuse of the FISA system in 2016.³⁰² This prohibition led to the introduction of H.R. 202, the Inspector General Access Act of 2019, discussed briefly in section C, *supra*.³⁰³ This bill would “transfer[] responsibility for investigating certain allegations of misconduct from the [DOJ] Office of Professional Responsibility to the DOJ Office of the Inspector General. Specifically, the bill transfers responsibility for allegations relating to a DOJ attorney’s authority to investigate, litigate, or provide legal advice.”³⁰⁴ The bill was introduced by Senator Mike Lee.³⁰⁵ According to Lee, “The Inspector General Access Act solves the problems that have long plagued oversight of

Stephen M. Kohn, *How Firing Inspector General Atkinson Impacts the Government’s Ability to Fight Coronavirus*, THE HILL (Apr. 6, 2020), <https://thehill.com/blogs/congress-blog/politics/491284-how-the-firing-inspector-general-atkinson-impacts-the> [perma.cc/69QK-QD9Y] (discussing the pressure put on the Navy’s IG not to open an investigation into firings of sailors who raise concerns regarding COVID-19 aboard their ships).

³⁰² See Allie Gottlieb, *Current Law Helps Shield Attorney General From Independent Review*, REG. REV. (Mar. 3, 2020), <https://www.theregreview.org/2020/03/03/gottlieb-current-law-helps-shield-attorney-general-independent-review/> [perma.cc/3HRY-2JD7] (summarizing the law that requires the DOJ IG to defer to the Attorney General’s Office of Professional Responsibility on all investigations of DOJ attorney misconduct).

³⁰³ Inspector General Access Act of 2019, *supra* note 278.

³⁰⁴ See CONG. RSCH. SERV. SUMMARY: H.R. 202—116TH CONGRESS (2019–2020), <https://www.congress.gov/bill/116th-congress/house-bill/202/summary/> [perma.cc/2MDG-37SF].

³⁰⁵ The bill was introduced by four Republican Senators. *Id.* However, it also received support from traditionally liberal groups, such as the ACLU. See Letter from ACLU to Sens. Mike Lee, Marsha Blackburn, Charles Grassley, Lisa Murkowski & Marco Rubio, ACLU (Oct. 16, 2019), available at <https://www.aclu.org/letter/coalition-letter-ig-access-act> [perma.cc/3LUZ-9YDP] [hereinafter ACLU Letter] (“The Inspector General Access Act is commonsense legislation that would make a simple yet vital revision to the Inspector General Act of 1978 that we believe will enhance the accountability of the Department of Justice (DOJ) by allowing the DOJ inspector general to investigate allegations of misconduct by federal attorneys. . . . Under current policy and practice, alleged professional wrongdoing or other issues relating to professional misconduct by DOJ attorneys are handled by an internal and non-independent entity, the Office of Professional Responsibility.”).

DOJ lawyers by simply striking the jurisdictional carve out in § 8E of the Inspector General Act.”³⁰⁶ This would remove barriers preventing DOJ’s IG from investigating allegations of misconduct against DOJ attorneys.³⁰⁷

Given former Attorney General William Barr’s attempts to politicize the DOJ, the Inspector General Access Act would arguably create a necessary safeguard to protect the integrity of the institution.³⁰⁸ It would make it possible to determine whether investigations initiated by a presidential administration are being carried out for proper purposes, such as to prevent corruption, and not merely to smear political opponents. The bill received support from politicians and advocacy groups across the political spectrum. For example, a coalition of civil liberties groups, including the ACLU, expressed support for the bill in a letter to Senator Lee, a Republican.³⁰⁹ According to an ACLU press release, the organization’s support is grounded in concerns over transparency.³¹⁰ The legislation was intended to promote accountability, transparency, and integrity in the Department of Justice by allowing the Inspector General to exercise jurisdiction over attorneys just as would be exercised over other DOJ employees.³¹¹

2. Principal Deputy Inspector General of Health & Human Services

On May 2, 2020, Trump replaced Acting IG Christi Grimm at the Department of Health & Human Services.³¹² This was in response to Grimm’s report that hospitals were experiencing “severe shortages” in

³⁰⁶ Press Release, Sen. Mike Lee, Sens. Lee, Grassley, Murkowski, Blackburn, and Rubio Introduce Inspector General Access Act, (Mar. 6, 2019), <https://www.lee.senate.gov/public/index.cfm/2019/3/sens-lee-grassley-murkowski-blackburn-and-rubio-introduce-inspector-general-access-act>. [perma.cc/8WL6-3LVP].

³⁰⁷ See *id.* (“[T]he Department of Justice OIG currently does not have the power to review the conduct of DOJ attorneys, an oversight which this legislation corrects.”).

³⁰⁸ Barr’s efforts to use the massive investigatory apparatus of the Justice Department to cast suspicion on political opponents was well documented. See, e.g., Devlin Barrett, Matt Zapotosky & Josh Dawsey, *Barr’s Internal Reviews and Re-Investigations Feed Resentment, Suspicion Inside Justice Dept.*, WASH. POST (Feb. 15, 2020) (“The Justice Department in the Trump era has repeatedly tasked U.S. attorneys from far-flung offices to parachute into politically explosive cases in Washington, raising concerns among current and former officials that agency leaders are trying to please the president by reviewing and reinvestigating cases in which he is personally or politically invested.”).

³⁰⁹ ACLU Letter, *supra* note 305.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*; Lisa Rein, *Trump Replaces HHS Watchdog Who Found ‘Severe Shortages’ at Hospitals Combating Coronavirus*, WASH. POST (May 2, 2020), https://www.washingtonpost.com/politics/trump-replaces-hhs-watchdog-who-found-severe-shortages-at-hospitals-combating-coronavirus/2020/05/02/6e274372-8c87-11ea-ac8a-fe9b8088e101_story.html [perma.cc/Q3VF-V9SM].

critical resources such as personal protective equipment (PPE) and intensive care unit (ICU) capacity because of COVID-19.³¹³ This firing was especially concerning given the vast scope of the public health and economic responses triggered by the pandemic, which has already involved trillions in federal response funding, all of which needs to be overseen by a financial watchdog. In response to the pandemic, Congress passed the CARES Act, a \$2 trillion economic relief bill.³¹⁴ The Act contains three mechanisms for oversight regarding how the money is spent.³¹⁵ First, it created the Pandemic Response Accountability Committee, a panel of IGs tasked with general oversight of the law's administration.³¹⁶ Second, it created the Special Inspector General for Pandemic Recovery, who is assigned to oversee the Treasury Department's distribution of money for large corporations.³¹⁷ Finally, it created a bi-partisan, bicameral Congressional Oversight Commission to oversee the Treasury Department and Federal Reserve.³¹⁸

The timing of the enactment of the CARES Act coincided with Trump's campaign of intimidation against federal IGs. To this day, the need for effective oversight of CARES Act funding remains urgent, as indicated by the findings of a House panel that HHS overpaid for ventilators by as much as \$500 million.³¹⁹ The same deal allowed the contractor to delay production of the ventilators until September 2022, despite a present need for them.³²⁰ Furthermore, IGs across the federal government felt intimidated under Trump. If the precedent lingers that IGs may be unable to do their jobs without fear of retaliation, the oversight provisions in the CARES Act are

³¹³ CHRISTI A. GRIMM, OFF. OF INSPECTOR GEN., DEP'T OF HEALTH AND HUM. SERVS., OEI-06-20-00300, HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23-27, 2020, at 1 (2020), available at <https://www.oig.hhs.gov/oei/reports/oei-06-20-00300.pdf> [perma.cc/X28Z-52Y3]; Rein, *supra* note 312.

³¹⁴ See Jackson Gode, Congressional Oversight of the CARES Act Could Prove Troublesome, BROOKINGS INST. (Apr. 15, 2020), <https://www.brookings.edu/blog/fixgov/2020/04/15/congressional-oversight-of-the-cares-act-could-prove-troublesome/> [perma.cc/F5KZ-3P3G] ("President Trump signed the CARES Act providing for more than \$2 Trillion in federal spending in response to the COVID-19 crisis.").

³¹⁵ *Id.*

³¹⁶ *Id.* The panel is composed of a minimum of nine IGs. Currently, the panel is comprised of 22 IGs. PANDEMIC RESPONSE ACCOUNTABILITY COMM., *About the PRAC*, <https://www.pandemicoversight.gov/our-mission/about-the-prac> [perma.cc/XU8M-DZC3] (last visited Dec. 4, 2021).

³¹⁷ Gode, *supra* note 314.

³¹⁸ *Id.*

³¹⁹ Patricia Callahan & Sebastian Rotella, *The White House Paid Up to \$500 Million Too Much for These Ventilators*, *Congressional Investigators Say*, PROPUBLICA (Aug. 7, 2020), <https://www.propublica.org/article/the-white-house-paid-up-to-500-million-too-much-for-these-ventilators-congressional-investigators-say> [perma.cc/3K2F-YL9T].

³²⁰ *Id.*

rendered pointless. Grimm highlighted these very concerns upon her ousting, stating “I cannot let the idea of providing unpopular information drive decision-making in the work we do.”³²¹ Like Atkinson, she stressed that independence is “the cornerstone of what any office of inspector general does.”³²²

3. Inspectors General of the State Department

Under President Trump, the Inspector General for the State Department was replaced twice. First, Steve Linick was replaced as a part of the “slow-moving Saturday Night Massacre.”³²³ Second, his replacement, a political appointee named Stephen Akard, resigned for undisclosed reasons.³²⁴ Though the reason for Akard’s resignation was unclear, the circumstances around his appointment were controversial.³²⁵ Akard replaced Linick in response to pressure on President Trump from Secretary of State Mike Pompeo, whom Linick was investigating for his involvement in a 2019 arms sale to Saudi Arabia that was completed without Congressional approval.³²⁶

Despite this tumult, the State Department’s OIG was busy. In August 2020, it published a report titled “Review of the Department of State’s Role in Arms Transfers to the Kingdom of Saudi Arabia and the United Arab

³²¹ Amy Goldstein, *Top HHS Watchdog Being Replaced by Trump Says Inspectors General Must Work Free From Political Intrusion*, WASH. POST (May 26, 2020), https://www.washingtonpost.com/health/top-hhs-watchdog-being-replaced-by-trump-says-inspectors-general-must-work-free-from-political-intrusion/2020/05/26/5c83f41a-9f49-11ea-9590-1858a893bd59_story.html [perma.cc/8TFP-V57A].

³²² *Id.*

³²³ Aaron Blake, *Trump’s Slow-Motion Friday Night Massacre of Inspectors General*, WASH. POST, (May 18, 2020), <https://www.washingtonpost.com/politics/2020/05/16/trumps-slow-moving-friday-night-massacre-inspectors-general/> [perma.cc/Y69U-Y6D5]; see also Michele Kelemen, *Trump Removes State Department Inspector General Steve Linkick*, NPR (May 16, 2020), <https://www.npr.org/2020/05/16/857334790/president-trump-removes-state-department-inspector-general-steve-linick> [perma.cc/Y7XW-5CDX] (“President Trump is ousting State Department Inspector General Steve Linick, extending a string of administration firings of government watchdogs.”); Pranshu Verma & Edward Wong, *Another Inspector General Resigns Amid Questions About Pompeo*, N. Y. TIMES (Aug. 25, 2020) <https://www.nytimes.com/2020/08/05/us/politics/inspector-general-pompeo-state.html> [perma.cc/QG8B-NZF3] (explaining that Stephen Akard, who replaced Steve Linick, resigned less than three months after his predecessor’s firing, and the resignation came as Congress continued to inquire about the reasons for Linick’s firing).

