ARTICLE

Protecting the U.S. National Security State from a Rogue President

Laura A. Dickinson[*]

CONTENTS

[*] Lyle T. Alverson Professor of Law, The George Washington University Law School. I would like to thank Professors Bill Banks, David Driesen, Eugene Fidell, Harold Hongju Koh, Mark Nevitt, and Todd Peterson for comments and discussion that improved the Article enormously. In addition, I am grateful for input from a variety of thoughtful and knowledgeable practitioners, including Brian Finucane, Elizabeth Goitein, and Joseph Nunn. I would also like to thank my research assistants Patrick Burnett, Austin Roy, Riley Satterwhite, and Brennan Sullivan.

The first presidency of Donald Trump, from 2017 to 2021, created what many have called a "stress test" for American democracy.[1] Because President Trump either did not know or did not care about existing safeguards involving separation of powers, limits on the executive, and norms of law enforcement, military, and civil service independence, the country faced an arguably existential crisis regarding whether the basic structures of U.S. government could survive a President apparently willing to destroy or ignore them. This rolling crisis culminated, during the waning days of the Trump administration, in what seemed to be an effort to undermine American democracy itself,[2] with President Trump attempting to install officials who would do his bidding at the Department of Justice (DOJ)[3] and the Department of Defense (DOD)[4] as part of what many saw as a failed attempt to use the weapons of law enforcement and the military to subvert the peaceful transition of power.[5] And in his 2024 election campaign, President Trump explicitly characterized his propensity to push the boundaries of the law as a willingness to go "rogue."[6] In short, throughout his presidency and beyond, Trump

---

[1] *See*, *e.g.*, WILLIAM COOPER, STRESS TEST: HOW DONALD TRUMP THREATENS AMERICAN DEMOCRACY (2022). For an overview of the ways in which President Trump abused power during his term in office from 2017 to 2021, *see generally* RICK ABEL, HOW AUTOCRATS ABUSE POWER, RESISTANCE TO TRUMP AND TRUMPISM (2024).

[2] *See* H. R. Rep. No. 117-663 (2022), https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/html-submitted/index.html [https://perma.cc/EG28-TP3K] (hereinafter "Jan. 6 Report").

[3] Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES, (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election [https://perma.cc/LAC5-9Y9W].

[4] Helene Cooper et al., *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets*, N.Y. TIMES, (Nov. 11, 2020), https://www.nytimes.com/2020/11/09/us/politics/esper-defense-secretary.html [https://perma.cc/BVP2-6ZEL].

[5] *See* Jan. 6 Report, *supra* note 2.

[6] *See* Susan B. Glasser, *Trump Isn't Even Hiding His Plans to Go "Rogue,"* THE NEW YORKER, (Jan. 18, 2024), https://www.newyorker.com/news/letter-from-bidens-washington/trump-isnt-even-hiding-his-plans-to-go-rogue [https://perma.cc/2X56-J9JQ] (noting that Trump stated on social media that he should be able to act as a "rogue cop" if he deems it necessary because "all presidents must have complete and total presidential immunity, or the authority and decisiveness of a president of the United States will be stripped and gone forever"). Glasser suggests this statement indicates that President Trump "aims to be … a leader unfettered by law." *Id*. Although Trump did not define precisely what he meant by the term "rogue," a standard definition is: "[to] behave erratically or dangerously, especially by disregarding the rules or the usual way of doing

claimed vast, potentially unlimited, constitutional authority. Under his approach, "any restraints coming from inside the executive branch could be ignored under a theory of unitary executive; any restraints from outside the executive could be treated as unconstitutional intrusions into the president's plenary national security powers."[7] With Trump set to re-take the power of the presidency in January 2025, the risk that he will claim unconstrained national security powers is even more acute.

Of course, concerns that a democratically elected political leader might subvert the rule of law and go "rogue" is not limited to President Trump. Social science literature has shown that in recent years democratic leaders have become more autocratic around the world. Furthermore, these new autocrats have cemented their power in part by making expansive claims of executive authority.[8] Within the United States, commentators have criticized presidents from across the political spectrum for overbroad assertions of executive power.[9] In the U.S. tradition, President Trump is arguably distinctive, however, because of the frequency and extent to which he has attempted to exercise such power and in explicitly stating that he is willing to go "rogue."

President Trump was unsuccessful in rupturing the rule of law during his term in office from 2017 to 2021. But only just barely, and only because others within the government took steps to uphold the law or were able to convince the President to refrain from breaking longstanding norms such that the rule of law could be retained.[10] That approach may not be effective the second time around. Therefore, it is imperative that, independent of the substantive policies one supports, scholars, policymakers, and judges consider now how to protect the rule of law from the risk of a rogue President, rather than waiting for the next crisis to occur.[11] Indeed, Trump's first term revealed many weaknesses in the U.S.

---

something." Google Dictionary. Throughout this Article, I use the term to indicate someone who repeatedly seeks to push the boundaries of the law or to violate the law outright.

[7] HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE 21ST CENTURY 205 (2024).

[8] *See* ABEL, *supra* note 1, at 1-5; DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER 95-120 (2021).

[9] *See*, e.g., BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 341-42 (2020).

[10] *See* Jan. 6 Report, *supra* note 2, Foreword from the Chairman ("[T]his plan faltered at several points because of the courage of officials (nearly all of them Republicans) who refused to go along with it. Donald Trump appeared to believe that anyone who shared his partisan affiliation would also share the same callous disregard for his or her oath to uphold the rule of law. Fortunately, he was wrong.").

[11] Of course, the concept of "rule of law" is notoriously hard to define. *See*, *e.g.*, David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 201 (2018) (calling the rule of law a "definitional thicket"). The term is used in a variety of contexts and can mean anything from checks on abusive executive power to predictability and stability in contract negotiations. Furthermore, sometimes rule of law sometimes refers only to compliance with formal law, while sometimes it can be imbued with substantive content, and it can also be defined

constitutional structure, its statutory frameworks, and its jurisprudence. These weaknesses were relatively obscured for most of our history because Presidents of all political parties have mostly voluntarily obeyed norms of behavior that kept the presidency within the bounds of constitutional democratic governance. Unfortunately, there is no guarantee that such norms have been permanently restored, and the second Trump administration appears likely to test our nation's constitutional commitments.

Although some scholars have begun this important work,[12] this Article is one of the first to provide a comprehensive set of achievable reforms targeted specifically at the dangers of a rogue President in the national security arena. National security has historically been an area in which presidential power is conceptualized to be at its zenith, implicating the Commander-in-Chief power, foreign affairs powers, and general executive power exercised to address national security issues, both domestically and abroad. As a result, Congress's power is thought to be circumscribed, and courts tend to be deferential to the executive branch.[13] This historical deference makes the dangers of a rogue President even more acute regarding national security-related powers than in other areas. As Harold Hongju Koh has aptly summarized, "The Trump presidency…glaringly exposed how dangerous executive unilateralism can be in the hands of a lawless executive. Trump was twice impeached not just because he was a bad President, but because as President, he became a *glaring national security threat*, who used his constitutional powers to normalize both election insecurity and an extreme form

---

in terms of procedural values. Nevertheless, despite these complications, I believe the rule of law remains a useful concept and one that has particular relevance in the national security domain. For the purposes of this Article, I use a concept of the rule of law that consists of meaningful checks on abuses of executive power, especially through the Constitution's separation of powers framework and fundamental rights protections. At the same time, I recognize that procedural values such as transparency and accountability are necessary to effectuate rule-of-law principles, as are organizational arrangements and mechanisms that actually implement the rule of law in practice. I draw from the seminal case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which Justice Robert Jackson famously grounded the rule of law in the executive's constitutional duty under Article II of the U.S. Constitution to "take Care that the Laws be faithfully executed," observing that "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Id.* at 646. As Richard Painter and Peter Golenbock have observed, the founders of the United States "wanted an elected president with limited powers," and therefore the "rule of law set forth in our Constitution provides for checks and balances that are supposed to prevent a man like King George III, or Nero, or Trump from using the presidency to exercise the powers of an autocrat." RICHARD PAINTER & PETER GOLENBOCK, AMERICAN NERO: THE HISTORY OF THE DESTRUCTION OF THE RULE OF LAW, AND WHY TRUMP IS THE WORST OFFENDER 383, 403 (2020). For an excellent theoretical overview of conceptions of the rule of law, see generally Brian Z. Tamanaha, *Vertical and Horizontal Dimensions of the Rule of Law*, 73 EMORY L. J. 1215 (2024).

