

Chapter 3: Balance of Power

Chapter Overview

The country's founders recognized that a system of checks and balances is critical to preventing a concentration of power, and they were especially wary of power amassing to the executive. The equal distribution of power they sought has shifted over the decades as Congress has acquiesced to presidential power grabs that expand the limits of their authority. The shift poses an existential threat to our democracy, limiting oversight in a way that allows officials to act with impunity, allowing agencies to be run by unconfirmed—and often unqualified—individuals, and instilling a system where the rule of law does not apply equally to everyone. If left unchecked, the unequal distribution of power will result in the country moving closer to authoritarianism—far away from the ideals the constitution's framers intended.

The president must reverse this trend and demonstrate respect for the balance of power by allowing Congress and Inspectors General the opportunity to engage in meaningful oversight. He must review and rescind sometimes decades-old national emergency declarations as well as those that address circumstances that do not rise to the level of a true emergency. The president must also respect the advice and consent authority of Congress and should commit to depoliticizing law enforcement matters, especially at the Department of Justice.

Principle 7: The executive branch must respect the limits of the presidency and recognize that it must act as one of three co-equal branches of government.

The Problem

Over the last several decades, Congress has ceded authority to the president in areas of critical importance, and the executive branch has seized the increased authority to abuse its power, often in secret, and unchecked by oversight. As a result, unconfirmed acting officials are running executive branch agencies; the U.S. military is engaged in conflicts without Congress having exercised its sole authority to declare war; and taxpayer funds are spent not as mandated by Congress through the appropriations process, but at the will of an executive branch abusing the power of the National Emergencies Act.

Recommendations for Action on Day One

1. Reopen the Executive to scrutiny from Congress and the People.

The president will take office or begin a new term after four years of unprecedented secrecy and assertions of extreme executive powers vis-a-vis Congress and the People. He will have an historic opportunity to reopen the government to appropriate scrutiny

from co-equal branches and the public and to reset the balance of power to what the Framers intended. He can do that by taking these steps on Day One:

- a. Announce his intent to follow the law and respect Congress's oversight authority; Initiate a review of congressional information requests⁹ to the administration over the past four years and determine what documents previously withheld should be shared with Congress and which of those documents should be shared simultaneously with the American people through an easily accessible web portal;
- b. Direct the Office of Legal Counsel to develop a new publication procedure for its unclassified opinions such that draft opinions are subject to public comment and review.

Recommendations for Short-term Action (First 100 Days)

1. **Initiate a review of all Office of Legal Counsel opinions regarding the power of the presidency and institute a transparent and timely process for withdrawal or revision where warranted, in addition to opinion publication.**

The president should commission an independent review of significant Office of Legal Counsel opinions on presidential power. Recommendations should be made public and should guide Office of Legal Counsel revisions, rescissions, or reaffirmations.

2. **Pledge nonpolitical inspectors general appointments and firings only for good cause.**

Beyond adhering to existing statutory requirements, the president should prioritize nominating qualified individuals to fill vacant inspector general positions, including pledging to not nominate as an inspector general anyone who has held a political position in his White House or Cabinet. The president should commit to removing an inspector general only for cause, and shall not do so until he communicates to Congress the detailed and specific reasons why the inspector general is no longer able to fulfill their important mission.

3. **Commit to following statutory lines of succession for vacancies of advice-and-consent positions.**

Where both an agency-specific statute and the Vacancies Act may be available to fill a vacancy temporarily, the president should commit to defaulting to the agency-specific statutory line of succession.

4. **Revise personnel composition of the Office of Legal Counsel at the Department of Justice.**

⁹ In conducting the review, the administration should prioritize those information requests related to (1) ethical violations by government officials, (2) lawbreaking by government officials, (3) family separation and the treatment of refugees, and (4) receipt or solicitation of assistance from foreign governments in federal election campaigns,

The president should commit to working with the attorney general to ensure that the Office of Legal Counsel is staffed by career civil servants with only the role of assistant attorney general at its helm as a presidential appointee; and pledge to diversify the background of Office of Legal Counsel hires, including those with congressional and advocacy professional expertise.

5. Conduct a review of ongoing national emergencies.

The president should direct a review of all national emergency declarations still in effect, including declarations dating to the Carter Administration. Emergency declarations that no longer meet the statutory requirements upon which they were based, that have a history of abuse as a mechanism for pursuing non-emergency policy goals, or that do not practically rise to the level of an exigent national emergency should be rescinded.