³²⁴ See Matt Perez, *Acting State Department Inspector General Resigns After Less Than Three Months*, FORBES (Aug. 5, 2020), <https://www.forbes.com/sites/mattperez/2020/08/05/acting-state-department-inspector-general-resigns-after-less-than-three-months/?sh=57547c3e3f89> [perma.cc/4VLL-ZMYN].

³²⁵ *Id.*

³²⁶ *Id.*

Emirates.”³²⁷ The report indicated that the Trump administration failed to adequately consider the humanitarian impact arms sales to Saudi Arabia would have in Yemen.³²⁸ In light of these concerning allegations, it remains important that stability and effective oversight in the State OIG are achieved.

4. Acting Inspector General of the Department of Defense

On April 7, 2020, President Trump replaced Glenn Fine, the Acting IG for the Department of Defense, just as he prepared to step into a new role as the chairman of the Pandemic Response Accountability Committee created under the CARES Act.³²⁹ While Trump never announced a retaliatory motive for replacing Fine, the New York Times reported that it may have been in response to the President’s perception that Fine was a “partisan foe.”³³⁰ This is most troubling because replacing Fine prevented Fine, a figure widely viewed as apolitical, from taking on a role overseeing the disbursement of the \$2.2 trillion in pandemic relief money.³³¹ Furthermore, Fine was replaced by

³²⁷ OFF. OF INSPECTOR GEN., U.S. DEP’T OF STATE, ISP-I-20-19, REVIEW OF THE DEPARTMENT OF STATE’S ROLE IN ARMS TRANSFERS TO THE KINGDOM OF SAUDI ARABIA AND THE UNITED ARAB EMIRATES (2020), available at <https://www.stateoig.gov/system/files/isp-i-20-19.pdf> [perma.cc/975Q-HFVK].

³²⁸ Diane Bernabei & Beth Van Schaack, *State Dept. Inspector General Report: A Troubling Message on Arms Sales*, JUST SECURITY (Aug. 26, 2020), <https://www.justsecurity.org/72188/state-dept-inspector-general-linick-saudi-arms-sales/> [perma.cc/Q5HE-2X5Z].

³²⁹ Charlie Savage & Peter Baker, *Trump Ousts Pandemic Spending Watchdog Known for Independence*, N.Y. TIMES (April 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/trump-coronavirus-watchdog-glenn-fine.html> [perma.cc/E88E-NX3T] (“President Trump moved on Tuesday to oust the leader of a new watchdog panel charged with overseeing how his administration spends trillions of taxpayer dollars in coronavirus pandemic relief, the latest step in an abruptly unfolding White House power play against semi-independent inspectors general across the government. The official, Glenn A. Fine, has been the acting inspector general for the Defense Department since before Mr. Trump took office and was set to become the chairman of a new Pandemic Response Accountability Committee to police how the government carries out the \$2.2 trillion coronavirus relief bill. But Mr. Trump replaced Mr. Fine in his Pentagon job, disqualifying him from serving on the new oversight panel.”).

³³⁰ *Id.* (“At his daily coronavirus briefing, Mr. Trump offered no particular explanation for sidelining Mr. Fine but characterized it as part of a larger shuffle of inspectors general, some of them left over from past administrations, and cited unspecified ‘reports of bias.’ . . . But Mr. Trump’s allies said he felt burned by the investigations of his campaign and associates and therefore distrusts figures he perceives to be partisan foes within government . . .”).

³³¹ *Id.* (“In removing Mr. Fine from his role overseeing pandemic spending, Mr. Trump targeted a former Justice Department inspector general who earned a reputation for aggressive independence in scrutinizing the F.B.I.’s use of surveillance and other law enforcement powers in the years after the Sept. 11, 2001, attacks A group of inspectors general led by Michael E. Horowitz, the Justice Department inspector general, will determine who will replace Mr. Fine as chairman of the new pandemic oversight committee. Created

the IG for the Environmental Protection Agency (EPA), who was not relieved of his duties at EPA.³³² Trump thus split his nominee between the two agencies—ensuring lax oversight at both.³³³

5. Acting Inspector General of the Department of Transportation

Finally, Trump demoted the former Acting IG for the Department of Transportation, Mitch Behm, to deputy after a long vacancy,³³⁴ using the Vacancies Act to install a political appointee at the post instead.³³⁵ This replacement was notable for several reasons. First, it was another example of Trump removing an official who would oversee implementation of money distributed by the CARES Act. Second, the nomination was done in such a way that executive authority under the Vacancies Act may have been expanded.

President Trump repeatedly used the Vacancies Act to replace career bureaucrats with political appointees across the federal government, including IGs.³³⁶ The Vacancies Act allows a President to appoint an acting official to temporarily fill a vacancy that would otherwise be filled by a Senate confirmed official.³³⁷ Normally, this appointment must occur within

as part of the coronavirus relief bill, the committee consists of nine inspectors general from across the executive branch and will have an \$80 million budget to hunt for waste, fraud, abuse and illegality in the disbursement of the \$2.2 trillion approved by Congress to provide relief to Americans affected by the pandemic.”).

³³² Anne Joseph O’Connell, *Watchdogs at Large*, BROOKINGS INST. (Aug. 6, 2020), <https://www.brookings.edu/research/watchdogs-at-large/> [perma.cc/P6SE-HRB4] (“Only when the White House nominated Jason Abend to the position in early April could President Trump demote Fine. Abend’s nomination allowed the Vacancies Act to kick in again, which permitted the President to select Sean O’Donnell, the EPA’s confirmed IG, as the new acting IG for the Department of Defense. (Under the quirks of the Vacancies Act, O’Donnell maintains his official title and responsibilities as the EPA’s IG as well. Although he can delegate work to others, he is now stretched very thin.”).

³³³ *Id.*

³³⁴ Sam Mintz, *Democrats Blast Removal of Acting DOT Inspector General*, POLITICO (May 19, 2020), <https://www.politico.com/news/2020/05/19/democrats-blast-removal-of-acting-dot-inspector-general-268611> [perma.cc/5JY6-BK45] (“Behm, a longtime deputy inspector general who had been acting in the lead position since Calvin Scovell retired in January, was replaced Saturday by Skip Elliott, who is also administrator of the Pipeline and Hazardous Materials Safety Administration.”).

³³⁵ O’Connell, *supra* note 332 (“Like Akard, the new acting IG at Transportation is a political appointee.”).

³³⁶ *See id.* (noting Trump’s use of the Vacancies Act to appoint Sean O’Donnell as Acting IG of the Department of Defense, Stephen Akard as Acting IG of the State Department, and Stephen Elliot as Acting IG of the Department of Transportation).

³³⁷ VALERIE C. BRANNON, CONG. RSCH. SERV., *THE VACANCIES ACT: A LEGAL OVERVIEW* 3 (2020).

a set timeframe of 210 days.³³⁸ However, Trump appointed his replacement Acting IG for Transportation after that time limit had already expired.³³⁹ In doing so, Trump may have effectively expanded the timeframe further as a matter of precedent, thus allowing him more time in the future to delay selecting a temporary appointment, and providing additional opportunities to thwart potentially harmful internal investigations.³⁴⁰

6. Inspector General of the Post Office

One key agency involved in the 2020 election was the United States Postal Service (USPS), which received public scrutiny because of reported changes by the Trump administration. As allegations of politically motivated reforms emerged, it became increasingly vital that the IG ensure accountability and foster public trust in the USPS. Indeed, the IG of USPS announced in August 2020 that the office was opening an investigation into policy changes imposed under Postmaster General Louis DeJoy.³⁴¹ This investigation was in response to a request from Congress.³⁴² The investigation followed the resignation of two members of USPS's Board of Governors over similar allegations of politicization of the agency.³⁴³

E. Weaknesses in Federal Advisory Committee Act

1. Open questions about the Trump White House's Coronavirus Task Force

The COVID-19 pandemic added urgency for Executive branch oversight in several additional ways. As discussed above, the need for a strong IG at HHS to oversee the distribution of CARES Act money became important, as well as the need to ensure other federal bodies overseeing the response to the pandemic are also accountable. In response to the pandemic,

³³⁸ *Id.* at 13.

³³⁹ O'Connell, *supra* note 332.

³⁴⁰ *See id.* ("The President did not need to nominate someone to change the acting IG at the Transportation Department because the vacancy still fell within the Act's time limits. President Trump extended those limits, however, when he did submit a nominee a month later.").

³⁴¹ Marshall Cohen & Kristen Holmes, *Exclusive: Postal Service Inspector General Reviewing DeJoy's Policy Changes and Potential Ethics Conflicts*, CNN (Aug. 15, 2020), <https://www.cnn.com/2020/08/14/politics/postal-service-inspector-general-reviewing-dejoy/index.html> [perma.cc/GJA6-U2BJ].

³⁴² *Id.*

³⁴³ Alana Abramson, *How the Postal Service Became Donald Trump's for the Taking*, TIME (Aug. 20, 2020), <https://time.com/5882006/usps-board-governors-trump/> [perma.cc/Z7U6-RTBV].

President Trump put his son-in-law, Jared Kushner, in charge of a “shadow” task force composed of federal officials and industry representatives. The goal of the task force was to help federal agencies address the nation’s acute shortage of tests to determine whether patients are infected with COVID-19.

Ethics watchdogs sounded the alarm that the task force may have actually been a rogue advisory committee in violation of FACA.³⁴⁴ In a letter to the White House by Citizens for Responsibility & Ethics in Washington (CREW), the group stated, “Mr. Kushner’s use of a committee composed of federal employees and non-governmental members to solicit advice on how the White House should address the coronavirus pandemic implicates the FACA.”³⁴⁵ According to CREW, the committee’s use of a private email server likely violated both FACA and the Presidential Records Act.³⁴⁶ CREW also expressed concern that the committee’s secret meetings violated FACA.³⁴⁷ Without access to meetings or emails, the public remains in the dark. These concerns should have raised congressional alarms, especially because President Trump and Jared Kushner stood to potentially benefit personally from the passage of stimulus bills related to COVID-19.³⁴⁸ If Trump, Kushner, and their associates were profiting off policies related to the crisis, it is likely that related FACA violations resulted in the very sort of corruption the Act was intended to prevent. However, given weaknesses in the enforceability of FACA that were outlined by the D.C. Circuit during the Bush administration, it is difficult to see what the practical consequences for such violations would be.