[12] *See generally* BAUER & GOLDSMITH, *supra* note 9; DRIESEN, *supra* note 8; KOH, *supra* note 7.

[13] *See*, *e.g.*, Shirin Sinnar, *A Label Covering a "Multitude of Sins": The Harm of National Security Deference, Forum Response to Professor Chesney's Comment*, 136 HARV. L. REV. F. 59 (2022).

of executive unilateralism."[14] And again, although the Trump presidency exposed these risks, they are present with any President.

It is important to stress, however, that the President's power over national security matters is not unlimited. To the contrary, as the U.S. Supreme Court made clear in its landmark decision in *Youngstown Sheet & Tube v. Sawyer*, even in times of military conflict abroad, domestic assertions of presidential power remain subject to important constitutional constraints.[15] Justice Robert Jackson's influential concurrence in that case famously adopted a functionalist approach to separation of powers, recognizing the importance of wide latitude for the executive to address national security, as well as the general need for flexibility and overlap in the roles of the three branches of government.[16] At the same time, the opinion invoked the specter of an authoritarian President as a principal reason for insisting on constraints against executive overreach,[17] especially within the United States.[18] Known most for delineating three zones of presidential power in relation to Congress (congressional authorization, silence, or restriction),[19] the opinion focuses primarily on interpreting legislation as a check on the executive. In that instance, the statute was construed as barring the President from seizing the steel mills during a labor strike. The Court concluded that there was no applicable exclusive, inherent executive authority to override Congress's prohibition.[20]

But the opinion might also be read as a mode of interpreting not just legislation, but the structure of the Constitution itself, by stressing the importance of congressional action and the courts alongside the assertion of executive power, in a "balanced institutional" approach.[21] I would also argue that the case, and in particular the opinion by Justice Jackson, sets an outer bound on presidential power to guard against autocracy and fundamental threats to the rule of law. Under this view, even in the national security arena, where the President wields expansive power, the structure of the Constitution sets limits on that power to provide an essential bulwark against authoritarianism. And Justice Frankfurter's concurrence is also important because it emphasizes that "systematic, unbroken, executive practice" can provide a "gloss" that ought to inform interpretation of the scope of executive power.[22] The Frankfurter opinion therefore suggests that the Presidency

---

[14] Harold Hongju Koh, *The 21st Century National Security Constitution*, 91 GEO. WASH. L. REV. 1391, 1416 (2023).
[15] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 587-88 (1952).
[16] *Id*. at 634-35 (Jackson, J., concurring).
[17] *See id.* at 653 (Jackson, J., concurring) ("I am not alarmed that [the President's claim of power in this case] would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.").
[18] *Id*. at 642.
[19] *Id*. at 635-38 (Jackson, J., concurring).
[20] *Id*. at 655 (Jackson, J., concurring).
[21] KOH, *supra* note 7, at 263.
[22] *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring). Although Justice Frankfurter discussed the "gloss" of history as a potential basis for expanded executive power (and found no

can accrue authority as customary law by repeatedly taking actions that are not otherwise explicitly authorized in the Constitution, but a corollary of that principle is that a tradition of executive branch *restraint* could serve as a potential limiting factor in analyzing the scope of presidential power.

Thus, an emphasis on the core principles of "balanced institutional participation" set forth in the *Youngstown* case,[23] along with the notion of an outer bound on assertions of executive power and the importance of historical practice, offer a frame for considering a range of steps that could be taken by all three branches of government that would help protect and embed rule-of-law norms and guardrails to at least make it more difficult for a rogue President of any party to tear them down. This Article identifies five areas of risk and, in each, suggests steps to address the risk: (1) the President's power to use the military domestically under the Insurrection Act; (2) the President's domestic emergency powers in relation to the National Emergencies Act and related statutes; (3) the President's exercise of the pardon power with regard to war crimes; (4) the President's authority with respect to inspectors general throughout government (and particularly in the national security agencies), including appointment and removal; and (5) the courts' interpretation of the judge-made state secrets doctrine to shield governmental actions from disclosure and scrutiny. I identify substantive and procedural legislative reforms that better set limits on presidential abuse and improve inter-branch dialogue and at the same time make the case that existing legislation, even without reform, ought to be read narrowly to constrain presidential action based on historical practice. In each context, I address potential constitutional concerns with proposed reforms and the constitutional backdrop that favors an interpretation of existing legislation as a check on the executive. In addition, I propose steps that the executive branch could take, prior to January 2025, including the issuance of legal opinions that interpret the constitutionality of proposed legislation, as well as the adoption of rules and policies to guide the exercise of executive power. Of course, any U.S. executive branch administration could and should be interested in clarifying the boundaries around executive power in the national security realm, but based on current indications, the incoming administration seems less likely to do so. In the case of the state secrets doctrine, I suggest that recent jurisprudence offers a pathway for the courts to take a more skeptical approach to evaluating executive branch assertions of the need for secrecy, thereby preserving the role of

---

such gloss in *Youngstown*), the same logic could also apply to an unbroken practice of executive restraint. For a thorough account of the ways in which the "gloss" of history has informed U.S. jurisprudence in the foreign affairs domain, see generally CURTIS BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS, CONSTITUTIONAL AUTHORITY IN PRACTICE (2024).

[23] *See* KOH, *supra* note 7, at 263-64 (using Jackson's concurrence in *Youngstown* to argue that "balanced institutional participation in the making of foreign policy is not only more true to the U.S. Constitution … [but a]s a policy matter, the *Youngstown* vision better supports democracy, avoids authoritarian capture, and lowers the risks of militarism and catastrophic outcomes").

the courts in reviewing executive branch decision-making, even while protecting the significant need for secrecy in the national security arena.[24]

To be sure, a rogue President with authoritarian impulses, unconstrained by respect for the rule of law or any sense of democratic norms, could lay waste to all guardrails that are created. However, that does not mean that strengthening those guardrails is a waste of time. Indeed, one of the lessons of the first Trump presidency is that formal executive branch policies, legislative constraints, and judicial oversight do in fact make it significantly more difficult for even a President with rogue tendencies to dislodge them.[25] Thus, it is crucial that all three branches of government exercise their authority now and continue to be on guard to preserve the future of U.S. constitutional democracy and the rule of law, particularly in areas such as national security, where presidential power is strong.

I. THE INSURRECTION ACT

The decision to use the military domestically, absent invasion, civil war, or major violence, is a significant means by which political leaders may abuse their authority and threaten the rule of law.[26] The U.S. Constitution makes the President the Commander-in-Chief of the armed forces,[27] and that authority extends to some unilateral domestic use of the military in limited circumstances.[28] Congress, however, wields important constitutional powers related to the military and militia, including the power to declare war,[29] the power to raise an army and navy,[30] the

[24] There are, of course, other potential reforms needed that are related to national security, such as alterations to the War Powers Resolution, 50 U.S.C. §§ 1541-1548, repeal of current congressional authorizations to use military force, Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002) (hereinafter "2002 AUMF"); Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (hereinafter "2001 AUMF), and reforms of nuclear authorization procedures. For further discussion of these and others, see generally BAUER & GOLDSMITH, *supra* note 9, at 287, 303-07 (arguing for repeal or revision of War Powers Resolution); *id*. at 303 (calling for repeal of 2002 AUMF); *id*. at 304-05 (calling for repeal and replacement of 2001 AUMF); *id*. at 287-96 (calling for reforms to nuclear authorization procedures); Koh, *supra* note 7 at 1431-32 (recommending revisions of War Powers Resolution); *id*. at 1426-27 (calling for reforms to nuclear authorization procedures). This article focuses on needed areas of reform that those commenters have explored less thoroughly.