6. Disclose Presidential Emergency Action Documents to the Gang of Eight.

Consistent with post-Watergate reforms that require the executive branch to disclose covert military and intelligence planning and operations to at least some members of Congress, Presidential Emergency Action Documents should be confidentially shared with the Gang of Eight to facilitate basic and essential congressional oversight. The administration should also work with Congress to develop protocol for the timely disclosure of future Presidential Emergency Action Documents.

7. Initiate a review of all relevant Office of Management and Budget guidance regarding budget and appropriations law.

The president should prioritize a comprehensive review of all relevant Office of Management and Budget guidance from the prior administration or term that provides instructions regarding federal agency (including White House) prerogatives in budget and appropriations law in order to revise, rescind, or reaffirm them.

8. Instruct federal agencies to report Anti-Deficiency Act violations identified by the Government Accountability Office.

Federal agencies are required by law to report Anti-Deficiency Act violations to the comptroller general, the president, and Congress, including violations identified by the Government Accountability Office with which an agency disagrees. Despite this, the Office of Management and Budget has issued guidance that agencies need not report violations if an agency and the Office of Management and Budget disagree with the Government Accountability Office's determination. This guidance should be immediately rescinded and proper reporting requirements reinstated.

9. Instruct the Office of Management and Budget to make apportionments of appropriations transparent.

The Office of Management and Budget should regularly collate, centralize, and make accessible apportionment decisions. A system for easily accessing apportionment decisions should be built by the Office of Management and Budget that allows for publication of data in a timely manner and that is accessible to the public.

Recommendations for Legislative Action

1. Amend the Federal Vacancies Reform Act.

The president should support an amended Federal Vacancies Reform Act that would: (1) clarify that the Act does not supersede agency-specific succession statutes; (2) extend all protections intended to guard inspectors general independence to acting inspectors general; (3) require that “first assistants” be in place prior to a vacancy, and that any individual who becomes an acting officer by way of 5 USC 3345(a)(1) has been serving in the role of the first assistant for at least 90 days in the year prior to the vacancy; and (4) establish new enforcement mechanisms available to Congress should the executive bypass Senate consent to fill key federal offices.

2. Protect the integrity of inspectors general.

The president should support codifying stronger standards that protect the independence and integrity of the federal government’s inspectors general. Foremost, this should include support for legislation that gives inspectors general protections against removal without good cause. Congress should also protect the identities of all whistleblowers that come to inspectors general and the ongoing investigations in an office by prohibiting the president from appointing acting inspectors general who would simultaneously hold other political positions within the executive branch. (See also Chapter 4, “Whistleblowers”)

3. Amend the National Emergencies Act.

The president should voice his support for a reinvigorated role for Congress in addressing national emergencies by endorsing legislation that would require that Congress must agree with the president in order to renew an emergency declared by the president and thus maintain presidential access to the statutory emergency powers unlocked by the declaration. An amended National Emergencies Act should include an initial sunset period of 30 days after an emergency declaration, subject to regular renewal votes. Further, should Congress decline to renew a national emergency, the president must be prohibited from unilaterally circumventing that outcome by declaring another emergency concerning the same circumstances.

4. Amend the War Powers Resolution of 1973.

Drawing on his unique understanding of the essential role for Congress in foreign policy and matters of war and peace, the president should support legislation that would strengthen requirements that the Executive branch report to Congress all uses of force or engagement in hostilities, regardless of the underlying legal authorities for the activity; clarify the definition of “hostilities”; make public reports on the uses of military force; provide for automatic funding cut-offs for military operations that do not comply with the provisions of an amended War Powers Resolution; and authorize fines and other penalties for failures to report to Congress.

5. Establish new Authorizations for Use of Military Force requirements.

The president should press for updated Authorizations for Use of Military Force requirements that would specify, at minimum, that: (1) the 2001 Authorization for use of Military Force sunsets automatically within one year of enactment; (2) subsequent Authorizations for Use of Military Force specify the individual groups or nations against which Congress is authorizing the use of force, as well as the specific countries where such force may be used; and (3) each future Authorization for Use of Military Force automatically expires after two years, at which time Congress may vote to extend it.