³⁴⁴ See e.g., Press Release, Kushner’s Shadow Task Force Appears to Violate Multiple Laws, CITIZENS FOR RESP. AND ETHICS IN WASH. (Mar. 27, 2020), <https://www.citizensforethics.org/press-release/kushners-shadow-task-force-violate-multiple-laws/> [perma.cc/G6BS-8NGV] (noting Citizens for Responsibility and Ethics in Washington letter raising alarms that Kushner’s task force violated the PRA and FACA).

³⁴⁵ Letter from Noah Bookbinder, Executive Director, Citizens for Resp. and Ethics in Wash. to Pat Cipollone, White House Counsel (Mar. 27, 2020), <https://www.citizensforethics.org/wp-content/uploads/legacy/2020/03/2020-3-27-WH-Counsel-letter-PRA-FACA.pdf> [perma.cc/B78W-B96J].

³⁴⁶ CITIZENS FOR RESP. AND ETHICS IN WASH., *supra* note 344.

³⁴⁷ *Id.*

³⁴⁸ Jonathan Lemire & Stephen Braun, *Virus Relief Package Could Help Trump, Kushner Businesses*, AP (Mar. 26, 2020), <https://apnews.com/article/virus-outbreak-donald-trump-politics-windfalls-business-cfd3e3fe42997a7f3dbcc5c9225a4851> [https://perma.cc/4PPG-3GZH] (“The \$2 trillion legislative package moving through Congress to shore up the U.S. economy devastated by the coronavirus was carefully written to prevent President Donald Trump and his family from profiting from the federal fund. But the fine print reveals that businesses owned by Trump and his family still may be eligible for some assistance.”).

2. NDRC's FACA objection to Cheney Energy Task Force

The George W. Bush administration pushed the limits of FACA, prompting the D.C. Circuit to clarify the scope of its enforceability.³⁴⁹ In 2004, environmental and public interest groups sued the federal government under FACA and FOIA to obtain records related to an “energy task force” at the Department of the Interior, led by Vice President Cheney.³⁵⁰ The lawsuit was prompted by the agency’s failure to make public committee notes, correspondences between committee members and government employees, and conversations committee members had with private outside parties.³⁵¹ Importantly, NRDC alleged that representatives of energy industry groups improperly presented information to the task force.³⁵²

Despite seeming not to comply with FACA’s basic requirements, the task force did not face formal sanctions of any sort.³⁵³ Instead, the D.C. Circuit held that although the spirit of FACA may have indeed been violated, it was beyond the authority of the judiciary to compel the information to be provided.³⁵⁴ This is because it is the role of the Executive, not the judiciary, to determine whether a private party is made part of an advisory committee by virtue of presenting information to it.³⁵⁵ In this instance, the Bush administration declared the private party was not a part of the task force, and therefore was exempt from FACAs requirements.³⁵⁶

This decision raised an important weakness in FACA’s efficacy. If a court is unable to enforce FACA unless the Executive declares an advisory committee or individual members as subject to FACA, the Executive essentially has full authority to disregard the statute entirely. Thus, FACA

³⁴⁹ *No Openness Required for Cheney Energy Task Force*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (May 12, 2005), <https://www.rcfp.org/no-openness-required-cheney-energy-task-force/> [perma.cc/76T9-QAWJ].

³⁵⁰ *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005); *See also* Press Release, *U.S. Supreme Court to Hear Cheney Energy Case*, NAT. RESOURCES DEF. COUNCIL (Apr. 23, 2004), <https://www.nrdc.org/media/2004/040423> [perma.cc/G2YV-B4WF] (“The fundamental issue before the U.S. Supreme Court in the FACA lawsuit against Vice President Cheney and others is whether the public should have access through discovery to records of the energy task force to determine whether FACA was violated. Neither the district court nor the D.C. Circuit determined that the administration had violated FACA, but both held that the plaintiffs had the right to access the information that could prove such violations.”).

³⁵¹ *See* Letter from Sharon Buccino & Johanna Wald, Senior Att’ys, Nat. Resources Def. Council, to William Wolf, FOIA Appeals Officer, U.S. Dep’t of Interior (Apr. 11, 2002), (<https://www.nrdc.org/sites/default/files/taskforce-0411doi.pdf>) [perma.cc/2XHD-8ZP9] (detailing the Agency’s failure to comply with FOIA requests).

³⁵² *Id.*

³⁵³ REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 349.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*; *In re Cheney*, 406 F.3d at 728.

must be broadened to include not only members of a committee, but also individuals who present information or provide advice to that committee. Doing so would remove the loophole identified by the D.C. Circuit in 2004 by ensuring that, regardless of whether the Executive identifies particular individuals as “members” of a task force, they will be subject to FACA requirements simply by virtue of participating in a task force’s meetings.

F. Campaign Finance Violations

1. Dismantling the FEC

Even before his first impeachment acquittal and the COVID pandemic, Trump had tested the boundaries of the post-Watergate oversight reforms in a number of ways. For example, early in his administration he effectively undermined the powers of the FEC by refusing to appoint a sufficient number of commissioners to enable the agency to take virtually any actions whatsoever.³⁵⁷ The Commission requires four presidentially appointed commissioners for a quorum, which is required to approve the opening of investigations.³⁵⁸ As long as a president does not appoint anyone else to the Commission, it is unable to investigate campaign finance violations. In the Trump era, this was particularly troubling because Trump appears to have potentially committed multiple campaign finance violations and facilitated widespread lies and disinformation about the legitimacy of Joe Biden’s win in November 2020.

2. Possible FECA violations

First, in the runup to the 2016 election, Trump received assistance from Russia-based hackers and Wikileaks in connection to his election when those foreign nationals hacked into Democratic National Committee servers and publicly dumped thousands of embarrassing emails regarding then-presidential candidate Hillary Clinton. If Trump’s campaign coordinated with those foreign nationals, their involvement could constitute an in-kind contribution from a foreign national. FECA and FEC regulations include a broad prohibition on foreign national activity in connection with elections in

³⁵⁷ See Dave Levinthal, *Prepare to be Shocked! Trump’s One Weird Trick to Avoid a Campaign Investigation*, CTR. FOR PUB. INTEGRITY (Jan. 13, 2020), <https://publicintegrity.org/politics/trump-fec-campaign-election-quorum-pascrell/> [perma.cc/5Z2V-AA5U] (“[T]he FEC didn’t have enough commissioners to take meaningful action. Republican Vice Chairman Matthew Petersen had resigned on Sept. 1, causing the 309-employee agency to slip below a minimum quorum of four commissioners needed to conduct high-level business, including approving investigations and penalizing scofflaws.”).

³⁵⁸ *Id.*

the United States.³⁵⁹ In general, foreign nationals are prohibited from “making any contribution . . . in connection with any federal . . . election in the United States.”³⁶⁰ FEC regulations define a “contribution” broadly, including “anything of value made . . . for the purpose of influencing any election for Federal office.”³⁶¹ A “foreign national” includes foreign governments, foreign citizens, foreign corporations, associations, or partnerships, or any other “foreign principal” as defined at 22 U.S.C. § 611(b).³⁶² The leaking of embarrassing opposing campaign emails arguably fell within the FEC’s broad definition of a “contribution.”³⁶³ Further, both Wikileaks and the hackers involved in the leaks were foreign nationals.³⁶⁴ Therefore, if the Trump campaign was aware of the leaking operation, it likely violated FECA.

Like his 2016 campaign, President Trump’s 2020 presidential campaign seemed prepared to commit additional campaign finance violations. For example, both the President and his family members appear to have profited off his re-election campaign.³⁶⁵ According to filings with the FEC, Trump’s 2020 campaign spent a considerable amount of money on

³⁵⁹ See 52 U.S.C. § 30121(a) (prohibiting contributions or attempts at electioneering from foreign nationals to political committees, parties, or in connection with an election); See generally 11 C.F.R. § 110.20 (same).

³⁶⁰ *Foreign Nationals*, FED. ELECTION COMM’N (June 23, 2017), <https://www.fec.gov/updates/foreign-nationals/> [perma.cc/DY8J-AQKX].

³⁶¹ *Id.* §§ 100.52(a), 100.54.

³⁶² *Foreign Nationals*, *supra* note 360.

³⁶³ FEC Chairwoman Ellen Weintraub was among the most high-profile and authoritative experts to express this opinion. See Caroline Linton, *FEC Chairwoman Tweets “It Is Illegal” to Accept Anything of Value From a Foreign National in U.S. Election*, CBS NEWS (June 13, 2019), <https://www.cbsnews.com/news/fec-chairwoman-tweets-illegal-to-accept-anything-of-value-from-foreign-national-in-us-election-2019-06-13/> [perma.cc/WY4A-P3DD] (noting tweet from Weintraub clarifying that it is illegal to receive “anything of value” from foreign nationals in connection with a U.S. election).

³⁶⁴ Danny Yadron, *Russian Government Hackers Steal DNC Files on Donald Trump*, THE GUARDIAN (Jun. 14, 2016, 14:41 EDT), <https://www.theguardian.com/technology/2016/jun/14/russian-dnc-hack-donald-trump-files-us-election> [https://perma.cc/2V5G-86QX].

³⁶⁵ See, e.g., Katelyn Burns, *Trump Campaign Groups Spent \$1.7 Million at His Own Properties and Businesses Last Quarter*, VOX (Feb. 3, 2020), <https://www.vox.com/policy-and-politics/2020/2/3/21120187/trump-fec-campaign-trump-organization> [https://perma.cc/DBD3-CG2M] (“President Donald Trump once bragged that if he ever ran for president, he’d be the first person to make money off it. According to his campaign’s filings with the Federal Election Commission, that prediction appears to be coming true.”). In total, the President’s campaign appears to have spent \$194,247.57 on Trump businesses, while conservative leaning groups have spent an additional \$1.7 million at them. See *id.*

rentals at Trump hotels, restaurants, and other businesses.³⁶⁶ While such payments may not be violations of FECA *per se*, they are if the payments were above “fair market rate” for the goods or services rendered.³⁶⁷ An FEC investigation is needed to resolve that question of fact.

Following the election, the nation was shocked by one of the most brazen examples of political intimidation in the nation’s history when President Trump pressured Georgia Secretary of State Brad Raffensberger and Governor Brian Kemp to overturn the results of the Georgia presidential election.³⁶⁸ The incident came to a head when Raffensberger’s legal team leaked audio of a phone call in which Trump directly suggested Raffensberger “find” votes in his favor so as to overturn the election’s results.³⁶⁹ The incident is being investigated at a state level by the Fulton County District Attorney.³⁷⁰ House Democrats urged FBI Director Christopher Wray to look into the incident to determine whether federal law was broken, but the Bureau has not yet announced any action.³⁷¹

G. National Emergencies Under Trump

President Trump’s expansive view of executive power proved especially dangerous in the time of a global pandemic because of the unclear limits of the powers he is permitted to seize under the National Emergencies Act. On March 13, 2020, President Trump utilized the processes in the National Emergencies Act to declare a national emergency in response to the explosive spread of SARS-CoV-2 (“coronavirus”).³⁷² He was vague about

³⁶⁶ See FED. ELECTION COMM’N, CAMPAIGN FINANCE DATA: DISBURSEMENTS https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00580100&recipient_name=trump&two_year_transaction_period=2020&line_number=F3P-23 [perma.cc/3PTU-EZRS] (last visited Nov. 1, 2021) (noting *inter alia* several \$37,541 payments to Trump Tower and \$3,000 payments to Trump Restaurants for “rent,” plus thousands more in travel lodging, facility rentals, and “legal & IT consulting”).