[25] *See*, *e.g.,* ABEL, *supra* note 1, at 8-73, for a case study on the way in which congressional oversight and judicial decisions checked the illegal elements of the Trump administration's immigration policies.

[26] *See id*., at 4.

[27] U.S. CONST. II, § 2, cl. 1.

[28] *See*, *e.g*., The Prize Cases, 67 U.S. 635, 668-69 (1862) (upholding President Abraham Lincoln's decision to impose a naval blockade to address the insurrection that began the U.S. Civil War without congressional authorization, while Congress was not in session).

[29] U.S. CONST. art. I, § 8, cl. 11.

[30] *Id*. art. I, § 8, cl. 12-13.

power to call forth the militia,[31] and the power to regulate the armed forces[32] and militia.[33] Legislation thus has guided and constrained the President's use of the military throughout U.S. history.

The Posse Comitatus Act, a statute enacted after the Civil War, generally bars federal military personnel from participating in civilian law enforcement operations.[34] The Insurrection Act, first adopted in 1792 and amended multiple times since,[35] functions as a key exception to the Posse Comitatus Act, allowing the President to deploy U.S. armed forces domestically to quell civil unrest or enforce the law in a crisis. This authority is important because it has enabled the President to respond to significant domestic conflicts, for example as noted below, to address racial violence perpetrated by the Ku Klux Klan after the Civil War and to support the desegregation of schools over the objection of local officials. Under a rogue President, the meaning and scope of the Insurrection Act becomes crucial, because a President might abuse this authority, such as by deploying armed forces against potential political enemies or peaceful protestors, or to conduct mass deportations.

A. Overview and Risk of Abuse by a Rogue President

1. Insurrection Act Framework

Under the Insurrection Act as currently constituted, there are three possible triggers for the President to exercise the authority set forth in the statute.[36] First, Section 251 allows the President to deploy troops if a state's legislature (or governor if the legislature is unavailable) requests federal aid to suppress an "insurrection" in that state.[37] This provision is the oldest part of the law and the one that has most often been invoked.[38] It also presents the lowest risk of presidential

---

[31] *Id*. art. I, § 8, cl. 15.
[32] *Id*. art. I, § 8, cl. 14.
[33] *Id*. art. I, § 8, cl. 16.
[34] 18 U.S.C. § 1385.
[35] Although it is often referred to as the "Insurrection Act," the law is actually an amalgamation of different statutes enacted by Congress between 1792 and 1871. Today, these provisions occupy sections 251 through 255 in Title 10 of the United States Code. For an excellent historical overview of the Act, *see generally* William C. Banks, *The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SEC. L. & POL'Y. 39 (2009).
[36] For an overview of the Insurrection Act's key terms, *see* Jennifer Elsea, CONG. RSCH. SERV., R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 34–42 (2018), https://crsreports.congress.gov/product/pdf/R/R42659 [https://perma.cc/2USM-D7PX] (hereinafter "*The Use of the Military to Execute Civilian Law*").
[37] 10 U.S.C. § 251 ("Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.").
[38] *See The Use of the Military to Execute Civilian Law*, *supra* note 36, at 11-13.

abuse because it requires a request from the state government and is limited to "insurrection" within the state. Commentators have argued that an insurrection should be understood as a "direct threat to" the "republican form of government," an "attack on the state qua state."[39]

The second trigger, Section 252, gives more discretion to the President because it does not require a governor's request and is broader in scope. Specifically, this section permits the President to deploy the military if the President "considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings."[40] Though somewhat vague, these substantive terms suggest a fairly limited set of contexts in which the President could validly invoke the Act's authority. The language indicates that the President may rely on this provision only in extreme circumstances, thus implying a condition of war or serious disruption of civilian affairs. In such a case, the President may "call into Federal service such of the militia of any State" as well as "use such of the armed forces," as the President "considers necessary to enforce those laws or suppress the rebellion."[41]

The third trigger, Section 253, presents the greatest risk because it also does not require a state request, and it is even more open-ended than Section 252. Under this provision, the President may invoke the authority of the Act when the President considers it "necessary to suppress, in a State, any insurrection, domestic violence, or conspiracy" if it "(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity or protection named in the Constitution … and the constituted authorities of that State are unable, fail, or refuse to protect" the above; or "(2) opposes or obstructs the execution of the laws of the United States or

---

[39] Banks, *supra* note 35, at 41. In another context, Section 3 of the U.S. Constitution's Fourteenth Amendment bars certain public officials from serving in public office if they have engaged in "insurrection" against the United States. U.S. Const. amend. XIV § 3. The Colorado Supreme Court concluded that President Trump had engaged in an "insurrection" under § 3 on Jan. 6, 2021, and defined "insurrection" in that context as a "concerted and public use of force or threat of force by a group of people to hinder or prevent the U.S. government from taking the actions necessary to accomplish the peaceful transfer of power." Anderson v. Griswold, 543 P.3d 283, 330 (2023). The U.S. Supreme Court reversed the Colorado Supreme Court, but on other grounds, and did not reach the question of the scope of the term "insurrection." Trump v. Anderson, 601 U.S. 100 (2024) (reversing decision of Colorado Supreme Court on the ground that states may not enforce Section 3 of the Fourteenth Amendment with respect to federal offices). Some experts have contended that, in the Fourteenth Amendment context, the definition of "insurrection" is relatively narrow and does not include "mere political violence—such as violence connected with a KKK or BLM rally." Brief for J. Michael Luttig et al. as Amici Curiae Supporting Respondents, Trump v. Anderson, 601 U.S. 100 (No. 23-719), at 24.

[40] 10 U.S.C. § 252.

[41] *Id*. The "militia of any state" are understood to be the modern National Guard, see *The Use of the Military to Execute Civilian Law*, *supra* note 36, at 61.

impedes the course of justice under those laws."[42] This latter subsection was added after the Civil War to address widespread violence and attacks by the Ku Klux Klan on the Black population.[43] But it is particularly broad and vague, and it could, in theory, potentially encompass relatively minor obstructions to the "execution of the laws" of the United States or impediments to "the course of justice" under those laws, such as a minor disruption to a judicial proceeding, so long as there were a conspiracy to do so by two or more persons.

Under this third trigger for the Act, the means of force allowed are also apparently quite broad under the statute's terms. This provision of the statute allows the President to respond "by using the militia or the armed forces, or both, or by any other means."[44] The word "militia" encompasses not only the National Guard, but also potentially private militias, currently defined by Congress to include "all able-bodied males at least 17 years or age and … under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States, and female citizens of the United States who are members of the National Guard."[45] Furthermore, the "any other means" language is quite sweeping and vague. On its face, it could be construed to encompass an even broader group of privatized militias, such as white supremacist group members, who do not meet the statutory definition of private militia members quoted above.

Section 251 has been used on several occasions to send armed forces to help quell labor disputes, racial unrest, and looting in response to national disasters, after requests from state governments to do so.[46] But the other sections of the Act, though broadly worded, have been invoked sparingly. Most famously, Presidents Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson relied on Section 253 to desegregate schools in the South and protect civil rights marchers in the face of opposition by state governors.[47] But in those cases, Section 253 was used in a limited fashion only to enforce federal court orders or when law and order had completely broken down.[48] Over the course of U.S. history, Presidents have invoked the Act in only 30 crises.[49]

---

[42] 10 U.S.C. § 253.
[43] *See* Banks, *supra* note 35, at 62-66.
[44] 10 U.S.C. § 253.
[45] 10 U.S.C. § 246. The term "militia" in this provision of the statute sweeps beyond the "militia of any state" language of the other provisions, understood to refer to the modern National Guard, see *The Use of the Military to Execute Civilian Law*, *supra* note 36, at 61.
[46] *See* Banks, *supra* note 35, at 34–38.
[47] *Id*. at 41–42.
[48] *Id*.; *see also* U.S. Dep't of Justice, Office of Legal Counsel, *Law Relating to Civil Disturbances* 8-9 (1975) (hereinafter "1975 OLC Memo").
[49] Elizabeth Goitein & Joseph Nunn, *Guide to Invocations of the Insurrection Act*, BRENNAN CENTER (April 25, 2022), https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act.