6. Modernize nuclear command and control protocols.

The president should recognize that no one person should have authority to or bear responsibility for launching nuclear weapons and thus all-but-ensuring casualties of unfathomable proportions among civilian populations abroad and even at home. He should support legislation that would establish that (1) the president may not use United States armed forces to conduct a first-use nuclear strike unless such a strike is conducted pursuant to a declaration of war by Congress that expressly authorizes it; and (2) that the president does not enjoy unilateral authority to launch a nuclear weapon, but instead must obtain the concurrence of at least two named senior officers, such as the Secretaries of State and Defense.

7. Prevent unconstitutional encroachments on Congress's power of the purse.

The president should endorse new legislation that would (1) close historically abused Impoundment Control Act and National Emergencies Act loopholes; (2) establish new transparency mechanisms, such as requiring the Office of Management and Budget to make apportionments and any legal opinions on budget laws regularly and publicly available; (3) update executive reporting requirements on Impoundment Control Act and Anti-Deficiency Act violations; and (4) establish new enforcement mechanisms, such as clarifying Government Accountability Office authorities to obtain information and sue agencies in violation of the law and authorizing administrative discipline for offending officials, and requiring the Department of Justice to investigate reports of criminal violations.

Principle 8: No one is above the law. Our justice system must serve the vulnerable and marginalized in our society rather than merely the politically powerful.

The Problem

Although the justice system has always worked to the benefit of the powerful while being unfairly applied to the politically vulnerable, the Trump administration exploited the system by weaponizing the Department of Justice as a personal political tool. The DOJ, in turn, has placed loyalty to the president over fidelity to the law. The Department of Justice must be left to independently handle law enforcement matters, without being weaponized against political

opponents or steered away from investigations into political allies. The DOJ must defer to expert civil servant advice on matters such as security clearances, sentencing recommendations, and federal contracting,

Recommendations for Short-term Action (First 100 Days)

3. **Make “dissent channels” available in each federal agency.**

The president should prioritize the institutionalization and protection of dissent across government. Each agency should at minimum create a “dissent channel” —modeled after the Dissent Channel at the Department of State and the Direct Channel at the United States Agency for International Development—that allows civil servants and federal contractors to voice objections to policies, corruption, or inappropriate interference by political appointees, and clarify that any civil servant or contractor that appropriately utilizes the channel for those purposes will be protected from retaliation under applicable whistleblower protection laws.

4. **Establish an Oath of Office training for all civil servants and political appointees.**

Deploy a government-wide training program for federal employees on their oath of office, their duty to serve the public interest—not the president’s—and the responsibilities, avenues, and protections available to them to report wrongdoing.

5. **Initiate a Department of Justice internal review of law enforcement politicization.**

Independent of the White House, the attorney general should direct a department-wide review of any instances of politicization of law enforcement activities, including investigations, charging or sentencing decisions, and where it is determined that such politicization occurred. The Department of Justice should ensure that career law enforcement are able to pursue those cases and investigations without any political interference whatsoever.

6. **Promulgate and publicly publish new White House-law enforcement contact policies to prevent political interference in criminal law enforcement.**

The White House should immediately establish clear policies governing contact with federal law enforcement agencies, including, at minimum: the disclosure to Congress of all contacts between White House officials and agencies regarding specific-party enforcement matters, and an express ban on White House officials directing agency decisions on individual investigations and prosecutions. Additionally, the White House should require all executive agencies with a law enforcement role to promulgate equivalent public policies governing contacts with the White House on specific-party matters.

7. **Repair and strengthen the security clearance process.**

The president should issue an executive order to strengthen the objectivity of processes used to determine access to classified information. At minimum, security clearance holders should be protected from discrimination or retaliation for First Amendment activity and have clear access to recourse, such as through an independent appeal

process, in the event that a clearance is denied. The executive order should also limit the length of time that White House officials may operate with interim clearances.

8. Commit to good faith pardons.

The president should commit to (1) ensuring transparency of the pardon process, and (2) using pardons for mercy and justice and never for personal protection or political favor.

9. Provide available records to Congress regarding pardons and commit to transparent pardon processes.

Available records of both actual and dangled pardons should be provided to Congress. Transparency of the pardon process will serve the public interest function of evaluating whether pardon powers have been used for corrupt or unlawful purposes, as well as aid in reestablishing norms governing the judicious and circumspect use of presidential pardons as an instrument of justice and mercy in a fallible legal system.