³⁶⁷ 52 U.S.C. § 30114.

³⁶⁸ See Quint Forgy, *Raffensberger: Trump Could Face Investigation Over Election Call*, POLITICO (Jan. 4, 2021), <https://www.politico.com/news/2021/01/04/raffensperger-trump-investigation-call-454478> [perma.cc/H8M4-3C7L] (noting that legal experts and lawmakers “have expressed alarm” over the phone call).

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² Proclamation No. 9994, 85 Fed. Reg. 15,337–38 (Mar. 13, 2020) (“NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*) . . . do hereby find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency . . .”). While the virus is often referred to in common parlance as “coronavirus” or “COVID-19,” it

what authorities he intended to exercise in response to the pandemic—specifying only that he would immediately waive or modify certain requirements of the Medicare, Medicaid, and State Children’s Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule.³⁷³

The emergency declaration was also issued in addition to a prior emergency declaration related to illegal immigration from Latin America in early 2019 so that he could gain control over sufficient funding to construct a wall along the border of Mexico.³⁷⁴ The declaration occurred shortly after a five-week shutdown of the federal government, spurred by Democrats’ refusal to approve a federal budget that included funding for the wall.³⁷⁵ Trump declared that, as part of his emergency powers, he would redirect money appropriated for various Department of Defense construction projects to the wall.³⁷⁶ Democrats were outraged and public watchdog groups sued.³⁷⁷ Ultimately, a federal judge ruled that while the declaration of the emergency was valid, the redirection of funds for the wall was not, because Congress had already expressly declined to issue the President funding for that specific purpose.³⁷⁸ However, because only the redirection of funds, and not the declaration of the emergency itself, was invalid, the emergency status remained active.³⁷⁹ Trump extended the emergency twice,³⁸⁰ thus retaining some emergency power³⁸¹ which he used to redirect billions of dollars for funding of increased counternarcotic activities along the border with

is actually a specific species of viruses that falls under the larger umbrella of “coronaviruses,” and is not analogous to “COVID-19,” as that term refers to the respiratory infection that develops in many individuals carrying the virus. *See, e.g. Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It*, WHO, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it). [perma.cc/84L3-ZQGQ] (last visited Nov. 1, 2021).

³⁷³ Proclamation No. 9994, 85 Fed. Reg. 15,337–38 (Mar. 13, 2020).

³⁷⁴ Niv Elis, *Trump Extends Emergency Declaration at Border*, THE HILL (Feb. 13, 2020), <https://thehill.com/policy/finance/483039-trump-extends-emergency-declaration-at-border> [perma.cc/V9JV-FRGN] (noting that for the wall, a prominent promise President Trump made repeatedly throughout his campaign, was at the center of a political dispute that culminated in the longest continuous shutdown of the federal government in American history).

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*, Pete Williams, *Judge Rules Trump Violated the Law on Wall Funding With National Emergency*, NBC NEWS (Oct. 11, 2019), www.nbcnews.com/politics/immigration/judge-rules-trump-violated-law-wall-funding-national-emergency-n1065216 [perma.cc/4VS7-R5HU].

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ Elis, *supra* note 374.

³⁸¹ Williams, *supra* note 377.

Mexico.³⁸² This funding, unlike the wall funding, fell within the President's emergency powers because there is no express congressional prohibition against the President using funds to fund counternarcotic activities, as there was against funding the wall.³⁸³

In many ways, this standoff over funding for the wall echoed Nixon's standoff with Congress over water pollution funding. Even more egregious, perhaps, was the fact that Trump's actions followed a congressional override of his veto. Thus, his actions not only seemed to run contrary to Congress' express will, but also sought to undermine the very check the Constitution imposes on the executive for this type of situation.

H. Failures to Comply with Freedom of Information Act

1. Persistent FOIA backlog

Finally, agencies under the Trump administration repeatedly failed to comply with the Freedom of Information Act, and persistent inefficiencies in the FOIA process exacerbated the difficulties bringing those agencies into compliance. This was especially concerning because the Trump Administration received an unprecedented number of FOIA requests.³⁸⁴ Republicans argued this was former employees of Hillary Clinton and Barack Obama being paid by liberal groups to harass the Republican administration.³⁸⁵ Opponents argued it was because of the Trump administration's unusual opacity. Regardless of the reason, the increase in requests resulted in a significant backlog that has revealed significant shortcomings in the FOIA process.³⁸⁶ This backlog reflects a self-perpetuating cycle of delay. Many agencies' FOIA offices are unable to timely respond to the increased volume of requests, and therefore those

³⁸² *Id.*

³⁸³ *Trump v. Sierra Club*, 140 S.Ct. 1 (2019) (“[T]he Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary’s compliance with Section 8005”); *see also*, Andrew Arthur, *Supreme Court Allows Wall Construction to Proceed*, CTR. IMMIGR. STUD. (Aug. 2, 2019), <https://cis.org/Arthur/Supreme-Court-Allows-Wall-Construction-Proceed> [perma.cc/AN5P-SCQD] (explaining that the Supreme Court found no possible violation of the Department of Defense Appropriations Act for using counternarcotics funds to construct the border wall).

³⁸⁴ H.R. REP. NO. 116-09, at 3, 6–8 (2019).

³⁸⁵ *Id.*

³⁸⁶ *See id.* at 7 (statement of Rachel Spector, Acting Dep. Chief, FOIA Officer, U.S. Dep’t of the Interior). A FOIA backlog has existed for years. However, under President Trump, the backlog has increased drastically. *See, e.g.*, Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, THE FOIA PROJECT (Nov. 12, 2018), <http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/> [perma.cc/F8GP-458V] (containing detailed data related to FOIA requests, ongoing FOIA related litigation, and other metrics relevant to FOIA’s effectiveness).

offices are faced with increased litigation in response to failure to comply with FOIA. As processors are distracted by litigation, more FOIA requests pile up in the backlog, and those too eventually result in litigation.

Federal agencies have led the effort to address this problem. For example, EPA created new offices specifically dedicated to eliminating the FOIA backlog.³⁸⁷ Some approaches, however, are transparent efforts to quash public records requests. For example, in spring 2020, the FBI temporarily stopped accepting electronic FOIA requests entirely, and announced it would only respond to mailed requests.³⁸⁸ Since then, the agency has resumed processing emailed FOIA requests, but the Information Management Division's FOIA submission website says the agency is still "unable to timely process Freedom of Information/Privacy Act (FOIPA) requests received via the eFOIPA portal or by standard mail."³⁸⁹ These approaches appear to run directly counter to the goal of increasing government transparency. Thus, further reforms to the FOIA process are needed to ensure agencies have the resources at their disposal to process FOIA requests in a timely and transparent manner.

2. FOIA as applied to Trump in a private capacity

An additional challenge presented by the Trump Administration in this context related to President Trump's status as a private business owner. Even before Trump took office, there were widespread complaints that his campaign was spending its money improperly at Trump held companies. After Trump's election, these allegations transferred from the Trump campaign to the Trump government. For example, a Public Citizen FOIA

³⁸⁷ See H.R. REP. NO. 116-09, *supra* note 384, at 8 (statement of Tim Epp, Acting Dir., Nat'l FOIA Off., U.S. Env't Prot. Agency) (noting recent creation of EPA's National FOIA Office to centralize FOIA responses as part of broader strategic goal of increasing transparency, including eliminating the FOIA backlog).

³⁸⁸ See Jeanmarie Evely, *Access to Public Information in the Age of COVID-19*, CITY LIMITS (March 26, 2021), <https://citylimits.org/2021/03/26/access-to-public-information-in-the-age-of-covid-19/> [perma.cc/3P55-HEBU] ("At the national level, certain agencies also suspended or severely limited their processing of federal Freedom of Information Act or FOIA requests, citing the ongoing emergency: the State Department, for instance, claimed it was facing a 96 percent reduction in its ability to handle those requests while the FBI dismantled its electronic FOIA portal for about three weeks, according to Gunita Singh, a legal fellow with the Reporters Committee.").

³⁸⁹ *FBI Records: Freedom of Information/Privacy Acts (FOIPA)*, FED. BUREAU OF INVESTIGATION, <https://efoia.fbi.gov/#home> [perma.cc/2HVN-LW64] (last visited Nov. 6, 2021).

request revealed that the Secret Service spent thousands of dollars at Trump businesses.³⁹⁰

This problem is especially concerning because of a simple reality: FOIA does not apply to private entities, even if they are owned by the President.³⁹¹ Therefore, Trump's businesses do not have to reveal any information when government officials or agencies use their services. The only oversight that can be exercised through FOIA comes in the form of FOIA requests to specific agencies. The Public Citizen FOIA request against the Secret Service is a useful example for understanding how this approach works. A journalist or watchdog group must FOIA the agency regarding money spent on Trump businesses.³⁹² They must then wait, often years (in the case of Public Citizen, it was over three years),³⁹³ for the agency to provide the information. This information relates only to that specific agency and may be incomplete. For example, the Secret Service initially provided Public Citizen with an eight-page report before an appellate body within the agency eventually ordered production of thousands more pages of documents.³⁹⁴

3. Important recent FOIA revelations

Despite these challenges, FOIA has still proven an effective tool for government oversight. For example, in 2018, FOIA enabled reporters for a number of media outlets to steadily uncover a series of abuses and misallocations of funds by former-EPA Administrator Scott Pruitt.³⁹⁵ In fact, Kevin Chmielewski, the EPA official who blew the whistle on Pruitt initially,

³⁹⁰ Patrick Llewelyn, *How We Used FOIA to Hold Trump's Secret Service Accountable*, PUB. CITIZEN (Mar. 5, 2020), <https://www.citizen.org/news/secretservicefoia/> [perma.cc/U6VV-ZH7M].

³⁹¹ See e.g., *What Information Is Not Available Under the FOIA?*, DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/foia/faqs/what-information-is-not-available-under-the-foia/index.html> [perma.cc/X8TD-YAFU] (last updated Sept. 17, 2015) ("The FOIA does not require a state or local government or a private organization or business to release any records directly to the public, whether such records have been submitted to the federal government or not. However, records submitted to the federal government by such organizations or companies may be available through a FOIA request if they are not protected by a FOIA exemption, such as the one covering trade secrets and confidential business information.").