2. Risk of Abuse

The Insurrection Act's vague and overbroad terms, along with the statute's failure to provide a clear role for congressional oversight and judicial review, leaves it ripe for abuse by a rogue President. Indeed, in recent years, concerns about potential abuses have prompted significant calls for reform from a broad, bipartisan, swath of scholars and commentators.[50]

As noted above, Section 253 poses the greatest concerns. This section, "[t]aken literally … would allow the President to deploy the 82nd Airborne in response to two people conspiring to intimidate a witness at a federal trial" or "the use of troops to suppress an unpermitted but peaceful protest against a controversial executive order."[51] Furthermore, the means of force potentially authorized, which extends beyond uniformed troops to privatized militias and other groups engaging in "any other means," presents serious risks of abuse. As Elizabeth Goitein and Joseph Nunn have observed, "[t]his alarming delegation of unlimited power explains why the Oath Keepers and similar groups [have] hung their hopes on this law. . . . A substantial portion of white supremacist organizations' members would likely meet that definition [of privatized militia], and, in theory, [] others could be mobilized under the 'any other means' language."[52]

Notably, toward the end of President Trump's first term in 2020, his administration reportedly drew up plans to invoke the Act to quell protests against police violence.[53] And perhaps even more concerning, top U.S. generals and

---

[50] *See*, *e.g.*, BAUER & GOLDSMITH, *supra* note 9, at 337-40; Elizabeth Goitein & Joseph Nunn, *How to Fix the Insurrection Act*, BRENNAN CENTER (Sept. 20, 2022), https://www.brennancenter.org/our-work/analysis-opinion/how-fix-insurrection-act [https://perma.cc/N6K2-GXLF]; Mark Nevitt, *Good Governance Paper No. 6 (Part One): Domestic Military Operations – Reforming the Insurrection Act*, JUST SECURITY (Oct. 20, 2020), https://www.justsecurity.org/72959/good-governance-paper-no-6-part-one-domestic-military-operations-reforming-the-insurrection-act/ [https://perma.cc/D6MG-7MGP].

[51] Goitein & Nunn, *supra* note 49. Similarly, another commentator has criticized the overbreadth and vagueness of this provision, noting: "What activities might meet this threshold? How large does a "conspiracy" have to be? Is it a conspiracy that could trigger domestic deployment of the Marines if a handful of people conspire to violate federal law? That sounds ridiculous, but as written the statute provides few guidelines or guardrails." Nevitt, *supra* note 50.

[52] Goitein & Nunn, *supra* note 49.

[53] *See* Charlie Savage et al., *Why a Second Trump Presidency May Be More Radical Than His First*, N.Y. TIMES (Dec. 4, 2023) (noting that, in 2020 "Mr. Trump had an order drafted to use troops to crack down on protesters in Washington, D.C., but didn't sign it"), https://www.nytimes.com/2023/12/04/us/politics/trump-2025-overview.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/726F-TBQ7]. President Trump also suggested to a rally audience in June 2020 that he would use the Act "to put down 'leftist thugs' protesting that summer." Tina Nguyen, *MAGA Leaders Call for the Troops to Keep Trump in Office*, POLITICO (Dec. 18, 2020, 4:30 AM), https://www.politico.com/news/2020/12/18/trump-insurrection-act-presidency-447986 [https://perma.cc/YY2X-DA7D].

civilian officials reportedly feared that, after losing the presidential election in 2020, President Trump would invoke the Act to remain in office.[54]

During the 2024 election cycle, advisors to candidate Trump reportedly argued that he should invoke the Act on his first day in office in order to squelch public protests against him, prompting significant critique.[55] Indeed, in campaign speeches, candidate Trump strongly suggested he would invoke the Act in cities such as New York, Chicago, Los Angeles and San Francisco in "Democrat-run state[s]."[56] Once in office, he might attempt to argue, for example, that even peaceful protestors temporarily blocking traffic on a federal highway or impeding the entrance to a federal courthouse make it "impracticable" to enforce the laws, justifying invocation of Section 252 or sufficiently "obstruct the execution of the laws," so as to justify invocation of Section 253. Robert Kagan has argued that President Trump will likely invoke the Act in his second term, triggering "an irreversible descent into dictatorship" within the United States.[57]

Importantly, however, President Trump is not the only President who might be tempted to abuse the Insurrection Act. Rather, there is a risk that any President could try to take advantage of the seemingly broad statutory text. As Bob Bauer and Jack Goldsmith have emphasized, the "focus on Mr. Trump is understandable but inadequate in capturing the compelling case for reform" because it "has been clear for decades that the poorly drafted and antiquated law needs revision."[58] They maintain there should be strong bipartisan interest in reforming the Act to curb presidential discretion: "Democrats and Republicans should want to deny any

---

[54] Ryan Goodman & Justin Hendrix, *Crisis of Command: The Pentagon, The President, and January 6*, JUST SECURITY (Dec. 21, 2021), https://www.justsecurity.org/79623/crisis-of-command-the-pentagon-the-president-and-january-6/ [https://perma.cc/F3TZ-PFJE]; *see also* CAROL LEONNIG & PHILIP RUCKER, I ALONE CAN FIX IT, DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR 388-389, 431 (2021) (reporting that Mark Milley, Chairman of the Joint Chiefs of Staff, and Secretary of State Mike Pompeo feared Trump would attempt to use the military to hold on to power if he lost the election). A broad range of Trump advisers had called for him to invoke the Act to remain in power. *See* Nguyen, *supra* note 53.

[55] *See*, *e.g.*, Robert Kagan, *A Trump Dictatorship Is Increasingly Inevitable. We Should Stop Pretending.*, WASH. POST (Nov. 30, 2023, 8:00 AM) https://www.washingtonpost.com/opinions/2023/11/30/trump-dictator-2024-election-robert-kagan/ [https://perma.cc/L955-ANG4]; Joseph Nunn, *Trump Wants to Use the Military Against His Enemies. Congress Must Act,* SLATE (Nov. 17, 2023, 2:27 PM), https://slate.com/news-and-politics/2023/11/trump-second-term-military-nightmare-congress.html [https://perma.cc/N8MY-9X95]. Project 2025, a Heritage Foundation proposal for a second Trump presidency, argues for the use of armed forces at the border, including to assist in arrest operations, although the proposal does not specifically refer to the Insurrection Act. MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE: PROJECT 2025 555-56 (Paul Dans & Steven Groves eds., 2023).

[56] Savage et al., *supra* note 53 (noting that, at a rally in Iowa, candidate Trump said he "intends to unilaterally send troops into Democratic-run cities to enforce public order in general").

[57] Kagan, *supra* note 55.