Recommendations for Legislative Action

1. Empower agency inspectors general to investigate improper interference in law enforcement matters.

The president should support an expansion of the jurisdiction of agency inspectors general to expressly include investigations into improper interference in law enforcement functions. A statutory expansion should specifically ensure that oversight into any professional misconduct of prosecutors—including the U.S. attorney general—is not outside the jurisdiction of the Department of Justice’s Office of Inspector General, and does not exclusively reside within the purview of the Department of Justice’s Office of Professional Responsibility.

2. Protect the integrity of the security clearance process.

The president should endorse legislative efforts to strengthen the objectivity of processes used to determine access to classified information. Specific provisions for legislation to protect security clearance reviews are included in Appendix 3.1.

3. Require policies to prevent inappropriate political influence in specific-party matters at law enforcement agencies.

In order to prevent improper political interference in law enforcement matters, model legislation should:

- a. Bar the president or other White House staff from ordering agencies to begin, continue, or end an investigation or prosecution, or otherwise influence agency decisions with respect to a specific matter. This prohibition would carry criminal penalties, though would in no way bar the president from setting generally-applicable policies or making appropriate judgments in cases implicating national security and foreign policy.
- b. Require the White House and law enforcement agencies to log all communications pertaining to specific cases or investigations that an agency

might undertake or is undertaking; and direct an agency's Office of the Inspector General to review the logs and to notify Congress if any are inappropriate from a law enforcement perspective or raise concerns about interference.

- c. Require the White House to issue and publish policies identifying which White House officials are authorized to communicate with law enforcement agencies about individual law enforcement matters. Law enforcement agencies should be required to promulgate equivalent policies identifying officials who may speak with the White House about such matters.

4. Reaffirm that criminal laws apply to the president.

The president should endorse new legislation that the president, like every American, is subject to the rule of law. Congress should clarify and affirm that criminal laws apply to the president just as they apply to any person within the jurisdiction of the United States, even when a president is purporting to act in his or her official capacity. Additionally, legislation should clarify that a president's term of office does not count toward a statute of limitations for criminal charges against the president. This tolling of statutes of limitations would apply prospectively, consistent with the Ex Post Facto Clause, to (1) offenses committed before or during the president's term of office, and (2) any statute of limitations that has not yet expired at the time of the legislation's passage.

5. Require disclosure of underlying investigatory materials to Congress for pardons in select circumstances.

In accordance with the president's commitment to a constitutional and transparent use of the pardon power, he should support legislation that requires the attorney general and the White House Counsel's Office to share underlying investigative materials and materials regarding the consideration of a pardon in three types of situations: when the president grants or offers to grant an individual a pardon for an offense against the U.S. that arises from (1) a charge of criminal contempt of court for violating others' constitutional rights in defiance of a court order to stop; (2) a charge of willfully making false statements to Congress in order to mislead or sabotage a congressional investigation, or (3) an investigation in which the president, or a relative of the president, is a target, subject, or witness.

6. Permit statutory damage suits against federal officials who violate an individual's constitutional rights.

The president should support the enactment of a general statute providing for damages suits against federal officials who act unlawfully to violate an individual's constitutional rights—as exists for state and local officials. The absence of such a statute ensures that federal officials enjoy broad immunity even when acting unconstitutionally. Congress should provide for damages suits against federal officials, including the president and other White House staff, where plaintiffs can demonstrate a reasonable basis to believe that their constitutional rights have been violated by an individual acting under color of federal law.

Appendix to Chapter 3: Balance of Power

Appendix 3.1: Security Clearance Reviews

The president should support legislation to improve the objectivity of criteria applied in security clearance reviews. Model legislation would:

1. Impose guardrails to prevent discrimination or retaliation for First Amendment protected activity;
2. Ensure that there is a clear, fair, and efficient independent appeal process available for people who have been denied security clearances;
3. Limit the length of time that White House officials may operate with interim clearances;
4. Require notifications to the congressional intelligence committees and an independent appeals board any time the White House overrules a security clearance determination by career professionals; and
5. Require that the director of the White House personnel security office be a career professional with specific expertise in the security clearance process.