³⁹² Llewelyn, *supra* note 390.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/insider/information-freedom-reporters-pruitt.html> [perma.cc/FD88-STMG].

credits FOIA as the main reason Pruitt was ultimately forced out.³⁹⁶ Chmielewski analogized his tips to journalists to leaving a trail of “breadcrumbs,” which journalists could follow by filing FOIA requests.³⁹⁷ Ultimately, Pruitt was forced out after documents uncovered through a FOIA request revealed he had misspent government funds, including \$1560 on fountain pens, and abused his office for personal gain, such as by seeking out a Chick-Fil-A franchise for his wife.³⁹⁸

Additionally, in late 2020, a series of FOIA requests were filed by the NAACP, ACLU, and others in response to revelations of controversial actions taken by the Department of Homeland Security during a summer of protests for racial justice in the wake of the high-profile killings of George Floyd, Breonna Taylor, and others.³⁹⁹ These FOIA requests could prove crucial to obtaining information from the agency, which has grown increasingly defiant in its responses to public and Congressional oversight.⁴⁰⁰ In light of a series of other disturbing scandals that consumed the agency in the second-half of 2020, FOIA will be a tool moving forward to shed light on what exactly happened in the Office of Information and Analysis and Immigration and Customs Enforcement under former Acting Secretary Chad Wolfe’s leadership.⁴⁰¹

³⁹⁶ Miranda Green, *Ex-Aide Says He’ll Take Credit for Pruitt’s Downfall*, THE HILL (July 8, 2018), <https://thehill.com/policy/energy-environment/396000-ex-aide-says-hell-take-credit-for-pruitts-downfall> [perma.cc/SJ4E-MNWE].

³⁹⁷ *Id.*

³⁹⁸ *ELP FOIA Work Plays Crucial Role in Pruitt Resignation*, SIERRA CLUB (July 5, 2018), <https://www.sierraclub.org/environmental-law/elp-foia-work-plays-crucial-role-pruitt-resignation> [perma.cc/48PB-L6P3].

³⁹⁹ See e.g. *LDF Files FOIA Requests Regarding the Activity of Federal Agents in Portland, Oregon*, NAACP LEGAL DEF. & ED. FUND (July 17, 2020), <https://www.naacpldf.org/press-release/ldf-files-foia-requests-regarding-the-activity-of-federal-agents-in-portland-oregon/> [perma.cc/4NKJ-GYQT]; Jay Stanley & Nicola Morrow, *ACLU Seeks Information on Government’s Aerial Surveillance of Protestors*, ACLU (Aug. 4, 2020), <https://www.aclu.org/news/national-security/aclu-seeks-information-on-governments-aerial-surveillance-of-protestors/> [perma.cc/3RY5-PJPK].

⁴⁰⁰ See Jackson Garrity, *Homeland Security’s Defiance Presents Vexing Challenge for Congressional Oversight*, OVERSIGHT PROJECT (Oct. 1, 2020), <https://oversightproject.org/2020/10/01/homeland-securitys-defiance-presents-vexing-challenge-for-congressional-oversight/> [perma.cc/6VRE-92J5] (noting DHS’ refusal to provide information requested by Congress during investigation of DHS scandals, and the Acting Secretary’s defiance of a congressional subpoena).

⁴⁰¹ In the second half of 2020, a series of disturbing allegations emerged regarding numerous DHS sub-agencies. This included allegations that the Office of Information and Analysis had conducted warrantless surveillance of peaceful protestors at Black Lives Matter protests in Portland, Oregon. *Id.* At the same time those allegations were coming to light, the Office was embroiled in a separate scandal involving allegations that a political appointee had specifically instructed staff to ignore intelligence suggesting Russian actors were seeking to

Prior to the Trump administration, FOIA also led to multiple important revelations. New York Times reporters uncovered information related to the Obama administration's targeted killing of an American citizen without a trial, and uncovered the administration's internal legal analyses related to the lawfulness of Guantanamo Bay detention center.⁴⁰² FOIA also allowed reporters to hold Bush administration Federal Emergency Management Act (FEMA) officials accountable for the slow response to Hurricane Katrina.⁴⁰³ The information contained in documents released by FEMA showed how aid money was spent and how logistics were coordinated.⁴⁰⁴

IV. SUGGESTIONS FOR REFORM

A. Priorities for a Post-Trump Congress

Close to half of voters supported Donald Trump in November 2020, and millions still falsely believe that President-elect Joe Biden secured the presidency through voter fraud.⁴⁰⁵ Another large section of the country took to the streets despite a global pandemic to mark Biden's win.⁴⁰⁶ This schism undermines the integrity of the federal system of separated powers itself. The American public cannot rely on hope alone that a president will not misuse their power. For an accountable Executive branch to survive, additional legislative reform is needed.⁴⁰⁷

interfere with the 2020 presidential election. *Id.* Parallel to those scandals was a whistleblower report alleging doctors were performing "mass hysterectomies" on non-consenting women held in Immigration and Customs Enforcement detention facilities. Laura Bonomini, *ICE Detention Whistleblower Highlights the Critical Role of Whistleblowers in Virtual Oversight*, OVERSIGHT PROJECT (Sept. 28, 2020), <https://oversightproject.org/2020/09/28/ice-detention-whistleblower-highlights-the-critical-role-of-whistleblowers-in-virtual-oversight/> [perma.cc/EW7Q-QYWL].

⁴⁰² Lucas, *supra* note 395.

⁴⁰³ Timothy J. Connor, *FEMA, Newspapers in the Eye of the Storm*, HOLLAND & KNIGHT (June 2006), <https://www.hklaw.com/en/insights/publications/2006/06/fema-newspapers-in-the-eye-of-the-storm-in-foia-ba> [perma.cc/5MNA-6856].

⁴⁰⁴ *Id.*

⁴⁰⁵ See Ella Lee, *Fact Check: Joe Biden Legally Won Election, Despite Persistent Contrary Claims*, USA TODAY (Dec. 15, 2020), <https://www.usatoday.com/story/news/factcheck/2020/12/15/fact-check-joe-biden-legally-won-presidential-election/6537586002/> [https://perma.cc/6VJN-VXKU].

⁴⁰⁶ Minyvonne Burke & Natalia Abrahams, *Biden's Win Sparks Street Celebrations Around the Country*, NBC NEWS (Nov. 7, 2020), <https://www.nbcnews.com/politics/2020-election/biden-s-win-sparks-street-celebrations-around-country-n1246922> [https://perma.Cc/VXZ4-ZLLU].

⁴⁰⁷ Kimberly Wehle, *The Flaw in the Twenty-Fifth Amendment*, THE BULWARK

This Part sketches out—very broadly—some areas that warrant immediate possible reform in Congress. The details of optimal legislation under each topic are well beyond the scope of this paper.

1. Strengthen Inspector General independence

When the IGA was signed into law, President Jimmy Carter stated an IG must “always remember that their ultimate responsibility is not to any individual but to the public interest.”⁴⁰⁸ Yet ironically, Presidents can divert the IG’s responsibility from the public interest to themselves as individuals because federal law permits them to remove IGs at-will.⁴⁰⁹ Although the current laws make it difficult for IGs to carry out their duties without the fear of being ousted for not seeing eye to eye with the president, legislative reform should allow for greater IG independence in conjunction with the President’s power to appoint.⁴¹⁰

For example, Senator Chris Murphy of Connecticut introduced the Inspectors General Independence Act to enable IGs to serve seven-year terms that can be renewed. Under the bill, if a president wishes to remove an IG, it can only be for cause.⁴¹¹ The rationale to extend for-cause removal protections to IGs lies in the Supreme Court’s decision in *Morrison v. Olson*, which found that the President’s control of the independent counsel “is [not] ‘so central to the functioning of the Executive Branch as to require’ that they be removable at will.”⁴¹² This would protect IGs from politically motivated firings and increase the likelihood that an IG’s actions are independent and not affected by the threat of termination.⁴¹³

(Oct. 6, 2020), [https://www.thebulwark.com/the-flaw-in-the-twenty-fifth-amendment/\[perma.cc/JSX6-UP2L\]](https://www.thebulwark.com/the-flaw-in-the-twenty-fifth-amendment/[perma.cc/JSX6-UP2L]) (“This is really where the Constitution has broken down. The Constitution is not self-executing. It is a piece of paper. It is only so good as it is enforced and respected.”).

⁴⁰⁸ *OIG History*, OFF. OF INSPECTOR GEN., DEP’T OF TRANSP., <https://www.oig.dot.gov/about-oig/oig-history> [perma.cc/B6QF-GFRH] (last visited Feb. 24, 2021).

⁴⁰⁹ Saikrishna Prakash, *Trump Has Declared War on Inspectors General. The System Can Still Be Saved.*, WASH. POST (May 22, 2020), https://www.washingtonpost.com/outlook/inspectors-general-independence-constitution-executive/2020/05/22/bb6be092-9b79-11ea-ac72-3841fcc9b35f_story.html [perma.cc/D9ZY-9CJF] (“Federal law allows presidents to remove most inspectors general at will.”).

⁴¹⁰ *See id.* (suggesting “for cause” protections for IGs, or vesting power-to-fire only in the chief IG rather than the President, as a way to insulate IGs from pressure).

⁴¹¹ Murphy, *Cooper Announce Legislation to Safeguard Inspectors General From Politically-Motivated Firings*, CHRIS MURPHY SENATE WEBSITE (Apr. 9, 2020), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-cooper-announce-legislation-to-safeguard-inspectors-general-from-politically-motivated-firings> [perma.cc/MEG2-H4HX].

⁴¹² Prakash, *supra* note 409.

⁴¹³ Murphy, *supra* note 411.

Regarding vacant IG positions, the Federal Vacancies Reform Act can be updated to require that “only the deputy IG, a senior official from the IG office or a senior officer within the broader IG community” can serve as acting IGs until the position is filled.⁴¹⁴ This change would minimize the extent to which a president could replace IGs with their political allies by instead requiring them to choose from individuals already in the IG’s office. Combined with the seven-year term reform, such a mechanism would enable IGs to have more independent control of their offices and foster better communication between different departments and agencies given the potential pool of candidates for filling potential vacancies.

Alternatively, Congress could create an entirely new role of Chief IG, who would be appointed by the President and removable at-will with delegated power to appoint and remove agency IGs for cause.⁴¹⁵ Thus, the IGs beneath the Chief IG would be viewed as more independent—much like the special counsel under DOJ regulations—and presidents would be more likely to face political scrutiny for firing a Chief IG for failing to execute a removal order.⁴¹⁶

Relatedly, Congress should consider passing the Merit System Protection Board Empowerment Act of 2020.⁴¹⁷ This Act would reauthorize the Merit System Protection Board, which has been unable to investigate whistleblower complaints under its jurisdiction for over a year,⁴¹⁸ and would grant the Board authority to proactively survey federal employees to ensure agencies are complying with federal whistleblower protection laws.⁴¹⁹

⁴¹⁴ Troy Cribb, *Five Ways Congress Can Strengthen the Independence of Inspectors General*, P’SHP FOR PUB. SERV. (July 1, 2021), <https://ourpublicservice.org/blog/five-ways-congress-can-strengthen-the-independence-of-inspectors-general/> [perma.cc/UM54-HC4T].

⁴¹⁵ Prakash, *supra* note 409.

⁴¹⁶ *Id.*

⁴¹⁷ H.R. 7864, 116 Cong. (2020); *see also* Press Release, H. Comm. on Oversight & Reform, Connolly, Maloney Introduce the Merit System Protection Board Empowerment Act of 2020 (July 30, 2020) [hereinafter House Oversight Committee Press Release], <https://oversight.house.gov/news/press-releases/connolly-maloney-introduce-the-merit-systems-protection-board-empowerment-act-of> [perma.cc/DU5H-7THB].