[58] Bob Bauer & Jack Goldsmith, *Trump Is Not the Only Reason to Fix This Uniquely Dangerous Law*, N.Y. TIMES (Dec. 27, 2023), https://www.nytimes.com/2023/12/27/opinion/insurrection-act-congress-trump.html [https://perma.cc/VA4C-5HAT].

president unchecked authority to use the military in the homeland."[59] Despite numerous calls for reform, however, Congress has thus far failed to act.[60]

B. Potential Legislative Reforms

Because the Insurrection Act in its current form contains few checks against presidential overreach, many commentators have called on Congress to enact a range of legislative reforms to limit the Act's broad scope for presidential discretion, particularly with regard to Section 253. These proposed reforms fall into four categories: (i) greater substantive limits on the circumstances under which the President may invoke the Act; (ii) a ban on the deputization of private citizens under the Act; (iii) additional procedural requirements on the invocation of the Act, including mandated reports to Congress, specific authorization by Congress, and certification by, or at least consultation with, a range of officials; and (iv) an explicit judicial review provision.[61]

First, Congress could adopt substantive restrictions on the conditions under which the President may invoke Section 253. For example, Mark Nevitt has contended that Congress should "provide greater specificity" to clarify the meaning of 'opposes or obstructs the execut[ion] of the laws of the United States' and 'impedes the course of justice under those laws.'"[62] Likewise, Bauer and Goldsmith have criticized the Act's "broad and imprecise triggers" and have urged Congress to narrow the substantive language of the Act by "eliminat[ing] vague and obsolete terms like 'assemblage' and 'combination'; clearly define other terms like 'insurrection' and 'domestic violence'; and narrow the President's seemingly boundless discretion to determine when the act's triggers are satisfied."[63] Indeed, in an initiative led by Bauer and Goldsmith, the American Law Institute (ALI) recently issued a statement of principles drafted by prominent bipartisan experts advocating for statutory language in the Act limiting the President from deploying the armed forces unless "the violence [is] such that it overwhelms the capacity of federal, state, and local authorities to protect public safety and security."[64] Another possible substantive limitation, proposed by Elizabeth Goitein and Joseph Nunn at the Brennan Center, is that the third trigger should apply only if the specific

---

[59] *Id*.
[60] *See*, *e.g.*, Insurrection Act of 2024, S. 4699, 118th Cong. (2024) (introduced in the U.S. Senate and referred to the U.S. Senate Committee on Armed Services on July 11, 2024); REPUBLIC Act, S. 4373, 118th Cong. § 203 (2024) (introduced in the U.S. Senate and referred to the U.S. Senate Committee on Homeland Security and Governmental Affairs on May 21, 2024).
[61] Legislation aiming to reform the Insurrection Act passed the House in 2021, as part of the Protecting Our Democracy Act, H.R. 5314, Sec. 531. This legislation was reintroduced in the House in 2023. *Rep. Schiff Introduces Landmark Bill to Strengthen and Protect Our Democracy* (Jul. 27, 2023) [https://perma.cc/X3FG-S4B3].
[62] Nevitt, *supra* note 50.
[63] Bauer & Goldsmith, *supra* note 58.
[64] American Law Institute, *Principles for Insurrection Act Reform, at* 3 (Apr. 8, 2024) (hereinafter "*ALI Insurrection Act Principles*") [https://perma.cc/ZYB6-VDTQ].

obstruction of federal law "deprived a group or class of people of their constitutional rights — explicitly including the right to vote — or if it created an immediate threat to public safety that could not be handled by state or federal law enforcement."[65]

Second, commentators have urged Congress to eliminate the provision within Section 253 that would permit the President to deputize private militia to respond to crises.[66] Such amendments would preserve the President's ability to deploy active-duty armed services or call the National Guard into federal service under the Act but would prohibit the deputizing of private citizens.[67]

Third, the statute could be amended to include procedural protections that might help cabin the scope of presidential discretion. For example, Congress could require that the President report to Congress upon invoking the Act and regularly thereafter.[68] The Act's authorization could also expire within a set time frame unless Congress explicitly enacts a new authorization,[69] similar to the operation of the War Powers Resolution (WPR).[70] And the statute could be amended to require that top officials—such as the Secretary of Defense and the Attorney General—certify the conditions justifying the Act's invocation, so that it is not a unilateral decision of the President.[71] Finally, the President could be required to consult with state and local officials prior to invoking the Act "to ensure that troop deployment is needed to address a serious threat to safety," and "to make findings to that effect."[72]

Fourth, Congress could include a judicial review provision in the Act.[73] For example, Congress could specifically authorize the courts to determine whether the

---

[65] Goitein & Nunn, *supra* note 49.

[66] *See*, *e.g.*, Elizabeth Goitein & Joseph Nunn, Brennan Center for Justice, *Statement Submitted to the U.S. House Sel. Comm. to Investigate the January 6th Attack on the U.S. Capitol, The Insurrection Act: Its History, Its Flaws, and a Proposal for Reform*, at 26–28, Sept. 20, 2022.

[67] *See*, *e.g.*, *id*. at 26.

[68] *See*, *e.g.*, BAUER & GOLDSMITH, *supra* note 9, at 339; *ALI Insurrection Act Principles*, *supra* note 64, at 3; Nevitt, *supra* note 50; Goitein & Nunn, *supra* note 66, at 32.

[69] *See*, *e.g.*, BAUER & GOLDSMITH, *supra* note 9, at 339; *ALI Insurrection Act Principles*, *supra* note 64, at 3; Nevitt, *supra* note 50; Goitein & Nunn, *supra* note 66, at 34–35.

[70] 50 U.S.C. § 1544(b).

[71] *See*, *e.g.*, Nevitt, *supra* note 50. Nevitt suggests that the Chairman of the Joint Chiefs of Staff could be required to certify certain conditions as well, *id*., but such a requirement could potentially intrude on longstanding principles related to civilian control of the military. *See* Banks, *supra* note 35, at 39 (identifying constitutional and historical principles establishing civilian control of military).

[72] *See*, *e.g.*, *ALI Insurrection Act Principles*, *supra* note 64, at 3; Bauer & Goldsmith, *supra* note 58.

[73] *See*, *e.g.*, Goitein & Nunn, *supra* note 66, at 36–38. Some commentators oppose judicial review due to the potential need for quick action and the courts' relative lack of expertise. *See*, *e.g.*, BAUER & GOLDSMITH, *supra* note 9, at 339; *ALI Insurrection Act Principles*, *supra* note 64, at 4. Notably, however, previous versions of the law required advance judicial sign-off and placed time

criteria for invoking the Act were actually met.[74] This review presumably would need to be relatively deferential, perhaps under the "substantial evidence" standard, to ensure that courts do not overly intrude on the President's judgment.[75] However, some judicial oversight might at least restrain the most unjustified invocations of presidential power under the Act.

C. Potential Executive Branch Action

Even without legislative reform, the U.S. executive branch could take steps prior to January 2025 (or during any subsequent administration) to clarify and more explicitly set forth interpretive limitations on the President's invocation of the Act. First, the Office of Legal Counsel (OLC) could issue a new opinion explicating legal limitations on the President's invocation of the Insurrection Act, even as currently drafted. The OLC has written and disclosed numerous opinions on the Insurrection Act in the past, analyzing whether invocation of the Act in response to a particular request would be lawful (or wise).[76] Some of these memoranda appear to suggest constitutional limitations on the President's ability to invoke the Act and identify practical constraints on its use,[77] but a clearer exposition of these issues in a new opinion would be valuable.

Such an opinion could, for example, more fully articulate constitutional limitations on the broad statutory language or clarify that the language should be interpreted narrowly under the doctrine of constitutional avoidance.[78] Prior OLC opinions have suggested that the statute should be interpreted in light of various constitutional provisions, such as the Fourteenth Amendment,[79] the Supremacy

---

limits on the use of troops to enforce the law absent congressional approval. *See The Use of the Military to Execute Civilian Law*, *supra* note 36, at 7–8. The Supreme Court has indicated that the law gives the President wide discretion to decide whether deployment is warranted. *See id.* at 12–13 (citing *Luther v. Borden*, 48 U.S. 1 (1849)); *see also* Martin v. Mott, 25 U.S. 19, 29–30 (1827).

[74] *See* Goitein & Nunn, *supra* note 66, at 36.

[75] *Id*. at 38.

[76] *See*, *e.g.,* U.S. Dep't of Justice, Office of Legal Counsel, *Use of Potatoes to Block the Maine-Canada Border* 426 (1981); 1975 OLC Memo, *supra* note 48; U.S. Dep't of Justice, Office of Legal Counsel, *Legal Authority for Using Federalized National Guard and Reserve Components of Armed Forces in Suppressing Civil Disorders at the Request of a State* 1–5 (1968); U.S. Dep't of Justice, Office of Legal Counsel, *Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi* (1964), 1 Op. Att'y Gen. 493, 493 (2013) (hereinafter "1964 OLC Memo"); U.S. Dep't of Justice, Office of Legal Counsel, *President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas*, 41 Op. Att'y Gen. 313, 329 (1957) (hereinafter "1957 OLC Memo").

[77] *See*, *e.g.*, 1964 OLC Memo, *supra* note 76, at 496–7; 1957 OLC Memo, *supra* note 76, at 326–27.

[78] *See*, *e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[79] *See*, *e.g.*, 1964 OLC Memo, *supra* note 76, at 496 (noting that the Insurrection Act provisions granting authority to the President to deploy the armed forces without the consent of state officials "are limited… by the Constitution and by tradition," and that the "principal constitutional basis for

Clause,[80] and Article IV, Section IV, which obligates the federal government to protect the states from "invasion," but permits the federal government to protect against "domestic violence" only if the state requests protection.[81] It is true that the Supreme Court in *Martin v. Mott* has said that the President has a measure of latitude in determining whether the factual predicate for the statute is satisfied, but the Court made that statement in the narrow context of concluding that a citizen could be court-martialed for failure to report to the New York militia when the President had called it up during the War of 1812.[82] And the Office of Legal Counsel has indicated that the statutory text should be read narrowly for both constitutional and practical reasons. For example, the OLC has argued that the President can only invoke the Act in "situations where state and local law enforcement have completely broken down," under the authority of the Fourteenth Amendment to the U.S. Constitution,[83] or to enforce a federal court order when state officials refuse to do so—in which case the Constitution's Supremacy Clause provides added basis to use troops.[84] In addition, OLC opinions have noted that it is historical practice and tradition for Presidents to invoke Sections 252 and 253 only as a "last resort."[85] This reference to tradition echoes Justice's Frankfurter's concurrence in *Youngstown*, suggesting that the "gloss" of history[86] should inform the scope of executive power. A new OLC opinion might more clearly develop such theories.

---

the use of [these provisions] in connection with racial disturbances is the Fourteenth Amendment").

[80] *See id*. (asserting that "the degree of breakdown in state authority that is required [for the President to invoke the provisions of the Insurrection Act that allow deployment of armed forces without state consent] is less where a federal court order is involved, for there the power of the federal government is asserted not simply to enforce the Fourteenth Amendment, but to defend the authority and integrity of the federal courts under the Supremacy Clause of the Constitution").

[81] *See*, *e.g*., 1975 OLC Memo, *supra* note 48, at 1 (noting that the Insurrection Act provisions "implement[]" the U.S. Constitution Article IV, Section IV).

[82] 25 U.S. 19, 29–30 (1827). Notably, the Court emphasized Congress's power to provide for the calling forth of the militia to execute the laws of the Union, suppress insurrections, and repel invasions, *Id*. at 28 (citing U.S. Const. art. I § 8, cl. 15), and the statutory language at issue clearly fit within the constitutional text. Cf. Sterling v. Constantin, 287 U.S. 378, 399 (1932) (upholding injunction and concluding that federal courts had jurisdiction in case challenging Texas governor's seizure of oil wells as a violation of the Fourteenth Amendment due process rights of owners; yet suggesting that governor's determination of need for martial law was subject to broad judicial deference); Luther v. Borden 48 U.S. 1, 44-47 (1949) (concluding that Court should not assess legitimacy of state government determined to be lawful by state court when President chose not to intervene under U.S. Const. Art. IV section 4 and Insurrection Act precursor; therefore affirming denial of trespass claim brought by Rhode Island insurgent after state militia, acting under state-declared martial law, entered his house).

[83] 1964 OLC Memo, *supra* note 76, at 496–97; *see also* 1975 OLC memo, *supra* note 48, at 9; U.S. Dep't of Justice, Office of Legal Counsel, *Authority to Use Troops to Prevent Interference with Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions* 345 (1971) [hereinafter "1971 OLC memo"].

[84] 1964 OLC Memo, *supra* note 76, at 497; *see also* 1975 OLC memo, *supra* note 48, at 9; 1971 OLC memo, *supra* note 83, at 345.

[85] 1964 OLC Memo, *supra* note 76, at 496; *see also* 1975 OLC memo, *supra* note 48, at 9.

[86] 343 U.S. 579, 610–11 (Frankfurter, J., concurring).

An OLC opinion might also rely on historical practice to narrowly interpret the text in section 253 allowing the President to deputize private citizens as "militia"; for example, because this clause has apparently never been used, the Office of Legal Counsel might determine that the text should be interpreted to permit the deputization of private citizens only as a last resort, if at all. Furthermore, deputized private "militia" might be construed as encompassing only properly constituted and trained forces. Finally, the OLC might opine in more detail on the appropriate scope of military action, including limits on the use of force or detention authority, even assuming the President has properly invoked the Act. Such opinions would be valuable even if not made public, but publicly released OLC opinions on this topic would have the most impact because the longstanding executive branch view would then be even more clear to those outside the government, including members of Congress, the courts, and the general public. It is possible that such opinions already exist—if so, the executive branch should disclose them.

Second, the President could issue an Executive Order or proclamation interpreting the scope of the Insurrection Act, including constitutional or other limitations on the President's authority to invoke it, the meaning of statutory terms such as "domestic disturbance" and power to deputize private citizens as militia, and the extent of military authority, including limits on the use of force or detention. Executive Orders and presidential proclamations are a distinct form of executive branch action that follow a prescribed inter-agency process (also set forth by Executive Order) and managed by the Office of Management and Budget.[87] As long as these Orders or proclamations are issued pursuant to valid legal authority, they have the force of law[88] and may be directed at other actors within the government, as well as private actors.[89]

---

[87] *See*, *e.g.*, *Executive Orders: An Introduction*, CONG. RES. SERV. R46738, at 1, 3–4 (Mar. 29, 2021), https://crsreports.congress.gov/product/pdf/R/R46738#:~:text=•%20Authority%20for%20Executive%20Orders.&text=have%20the%20force%20and%20effect,delegation%20of%20power%20from%20Congress [https://perma.cc/4NR6-UFR9]; *see also* Exec. Order No. 11,030 § 2(a), 3 C.F.R. § 610 (1959–1963) (setting forth process for developing Executive Orders).

[88] *Executive Orders: An Introduction*, *supra* note 87, at 1 & n. 3 (citing Kevin Stack, *The Statutory President*, 90 IOWA L. REV. 539, 548 (2005)).

[89] *See Executive Orders: An Introduction*, *supra* note 87, Executive Summary. In the case of the Insurrection Act, the President has issued proclamations as required by the law when invoking the Act in specific contexts, directing any insurrectionists or others involved in the disturbance in question to disburse. *See*, *e.g.*, Proc. No. 3842, Apr. 9, 1968, 3173 F.R. 5499; Proc. No. 3841, Apr. 9, 1968, 33 F.R. 5497; Proc. No. 3840, Apr. 9, 1968, 33 F.R. 5495; Proc. No. 3840, Apr. 9, 1968, 33 F.R. 5495; Proc. No. 3645, Mar. 23, 1965, 30 F.R. 3739, Proc. No. 3554, Sept. 10, 1963, 28 F.R. 5707; Proc. No. 3542, June 11, 1963, 28 F.R. 5707; Proc. No. 3497, Sept. 30, 1962, 27. F.R. 9681; Proc. No. 2304, Sept. 23, 1957, 22 F.R. 7628. I am suggesting, however, that the President could go further than merely using Executive Orders to invoke the Act, but also use an Executive Order to interpret the Act and the Constitution as it relates the Act. A case can be made that the authority to issue such an interpretive Executive Order or proclamation derives from Article II's

How enduring would such an Executive Order be? It is true that subsequent administrations may revoke Executive Orders, but it is not so easy or politically costless to do so. Because these are public, legally binding documents, a revocation would likely be known to the public and would, at a minimum, spark debate. Thus, a rogue President who sought to invoke the Insurrection Act beyond the terms of a validly issued Executive Order would arguably first need to revoke that Order before doing so. As a result, other immediate priorities might intervene, and the imperative to invoke the Act might dissipate. In addition, Congress regularly enacts the text of Executive Orders into law.[90] Therefore, the issuance of an Executive Order could catalyze the legislative process, which would itself be an important development. It is true that a President could try to issue an Executive Order embedding a more expansive reading of the Act, but as discussed earlier, such an Order would be contrary to longstanding executive branch interpretations. In any event, it would be helpful for the outgoing administration (or any future administration inclined to define the outer bounds of executive power) to issue an Executive Order delineating the limits of the Insurrection Act long recognized by the executive branch.