⁴¹⁸ House Oversight Committee Press Release, *supra* note. 417; *see also* Ana Popovich, *U.S. Merit System Protection Board Plagued by Structural Defects*, WHISTLEBLOWER NEWS NETWORK (July 10, 2020), <https://whistleblowersblog.org/2020/07/articles/government-whistleblowers/u-s-merit-system-protection-board-plagued-by-structural-defects/> (discussing how under the Trump administration, the MSPB was essentially rendered useless because it lacked Senate confirmed members, and relatedly federal whistleblower complaints sat in unadjudicated limbo).

⁴¹⁹ House Oversight Committee Press Release, *supra* note 417.

2. Streamline FOIA

The Supreme Court teed up a potential necessary change to the FOIA in *U.S. Fish & Wildlife Service v. Sierra Club*, in which environmentalists challenged the failure by the Fish & Wildlife Service and the National Marine Fisheries Service [together, the “Services”] to produce a “draft” biological opinion requested by the environmentalists under FOIA.⁴²⁰ The draft was produced by agency officials as part of a rulemaking by the EPA to assess the impact the rule would have on a species protected under the Endangered Species Act.⁴²¹ Because the drafts were not the final position taken by the Service with respect to the rule, and because the EPA had not yet finalized the rule itself, the Service cited FOIA’s deliberative process exemption as precluding the drafts from public reach through FOIA.⁴²² The ACLU and CREW filed a joint amicus brief with the Court arguing the case “presents an important opportunity for the Supreme Court to affirm the American public’s right of access to documents outlining government procedures under FOIA and limit the scope for which the government can . . . keep documents secret.”⁴²³ As these groups argued in their brief, the question turned on whether the Court views the exemptions within FOIA as identifying narrow categories of documents protected only when necessary to enhance agency decision making, or whether these exemptions enable broad confidentiality from the public.⁴²⁴

In her first opinion on the Supreme Court, Justice Amy Coney Barrett wrote for the majority that the draft was exempt from FOIA, thereby increasing the scope of the deliberative process exemption to FOIA. Under 50 C.F.R. § 402.14(g)(5), the Services must share final drafts with the action agency (here, EPA) before declaring the draft “finalized.”⁴²⁵ Yet, Barrett held that the draft biological opinion did not need to be shared under that regulation. This is problematic because, if a draft document influences EPA’s thinking on the subject so as to result in the agency amending its proposed

⁴²⁰ 141 S. Ct. 777, 783–84 (2021).

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *U.S. Fish & Wildlife Service v. Sierra Club*, ACLU (Aug. 26, 2020), <https://www.aclu.org/cases/us-fish-and-wildlife-service-v-sierra-club> [perma.cc/ZKD4-MX83].

⁴²⁴ See Brief for ACLU et al. as Amici Curiae Supporting Respondent, *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021) (No. 19-574), <https://www.aclu.org/legal-document/us-v-sierra-club-brief-amici-curiae-aclu-et-al> [perma.cc/C3RP-D8AM] (arguing the purpose of the deliberative process privilege is a narrow exception to the broad presumption that FOIA creates a right for the public to access government records, and that whether it applies should turn on whether the administrative context in which it was created is one which is enhanced when agency official’s discussions are shielded from the public eye).

⁴²⁵ *Sierra Club*, 141 S. Ct. at 785.

rule, the draft has the practical effect of being final within the Services. In this way, Barrett’s opinion creates a loophole, because an agency can change its rule based on a draft without ever declaring the draft to be final, thus exempting the draft from FOIA despite its tangible effect on the outcome of the rulemaking process.

The majority asserted that the draft did not have “real operative effect” because it did not change the “legal regime to which agency action is subject.”⁴²⁶ However, as the dissenting justices point out, the majority’s reasoning applies the deliberative process privilege in a way that allows the action agency to choose whether a document is labeled as “final” or a “draft,” and thus alter whether it is subject to FOIA.⁴²⁷ The majority opinion does not draw a clear limit on the discretion of the action agency to decide whether a document is final or not.⁴²⁸

In light of this broad holding, Congress should step in and clarify that where a draft has “real operative effect,” it is no longer protected under the deliberative process exemption. Congress should also make clear that a “real operative effect” is one which results in substantive changes to the action agency’s proposed course of action.⁴²⁹

There remains the larger problem of the persistent FOIA backlog, as well. Of course, the FOIA backlog was not new to the Trump administration, but the sheer volume and nature of the scandals that the administration generated heightened the need to address the problem. The GAO and DOJ’s Office of Information Policy have proposed new regulations to expedite the process by encouraging greater proactive disclosure of information by agencies.⁴³⁰ However, it remains unclear whether those regulatory changes will adequately address the problem. Congress should work with GAO and DOJ to develop a legislative approach to streamline the process and maximize the effectiveness of FOIA’s presumption by favoring disclosure.

⁴²⁶ *Id.* at 786–87 (internal citation omitted).

⁴²⁷ *Id.* at 789 (Breyer, J., dissenting).

⁴²⁸ *Id.* at 786.

⁴²⁹ *See id.* at 789–91 (Breyer, J., dissenting).

⁴³⁰ GAO, FREEDOM OF INFORMATION ACT: FEDERAL AGENCIES’ RECENT IMPLEMENTATION EFFORTS 1, 3, 12 (2020), <https://www.gao.gov/assets/710/705284.pdf> [perma.cc/353S-LGFP] (outlining GAO and OIP’s recommended changes to FOIA implementing regulations in agencies across the federal administrative state). The FOIA’s proactive disclosure provisions are intended to ensure that the public has ready access to certain key information about their government without the need to make a FOIA request. *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, DEP’T JUST., (last updated July 26, 2021) https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information.

3. Improve FISA compliance

The PATRIOT Act lowered the standard for collecting foreign intelligence information as a “primary” purpose to a “significant” purpose of the investigation.⁴³¹ Although the burden of proof standard has lowered, the meaning of “significant” is still undefined.⁴³² This lack of clarity has allowed federal agencies like the NSA to conduct upstream surveillance on all international communications made by Americans.⁴³³ There was previously litigation filed by the ACLU and other First Amendment non-governmental organizations (NGOs) regarding this matter, in which the NGOs claimed civil litigants must be able to challenge FISA surveillance because “it is critical that those directly affected by mass foreign intelligence surveillance be able to obtain judicial review.”⁴³⁴ Those claims were ultimately struck down by the United States District Court for the Eastern District of Virginia.⁴³⁵ The Fourth Circuit upheld that dismissal in September 2021.⁴³⁶

The USA Freedom Reauthorization Act would limit the FBI’s ability to seek FISA surveillance orders, precluding their collection on an “ongoing basis,” for example, as well as “cellular or GPS location information,” and applicants must certify that DOJ is aware of “any information that might raise doubts about the application.”⁴³⁷ The bill would also limit retention of FISA information to five years, increase criminal penalties for violations, and impose strict internal compliance and auditing mechanisms so that courts can declassify and publicly release FISA documents.⁴³⁸

⁴³¹ *Foreign Intelligence Surveillance Act (FISA)*, ELEC. PRIV. INFO. CTR., <https://epic.org/privacy/surveillance/fisa/> [perma.cc/6QTY-RVN5] (last visited Sept. 28, 2021).

⁴³² *Id.*

⁴³³ *Wikimedia v. NSA—Challenge to Upstream Surveillance Under the FISA Amendments Act*, ACLU (Sept. 6, 2018), <https://www.aclu.org/cases/wikimedia-v-nsa-challenge-upstream-surveillance-under-fisa-amendments-act> [perma.cc/KMB4-VRU4].

⁴³⁴ ELEC. PRIV. INFO. CTR., *supra* note 431.

⁴³⁵ *Lawsuit: Wikimedia Foundation v. NSA*, KNIGHT FIRST AMENDMENT INST. AT COLUM. UNIV., <https://knightcolumbia.org/cases/wikimedia--v-nsa>. [perma.cc/9KEM-CJLS] (last visited Aug. 24, 2021).

⁴³⁶ *See Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 14 F.4th 276 (4th Cir. 2021).

⁴³⁷ H.R. 6172, 116th Cong. (2020).

⁴³⁸ *Id.* §104(a)(3) (limiting retention time); *id.* § 205(b) (increasing penalties); *id.* §605 (establishing compliance mechanisms).

4. Strengthen special prosecutor independence

In the wake of the Mueller investigation, Congress needs to articulate—once again—the boundaries of executive branch investigations of sitting presidents.⁴³⁹ The existing ban on prosecuting presidents is contained in two Office of Legal Counsel (OLC) memoranda, which are not laws, and have not gone through the advocacy process that would produce a controlling judicial opinion.⁴⁴⁰

The current guidelines, issued in 1973 and 2000 by OLC,⁴⁴¹ were nonetheless binding on Mueller because the special counsel—an agent of DOJ—produced what amounted to an ambiguous report that obscured Trump’s legal violations, including possible obstruction of justice.⁴⁴² Because the guidelines were issued by an executive agency and without even the benefit of notice-and-comment procedures, they do not reflect the will of Congress, and in fact appear to undermine constitutional safeguards on the executive branch.⁴⁴³ Therefore, Congress should pass a statute overriding them, as it did post-Watergate, and specify the circumstances under which presidents can be indicted and the tolling of statutes of limitations to enable prosecutions after a president leaves office.⁴⁴⁴

5. Reform FACA

Although federal advisory boards and committees enjoy a great deal of autonomy under FACA, they remain subject to judicial review.⁴⁴⁵ In a 2020 case, the EPA argued that it was justified in forbidding those who

⁴³⁹ Jennifer Rubin, *Four Big Constitutional Fixes We Need, Thanks to Trump*, WASH. POST (Oct. 26, 2020), <https://www.washingtonpost.com/opinions/2020/10/26/four-big-constitutional-fixes-we-need-thanks-trump/> [perma.cc/9NPD-M6LG].

⁴⁴⁰ See, e.g., Kimberly Wehle, “Law and” *The OLC’s Article II Immunity Memos*, 32 STAN. L. POL’Y. REV. 1, 41–47 (explaining OLC memos may either be considered categorical exercises of prosecutorial discretion on the part of DOJ not to prosecute a sitting president or constitute non-legislative administrative rules).

⁴⁴¹ *Id.* at 21–23.

⁴⁴² Rubin, *supra* note 439; Wehle, *supra* note 440 at 5–6.

⁴⁴³ See Wehle, *supra* note 440, at 41–45 (explaining the proper sources of law under our constitutional framework are congressional lawmaking, judicial interpretation of the laws, and the power of states to institute their own laws).

⁴⁴⁴ See *id.* at 47–54 (arguing Congress should solve the constitutional ambiguity and reform prosecutorial procedures for sitting presidents).

⁴⁴⁵ Seth Jaffe, *EPA’s Limits on Advisory Committee Participation Are Subject to Judicial Review*, FOLEY HOAG (Mar. 27, 2020), <https://www.lawandenvironment.com/2020/03/27/epas-limits-on-advisory-committee-participation-are-subject-to-judicial-review/> [perma.cc/J3MB-F5TU].

received EPA grants from serving on the EPA advisory committee.⁴⁴⁶ The First Circuit explained that although FACA was enacted to avoid undue influence by the regulated community on federal advisory committees, the EPA's advisory committees must be balanced sufficiently to be able to provide independent advice and to "clearly [require] agency heads at least to consider whether new restraints on committee membership might inappropriately enhance special interest influence and to eschew such restraints when they do so."⁴⁴⁷ Congress should revisit FACA in light of modern developments in technology and political realities to ensure that decision-makers are not unduly influenced by certain interests without public scrutiny.

6. Amend the FEC

Because President Trump left the FEC without a quorum, the agency was powerless to investigate campaign finance law violations during his administration.⁴⁴⁸ Congress must amend FECA to create a mechanism to ensure empty Commission seats are immediately filled to facilitate a quorum, particularly in an election year. Otherwise, the country is vulnerable to the corrupting influence of improper contributions in politics. In addition to continued threats of foreign election interference, there remains the possibility that incidents similar to the ITT affair could occur again.

B. Additional Legislative Needs

The years following Nixon's Watergate scandal ushered in multiple measures to hold the Executive accountable and prevent misconduct, but those measures are not used to their full potential. Agencies are mainly under the control of the Executive, and vague laws in their current state are just words scrawled on paper with no real bite. That has thrown off the scale of equivalent separated powers, leaving an imbalanced system that favors the Executive. Lack of transparency and accountability is not something uniquely tied to the Trump administration. Still, it ran rampant under Trump. This is why, similar to post-Watergate, another era of legislative reform is needed to

⁴⁴⁶ See *Union of Concerned Scientists v., Wheeler*, 954 F.3d 11, 15 (1st Cir. 2020) (citing the appearance or reality of potential interference with board members' ability to serve independently and objectively).

⁴⁴⁷ *Id.* at 19; Jaffe, *supra* note 445; Union of Concerned Scientists, *Big Win! Court Questions EPA Limits on Science Advisory Committees*, ECOWATCH (Mar. 24, 2020), <https://www.ecowatch.com/epa-science-advisory-limits-win-2645574831.html?rebellitem=2#rebellitem2> [perma.cc/TT7U-QXHN] (citation omitted).

⁴⁴⁸ Levinthal, *supra* note 357.

ensure that in the future, mistrust in the executive branch does not reach the levels that we see today.

The foregoing discussion focused on amendments to pre-existing legislation that was passed to address the abuses of Watergate. Congress needs to do even more, as the abuses of the Trump administration stretched beyond what even Richard Nixon attempted.

1. Legislatively implement the Twenty-Fifth Amendment

When it was first incorporated into the Constitution, the Twenty-Fifth Amendment was designed to serve two purposes—to clarify the line of succession in the event the president dies, resigns, or is disabled; and to clarify how the role of vice president is to be filled if it ever becomes vacant.⁴⁴⁹ Some scholars have argued the amendment could be used as a “mutiny provision,” allowing the presidential Cabinet to rein in a president who is unwilling to discharge his duties for reasons other than physical disability.⁴⁵⁰ Experts have warned that the amendment as written is insufficient to check a president where doing so is necessary and Congress is otherwise unwilling to act.⁴⁵¹

President Trump tested positive for COVID-19 and was hospitalized amid a global pandemic.⁴⁵² Given his age at the time of infection and the election of Biden, who is also well into his senior citizen years, it would have been beneficial to have a plan in place to transition quickly had his health declined rapidly. Furthermore, legitimate discussions of invoking the Twenty-Fifth Amendment arose in the aftermath of the January 6, 2021 insurrection at the U.S. Capitol Building, which was widely blamed on

⁴⁴⁹ See Kimberly Wehle, *Nice Idea, But 25th Amendment is No Fix for a Dysfunctional President*, THE HILL (Sept. 11, 2018), <https://thehill.com/opinion/white-house/405952-nice-idea-but-25th-amendment-is-no-fix-for-a-dysfunctional-presidency> [perma.cc/7TDW-GLVN)] [hereinafter Wehle, *Nice Idea*].

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* (“[A]t the end of the day, impeachment remains the best bet for addressing fatal problems with an incumbent presidency. And if Congress is unwilling to take that step, it’s not likely to pull the Section 4 trigger, either. Ultimately, therefore, it’s up to voters to keep a close eye on things by exercising their prerogative to hire and fire at the ballot booth.”).

⁴⁵² Christine Wang & Mike Calia, *President Trump, First Lady Melania Test Positive for Coronavirus*, CNBC (Oct. 2, 2020), <https://www.cnbc.com/2020/10/02/president-donald-trump-says-he-has-tested-positive-for-coronavirus.html> [perma.cc/C27L-U8SA].

Trump.⁴⁵³ But if a vice president is unwilling to activate Section Four of the Amendment or obtain the requisite number of cabinet members, power may not be transferred from a president.⁴⁵⁴

The holes in the Twenty-Fifth Amendment reflect a broader theme underlying many issues discussed throughout this paper—that the “the Constitution mostly runs on the honor system.”⁴⁵⁵ The Trump administration demonstrated that, where a President does not act in good faith to execute and obey the laws of the United States, there must be consequences with teeth. Writer Jennifer Rubin has thus argued Congress should pass legislation requiring presidents, in writing, to designate mechanisms for transferring powers if they become disabled.⁴⁵⁶ To assess mental and physical fitness, a president may be required to have a yearly physical examination and submit the report by waiving doctor-patient privilege.⁴⁵⁷ A president may specify the circumstances under which such transfer of power would be activated.⁴⁵⁸ This may be constitutionally tricky, but given the advanced age of our recently elected presidents and unexpected circumstances like the global pandemic crisis, it would be wise for Congress to consider legislation implementing the 25th Amendment with more specificity and transparency.⁴⁵⁹ Such a change would strip the President of unchecked discretion to determine whether they are unable to discharge the duties of the office.⁴⁶⁰

2. Pass the For the People Act

Congress has already introduced legislation known as “For the People Act” in both the House (H.R. 1)⁴⁶¹ and Senate (S.1),⁴⁶² which would stave off the confusion and misinformation that culminated in January 6 with national automatic voter registration,⁴⁶³ provide an answer to partisan

⁴⁵³ See, e.g., John Hudak, *Invoke the 25th Amendment to Save the Country From Donald Trump*, BROOKINGS INST. (Jan. 7, 2021), <https://www.brookings.edu/blog/fixgov/2021/01/07/invoke-the-25th-amendment-to-save-the-country-from-donald-trump/> [perma.cc/W6P3-55PL].

⁴⁵⁴ *Id.*

⁴⁵⁵ See Wehle, *Nice Idea*, supra note 449 (“Of course, the notion that an ailing Donald Trump would step aside from his position as the most powerful man in the world for the good of the country is sheer folly. It would never happen.”).

⁴⁵⁶ Rubin, supra note 439.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ Wehle, *Nice Idea*, supra note 449.

⁴⁶¹ H.R. 1, 117th Cong. (2021).

⁴⁶² S. 949, 116th Cong. (2019).

⁴⁶³ *Id.* at Div. A, Tit. I, Sub. A, Pt. 1, Pt. 2.

gerrymandering,⁴⁶⁴ reform campaign finance laws,⁴⁶⁵ and revise federal ethics rules.⁴⁶⁶ The John Lewis Voting Rights Advancement Act (S. 4263) would also restore a key portion of the Voting Rights Act that was gutted by the Supreme Court in 2013.⁴⁶⁷ (The full range of potential federal changes to voting and election laws—and the need for a constitutional amendment enshrining an affirmative right to vote for citizens, although vital, are outside the scope of this article.)

3. Amend the Electoral Count Act of 1887

Importantly, Congress must immediately revisit the Electoral Count Act of 1887, an arcane and ambiguous law that prompted much mischief in 2020—including a threat that State legislatures could ignore the popular vote and legislate a slate of electors for Trump within a “safe harbor” deadline under the statute.⁴⁶⁸ The act also sets forth the procedures governing congressional objections to state certifications of Electoral College votes on January 6.⁴⁶⁹ The law should be amended to foreclose object political objections made without factual or legal justification—like those promoting the “Big Lie” that millions of Americans were duped into believing in 2020.⁴⁷⁰

⁴⁶⁴ *Id.* at Div. A, Tit. II, Sub. E.

⁴⁶⁵ *Id.* at Div. B, Tit. IV.

⁴⁶⁶ *Id.* at Div. C, Tit. VII.

⁴⁶⁷ See John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020) (expanding the protections of the original Voting Rights Act of 1965).

⁴⁶⁸ 3 U.S.C. § 15; Nick Corasaniti, Sydney Ember & Alan Feuer, *The Nation Reached ‘Safe Harbor.’ Here’s What That Means*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/us/politics/election-safe-harbor-deadline.html> [perma.cc/PW56-GAW9] (“A relatively obscure passage of the Electoral Count Act of 1887 says that if there are disputes in a state over the results of an election, but the results are settled “at least six days before the time fixed for the meeting of electors,” those results are conclusive and must be counted by Congress. That’s what is known as the safe harbor deadline.”).

⁴⁶⁹ 3 U.S.C. § 15.

⁴⁷⁰ See Melissa Block, *Can the Forces Unleashed by Trump’s Big Election Lie Be Undone?*, NPR (Jan. 16, 2021), <https://www.npr.org/2021/01/15/957141129/can-the-forces-unleashed-by-trumps-big-election-lie-be-undone> [perma.cc/KD6M-796N] (explaining that among the thousands of falsehoods Trump uttered during his presidency, his insistence he won the 2020 presidential election by a landslide earned the distinction of being called the “big lie”).

4. Pass impeachment procedure legislation

Donald Trump's second impeachment trial—like his first—highlighted some critical gaps in the Constitution which, despite mentioning impeachment six times,⁴⁷¹ left vague a number of questions that were left to internal Senate maneuvering and politics. These included the question of whether a president can be tried after leaving office so long as he is impeached while still in office (the Senate answered this twice in the affirmative on bipartisan votes, but Republicans voting for acquittal used it as a guise for avoiding conviction of a member of their own party);⁴⁷² whether the Chief Justice of the Supreme Court should preside under those circumstances (Chief Justice Roberts unilaterally bowed out, despite a lack of a case or controversy presenting that question for resolution);⁴⁷³ whether *ex parte* communications between Senators and defense counsel are permitted (this happened among Senators Ted Cruz and Lindsey Graham,

⁴⁷¹ U.S. CONST. Art. 1 § 2 (“The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.”); *id.* Art. 1 § 3 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”); Art. 2 § 3 (“[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment”); *id.* Art. 2 § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); *id.* Art. III § 2 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury”).