Third, the executive branch could also issue a Presidential Decision Directive on the topic. Such directives reflect policy rather than law, but they are important frameworks that do often guide official conduct. Although the process for developing such directives differs from that of Executive Orders, it does still typically include a multi-stakeholder initiative within the executive branch. Although policies may be changed with a change of administration, such policies can be "sticky" and often develop into best practices that persist across administrations.[91] An articulated policy that limits invocation of the Insurrection

---

grant of authority to the President to "take care that the laws" are "faithfully executed," U.S. CONST. art II, which could be read to confer power on the President to interpret the scope of presidential authority. Pursuant to this authority, the President could set forth a constitutional limiting principle around the circumstances in which the act may be invoked and could also define key terms in the Act. To be sure, some have suggested that the President can unilaterally waive executive orders without notifying Congress or the public, *see*, *e.g.*, Letter from John C. Yoo, Deputy Assistant Attorney General, to Judge Colleen Kollar-Kotelly, *Authority for Warrantless National Security Searches*, at 5, May 17, 2002, a view that has been strongly criticized, *see Feingold, Whitehouse Introduce Bill to Help Curb Secret Law*, Aug. 1, 2008, https://www.whitehouse.senate.gov/news/release/feingold-whitehouse-introduce-bill-to-help-curb-secret-law/ [https://perma.cc/Q67E-5SY9].

[90] For example, an executive order initially established the Committee on Foreign Investment in the United States (CFIUS), an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the impact of such transactions on national security. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975). Congress later enacted legislation codifying aspects of CFIUS's composition and functions. Foreign Investment and National Security Act of 2007, Pub. L. No. 110–49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565).

[91] *See* Laura A. Dickinson, *National Security Policymaking in the Shadow of International Law*, 2021 UTAH L. REV. 629 (2021) (arguing that counterterrorism targeting and detention policies have remained relatively consistent across multiple U.S. presidential administrations).

Act to extreme circumstances and defines key terms could therefore serve as at least an additional partial check on a rogue President, again especially if the policy is issued before the next President takes office.

Finally, agency-level policies can play a role as well. For example, ideally following an Executive Order or Presidential Decision Directive as described above, the DOD could issue an updated instruction (DODI)[92] setting forth further details and definitions that would clarify policy and guide the entire military, requiring both civilian and military officials to follow their terms.[93] Such a Directive could map out the chain of command, set forth more detailed rules regarding the use of force in specific contexts, and identify policies related to the use of private citizens deputized as militia, among other issues. Such a policy could, for example, ban the use of deputized private militia entirely or permit their use only as a last resort. Perhaps even more important than the formal terms of such a policy is the organizational impact; as actors throughout the Defense Department are trained to understand and follow the DODI, the organizational culture changes, again contributing to the endurance of the policies over time across administrations.

D. Constitutional Issues

The executive branch actions discussed above are unlikely to face serious constitutional challenges. Likewise, at least some of the proposed legislative

---

[92] *See*, *e.g*., WHITE HOUSE, FREQUENTLY ASKED QUESTIONS ABOUT DOD ISSUANCES, at 1-2 [https://perma.cc/QT2Q-BN5Q]; DoD INSTR. 5025.01, "DOD ISSUANCES PROGRAM" (Aug. 1, 2016) (change 4 effective, June 7, 2023) [https://perma.cc/5YJZ-VVHY].

[93] For example, current DOD policy sharply limits the domestic use of the military to provide emergency support to civilian authorities outside the context of the Insurrection Act. A Department of Defense Instruction specifies that such "immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory." DoD INSTR. 3025.18, "Defense Support of Civil Authorities," Dec. 29, 2010, Incorporating Change 2, Mar. 19, 2018 [https://perma.cc/B5C7-FC55]. Of course, because an existing Instruction, DODI 3025.21, briefly states that "[a]ny employment of Federal military forces in support of law enforcement operations shall maintain the primacy of civilian authority … unless otherwise directed by the President," any DODI would need to follow a whole-of-government Executive Order or Presidential Decision Directive. DoD INSTR. 3025.21, "DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES," Feb. 27, 2013 [https://perma.cc/T3DM-UN2P]. The Army recently issued guidance for domestic deployments, including under the Insurrection Act. CTR. FOR LAW & MIL. OPS. (CLAMO), DOMESTIC OPERATIONAL LAW, 2024 HANDBOOK FOR LEGAL PERSONNEL 114–125. This guidance, which is quite helpful, sets forth training requirements and maps out the variety of federal and state laws that govern how the military could use force. *Id*. at 121–23. However, the guidance could be even more clear about the rules governing the scope and type of force that may be used, along with any limits on military functions. For example, there could be confusion regarding the interaction of federal and state law regarding the use of force, *id*. at 122, and detailed rules regarding the use of force are classified, *id*. at 121. It would be helpful if more of these rules could be declassified. Furthermore, the Department of Defense should provide more detailed, Department-wide guidance on such issues.

amendments are unlikely to pose significant constitutional difficulties. In particular, the proposed procedural checks, including sunsets and time limits, are likely to be upheld, particularly given that such elements appeared in earlier versions of the Act.[94] Congressional notification and consultation requirements also seem unlikely to pose serious constitutional concerns, and they too have historical precedent,[95] even if they have dropped out of the current version of the statute. Judicial certification and other forms of judicial review may raise concerns about judicial branch interference in presidential prerogatives,[96] but such provisions also have some precedent in earlier iterations of the statute.

Certainly, there could be challenges to any substantive limitations added to the statute that would limit the circumstances under which the President could invoke the Act. However, such challenges would need to rely on a strikingly broad conception of presidential power under Article II, because the President would need to argue that Congress was encroaching on an inherent presidential power to use the military to address domestic disturbances. We can see examples of this broad invocation of the President's Article II powers in a notorious OLC memo[97] issued approximately a month after the terrorist attacks on September 11, 2001. The memo makes the case that, based on Article II, the President could use armed forces on U.S. soil to engage in actions that might encompass "making arrests, seizing documents or other property, searching persons or places or keeping them under surveillance, intercepting electronic or wireless communications, setting up roadblocks, interviewing witnesses, and searching suspects,"[98] without the Fourth Amendment being applicable.[99] Under the theory of this memo, the Posse Comitatus Act would not govern if, in the President's discretion, the armed forces are being used for a "military, rather than a law-enforcement, purpose," including to combat terrorism, however defined,[100] without the President even needing to invoke the Insurrection Act. Although the memo's views on presidential powers specifically in the terrorism context are already quite expansive, the language of the memo then sweeps more broadly still to include the President's ability to use the military in any circumstances involving threats to "civil order" or "the public welfare."[101]

---

[94] *See The Use of the Military to Execute Civilian Law*, *supra* note 36, at 7–8
[95] *See* Banks, *supra* note 35, at 88.
[96] It is worth noting that the American Law Institute proposals for reform of the Insurrection Act do not include these judicial checks. See *ALI Insurrection Act Principles*, *supra* note 64, at 4.
[97] U.S. Dep't of Justice, Office of Legal Counsel, *Authority for the Use of Force to Combat Terrorist Activities Within the United States* 6 (2001) (hereinafter "2001 OLC Memo").
[98] *Id*. at 18.
[99] *Id*. at 25.
[100] *Id*. at 19.
[101] *Id*. at 12 ("In sum, the principle that the Chief Executive is inherently vested with broad discretion to employ military force both domestically and abroad when necessary to safeguard the public welfare is firmly ingrained in the judicial branch's treatment of the subject since the founding of the Republic.").