⁴⁷² See Kathryn Watson, Melissa Quinn, Grace Segers & Stefan Becket, *Senate Finds Trump Impeachment Trial Constitutional on First Day of the Proceedings*, CBS NEWS (Feb. 10, 2021), <https://www.cbsnews.com/live-updates/trump-impeachment-trial-senate-constitutional-day-1/> [perma.cc/J8HL-R4PT] (reporting the Senate determined the constitutionality of the Trump trial); Frank O. Bowman, III, “The Constitutionality of Trying a Former President Impeached While in Office,” LAWFARE (Feb. 3, 2021), <https://www.lawfareblog.com/constitutionality-trying-former-president-impeached-while-office> [https://perma.cc/NX7G-CKZE] (explaining the Senate has twice set a precedent that a civil official may be tried by the Senate after leaving office so long as they are impeached while still in office, explaining “first, the case of Sen. William Blount, who in 1797-1798 was impeached by the House, expelled from the Senate, and then tried by the Senate, in that order, and, second, the case Secretary of War William Belknap, who in 1876 was both impeached and tried after he left office. But those cases hardly buttress Bobbitt’s position.”).

⁴⁷³ Amy Howe, *Roberts Will Not Preside Over Impeachment Trial*, SCOTUSBLOG (Jan. 25, 2021), <https://www.scotusblog.com/2021/01/roberts-will-not-preside-over-impeachment-trial/> [perma.cc/5BZC-BY54].

with no accountability or serious pushback);⁴⁷⁴ and the circumstances under which calling witnesses is appropriate—i.e., if there remains a question of fact salient to the underlying legal charge.⁴⁷⁵ On that final point, implementation of some form of rules of evidence would ensure that the trial does not become a “political circus” that weakens the integrity of the system.

5. Mandate compliance with the Advice and Consent Clause

Infamously, Donald Trump used the power to designate “acting” officials in lieu of putting his picks for Cabinet-level and other posts requiring Senate confirmation under the scrutiny of the Constitution’s Advice and Consent Clause.⁴⁷⁶ He also installed his personal attorney, Rudy Giuliani, as a de facto diplomat and his son-in-law, Jared Kushner, as the head of an assortment of executive functions, including the COVID-19 relief response task force.⁴⁷⁷ Congress must pass legislation establishing an alternative procedure for filling open posts that cannot function as an end run around its advice and consent prerogative, thereby precluding presidents from outsourcing the functions of the office to personal loyalists who are not even government employees. To be sure, the details of such legislation are not self-evident, but the necessity for it is.

6. Implement the Emoluments Clauses

The Framers of the Constitution were crystal clear about one thing: the presidency was not to be a personal money-making machine. To that end, Article I, Section 9, Clause 8 of the Constitution prohibits presidents from

⁴⁷⁴ Kelsey Vlamis, *Three GOP Senators Met with Trump’s Lawyers the Day Before Their Planned Impeachment Defense Presentation*, BUS. INSIDER (Feb. 12, 2021), <https://www.bussinsider.com/3-gop-senators-met-trump-lawyers-day-before-defense-presentation-2021-2> [perma.cc/E2FA-8E5S].

⁴⁷⁵ Renato Mariotti, *Witnesses Could Prevent a Foregone Conclusion in Second Impeachment Trial*, POLITICO (Feb. 8, 2021), <https://www.politico.com/news/magazine/2021/02/08/witnesses-could-prevent-a-foregone-conclusion-in-second-impeachment-trial-467177> [perma.cc/E2FA-8E5S].

⁴⁷⁶ Amanda Becker, *Trump Says Acting Cabinet Members Give Him ‘More Flexibility’*, REUTERS (Jan. 6, 2019) www.reuters.com/article/us-usa-trump-cabinet/trump-says-acting-cabinet-members-give-him-more-flexibility-idUSKCN1P00IG [perma.cc/688S-PBPJ]; U.S. CONST. art. II, § 2.

⁴⁷⁷ See Jill Colvin, *Giuliani Brags About Forcing Out Trump’s Ukraine Ambassador*, AP (Dec. 17, 2019), <https://apnews.com/article/ukraine-donald-trump-us-news-ap-top-news-international-news-37d6c911d3d89c2fe5c101756f028a57> [perma.cc/PKR7-5HF6] (reporting that President Trump’s attorney Giuliani began openly discussing his efforts to have the American ambassador to Ukraine removed); Brian Bennett, *Inside Jared Kushner’s Unusual White House Role*, TIME (Jan. 16, 2020), <https://time.com/5766186/jared-kushner-interview/> [https://perma.cc/HXW6-EDQA].

receiving gifts from foreign states and monarchies.⁴⁷⁸ Article II, Section 1, Paragraph 7 prohibits the president from receiving any “Emolument” from the federal government or the states beyond “a Compensation” for his “Services” as chief executive.⁴⁷⁹ Unlike prior presidents, Trump refused to divest his private assets upon ascending to the presidency and made money off of his properties through the use of Secret Service details and the conducting of business.⁴⁸⁰

Congress needs to implement presidential divestiture and disclosure laws and legislate a cause of action for Emoluments Clause violations to ensure accountability for non-compliance through the courts.⁴⁸¹ For starters, it should pass a statute requiring liquidation of a president’s business holdings through a blind trust agreement once they enter the office.⁴⁸² This would eliminate ethical problems from arising as a result of a president’s holdings.⁴⁸³ To address a president’s conduct in office, there needs to be a clear statutory definition of “emoluments” to prohibit a president from accepting gifts (and defining that term) unless Congress approves explicitly. Also, if a president violates this ban, a remedy of forfeiture should be established.⁴⁸⁴

7. Impose consequences for illegally impounded funds

As shown under both Nixon and Trump, Congress must impose tangible consequences for agencies when funds are impounded for political reasons. These could include administrative disciplinary measures modeled on the reporting requirement and non-criminal penalties for violations of the Antideficiency Act.⁴⁸⁵ The Congressional Power of the Purse Act, a bill

⁴⁷⁸ U.S. CONST. art. I, § 9, cl. 8.

⁴⁷⁹ U.S. CONST. art. II, § 1, ¶ 7.

⁴⁸⁰ See Gabe Lezra, *Profiting off the Presidency: Trump’s Violations of the Emoluments Clauses*, AM. CONST. SOC’Y (Oct. 1, 2019), <https://www.acslaw.org/expertforum/profitting-off-the-presidency-trumps-violations-of-the-emoluments-clauses/> [perma.cc/AW6E-5Y9B].

⁴⁸¹ Rubin, *supra* note 439.

⁴⁸² *Id.*

⁴⁸³ Patrick Healy, *To Avoid Conflicts, Clintons Liquidate Holdings*, N.Y. TIMES (June 15, 2007), <https://www.nytimes.com/2007/06/15/us/politics/15clintons.html> [perma.cc/B9XK-EBQM].

⁴⁸⁴ Rubin, *supra* note 439.

⁴⁸⁵ See Congressional Power of the Purse Act, Section-by-Section Analysis, S. APPROPRIATIONS COMM. 2, 2, https://www.appropriations.senate.gov/imo/media/doc/Power%20of%20the%20Purse%20Section%20by%20Section_Senate%20Bill.pdf (analyzing components of the Power of the Purse Act including Section 105’s penalties for failure to comply with the Impoundment Control Act of 1974).

proposed in June 2020 by Senator Patrick Leahy,⁴⁸⁶ includes penalty provisions aimed at deterring future executive officials from supporting rogue presidents who use public funding to further their own political aims.⁴⁸⁷

8. Reform the National Emergencies Act

In 2019, Senator Mike Lee introduced the Article One Act to place greater constraints on the ability of a president to declare national emergencies.⁴⁸⁸ Under the Article One Act, national emergencies would automatically expire after thirty days unless expressly approved by Congress.⁴⁸⁹ The emergencies would also have to be renewed every year or otherwise expire.⁴⁹⁰ However, the Act has not been passed in the time since its introduction.

In 2020, former Representative Justin Amash likewise introduced the National Emergencies Reform Act.⁴⁹¹ This Act involved even stricter constraints than proposed in the Article One Act. It would give Congress only two days to decide whether to authorize a presidential declaration of emergency, and if Congress failed to act in that timeframe the declaration would expire.⁴⁹² Congress would also be required to renew the emergency authorization every sixty days, rather than every year.⁴⁹³ Like the Article One Act, the National Emergencies Reform Act did not move forward after its introduction in the House Subcommittee on Economic Development, Public Buildings, and Emergency Management.

Either of these proposals would go a long way to ending the languishing states of emergencies declared by presidents and reduce the likelihood of future executives abusing the broad authority given to them under the National Emergencies Act. Congress should identify which timeframe properly balances the need to restrain executive authority and the need for Congress to carefully deliberate whether to approve a particular declaration, and then pass a law enacting these restraints.

⁴⁸⁶ See *id.*; Press Release, Sen. Patrick Leahy, Leahy Unveils Legislation to Defend Power of the Purse (June 3, 2020), <https://www.leahy.senate.gov/press/leahy-unveils-legislation-to-defend-power-of-the-purse#:~:text=Wednesday%20unveiled%20the%20Congressional%20Power,to%20be%20used%20as%20directed> [perma.cc/9QXS-54EC].

⁴⁸⁷ S. APPROPRIATIONS COMM., *supra* note 485, at 2.

⁴⁸⁸ Article One Act, S. 764, 116th Cong. (2019).

⁴⁸⁹ *Id.* § 201(C)(1).

⁴⁹⁰ *Id.* § 202(b).

⁴⁹¹ National Emergencies Reform Act, H.R. 9041, 116th Cong. (2020).

⁴⁹² *Id.* § 2(a)(1).

⁴⁹³ *Id.* § 2(d).

CONCLUSION

Watergate was a tipping point in American history in which the nation was forced to confront corruption on a scale that had never been seen in the federal government. In response, Congress passed reforms intended to ensure that level of corruption could never be repeated. For decades, those reforms were viewed as effective solutions, but all the while issues festered just outside the public eye. This included a growing FOIA backlog, persecution of whistleblowers and independent investigators, and other serious concerns. Like Nixon's Watergate, the Trump presidency may be another watershed moment for federal oversight. The Trump administration laid bare the weaknesses that remain in oversight laws. To seal the gaps left by the post-Watergate reform laws, Congress must act by passing laws providing independent investigators and public watchdog groups with the tools necessary to protect our nation's democracy.

These tools will take many forms. Oversight entities such as the FEC, Office of Government Ethics, and FISA courts must be given greater authorities. Independent officials, such as independent counsels and inspectors general, must be given greater protections so they can pursue their missions without interference. Likewise, the whistleblowers they rely upon must also be protected, including through a renewed MSPB. And public actors, such as the free press and oversight-oriented nonprofits, must be given a re-tooled FOIA and FACA to ensure they have access to information of importance to the public at-large.

Beyond shoring up post-Watergate reforms, Congress has spadework to do around the Twenty-Fifth Amendment, the Emoluments Clauses, the Advice and Consent Clause, the Impeachment Clauses, as well as voting rights and the procedures for calculating Electoral College votes. By ensuring investigative powers are widely held and effectively equipped among actors inside and outside of the federal government, Congress can build greater accountability into our constitutional system, and will help Americans rest easy knowing that our democratic values are not vulnerable to theft by corrupt officials working for their own political or personal ends.