Nevertheless, although this sweeping vision of presidential power could form the basis for a conceivable constitutional challenge, it is worth noting that the Office of Legal Counsel has since repudiated the 2001 memo.[102] Apart from that notorious memo, and outside the context of a military invasion, civil war, or insurrection, the executive branch itself has adhered to a relatively narrow view of inherent presidential power to use the military domestically. For example, relying on the U.S. Supreme Court's decision in *In re Debs*,[103] the OLC concluded in 1975 that armed forces deployed in a capacity to protect federal persons, property, or functions without the authority of a statute must serve a protective role only and not engage in affirmative law enforcement.[104] In addition, citing the U.S. Supreme Court's decision in *Youngstown Sheet & Tube v. Sawyer*,[105] the OLC has determined that armed forces may not replace striking workers.[106] Finally, the OLC has emphasized that when the President deploys the military pursuant to the Insurrection Act provisions, and a law enforcement function is therefore permitted, it has been as "a last resort."[107] Indeed, it is notable that even during the first Trump administration, Attorney General William "Bill" Barr resisted use of the Insurrection Act to quell the protests following the killing of George Floyd.[108] Mark Esper, the Secretary of Defense at the time, and Mark Milley, the Chairman of the Joint Chiefs of Staff, reportedly "recoiled at the idea, expressing the view that regular military forces should not be used except as a last resort, and that absent a real insurrection, the military should not be in charge but should provide support to civilian agencies."[109] The legislative language proposed above, therefore, would be entirely consistent with executive branch practice because it would merely define domestic disturbances under the Act to include situations that cannot be addressed "in the ordinary course of judicial proceedings,"[110] and/or to allow domestic use of the military only as a "last resort."[111] Thus, a legal challenge along these lines might well fail, even among judges who embrace a broad view of executive power.

---

[102] U.S. Dep't of Justice, Office of Legal Counsel, *Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities* 2 (2008).
[103] *In re Debs*, 158 U.S. 564 (1885).
[104] 1975 OLC Memo, *supra* note 48, at 5; *see also* 1971 OLC memo, *supra* note 83, at 343 (articulating theory of inherent Presidential power to use military to protect federal property and functions, for example to "prevent traffic obstructions designed to prevent the access of employees to their agencies").
[105] *See generally* Youngstown Sheet & Tube v. Sawyer, 342 U.S. 579 (1952).
[106] 1975 OLC Memo, *supra* note 48, at 4.
[107] *Id*. at 9.
[108] *See Transcript: Attorney General William Barr on "Face the Nation*," CBS, June 7, 2020, https://www.cbsnews.com/news/bill-barr-george-floyd-protests-blm-face-the-nation-transcript/ [https://perma.cc/PYU8-P95Q].
[109] Charlie Savage et al., *Deploying on U.S. Soil: How Trump Would Use Soldiers Against Riots, Crime and Migrants*, N.Y. TIMES (Aug. 17, 2024), https://www.nytimes.com/2024/08/17/us/politics/trump-2025-insurrection-act.html.
[110] 10 U.S.C. § 252.
[111] 1964 OLC Memo, *supra* note 76, at 496; *see also* 1975 OLC memo, *supra* note 48, at 9.

At the other end of the spectrum, Bill Banks argues that the *current* version of the Insurrection Act is unconstitutional because it gives the President too much power and that legislative amendments are therefore *required* to align the Insurrection Act with important limitations on the President's Article II power. Banks contends that Article IV, Section 4 requires the federal government to guarantee a republican form of government and "protect" the states "against Invasion," but only if requested by the state legislature (or the executive when the legislature cannot be convened) to protect against "domestic Violence."[112] In Banks', view, this constitutional language constrains the President from using the military for domestic law enforcement in the absence of a state request, except in the event of threats to the republican form of government, which would only encompass insurrection, invasion, or comparable disturbances.[113] Regardless of whether one agrees with Banks' view that Congress *must* amend the Insurrection Act to conform to the Constitution,[114] it seems clear that there is at least a strong argument that Congress could *choose* to adopt language limiting the scope of presidential power under Section 253. In addition, even if such amendments bring forth a constitutional challenge, that is not a reason for Congress to shrink from its role to safeguard separation of powers and the rule of law in the face of the risk of abusive presidential overreach in the national security context. Indeed, as is true with regard to the War Powers Resolution, even legislation not recognized by the executive branch as constitutional can serve a checking function because the executive tends to comply (if only intermittently) as a matter of practice, and failure to observe the terms of the legislation sparks public debate in Congress and beyond, which itself can serve an important rule-of-law function.[115]

II. EMERGENCY POWERS

Emergencies present another context in which a rogue President might engage in abuse of power, threatening democracy and the rule of law. By definition, emergencies are unforeseen crises, and the executive branch needs some degree of extraordinary power in such times that might enable greater restrictions on rights than would be allowed outside times of emergency, as well as greater authority in relation to other branches of government. Yet, the use of such executive power also

---

[112] Banks, *supra* note 35, at 40; *see also* U.S. CONST. art. IV, § 4.
[113] Banks, *supra* note 35, at 80-81.
[114] Any attempt to enforce the Banks interpretation in court would face significant hurdles, including the tendency of U.S. courts to give general "national security deference" to the executive in many contexts, *see* Sinnar, *supra* note 13, as well as specific difficulties related to judicial challenges of executive interpretation of statutory authorization to use the military in times of crisis. *See*, *e.g.*, Sterling v. Constantin, 287 U.S. 378, 399 (1932).
[115] *See*, *e.g.*, Brian Finucane & Heather Brandon-Smith, *Analyzing Previously Undisclosed Use of Force Reports: Challenges of Congressional Oversight of the War on Terror*, JUST SECURITY, Sept. 18, 2023, https://www.justsecurity.org/88187/analyzing-previously-undisclosed-use-of-force-reports-challenges-of-congressional-oversight-of-the-war-on-terror/ [https://perma.cc/3SLB-FCQW].

contains within it the risk of abuse and overreach, and so it is necessary to balance these two imperatives.

The U.S. constitutional framework for emergencies generally tries to strike this balance by allowing Congress to delegate emergency power to the President while retaining authority to curtail that power in the event of abuse. However, critics argue that Congress has delegated too much power in vague statutes that do not sufficiently define and limit what counts as an emergency.[116] Thus, "without reforms to strengthen Congress's hand, a future President could leverage these powers to undermine not just the policymaking process, but democracy itself."[117] Indeed, Senator Frank Church once said that emergency powers are "like a loaded gun lying around the house, ready to be fired by any trigger-happy president who might come along."[118]

A. Overview and Risk of Abuse by a Rogue President

1. Current Legal Framework

a. The Constitution

Unlike many constitutions around the world, the U.S. Constitution does not define "emergency" or indeed "refer at all to nonviolent, non-war-related, emergencies."[119] Alexander Hamilton contended during constitutional debates that it was difficult to "foresee or to define the extent and variety of national exigencies" or the "means necessary to satisfy them."[120] He therefore did not want to impose "constitutional shackles" on the power to address emergencies.[121] James Madison was concerned in the opposite direction, not about the risk that defining emergency powers might *limit* their exercise, but rather that granting emergency power might "plant[] in the Constitution itself necessary usurpations of power, every precedent

---

[116] *See*, *e.g.*, Elizabeth Goitein, *Emergency Powers: A System Vulnerable to Executive Abuse, Brennan Center for Justice*, BRENNAN CENTER FOR JUSTICE (Dec. 15, 2023), https://www.brennancenter.org/our-work/analysis-opinion/emergency-powers-system-vulnerable-executive-abuse [https://perma.cc/SG77-ZSPB].
[117] *Id*.
[118] Richard Gephardt, Gary Hart, Joel McCleary & Mark Medish, *Opinion | Why Trump's Chaos Requires New Guardrails on Biden*, POLITICO (Sept. 15, 2021), https://perma.cc/MS9G-TVXS. https://www.politico.com/news/magazine/2021/09/15/trump-white-house-milley-biden-guardrails-512009 [https://perma.cc/MS9G-TVXS].
[119] *See* Oren Gross, *Emergency Powers in the Time of Coronavirus … and Beyond*, JUST SECURITY (May 8, 2020), https://www.justsecurity.org/70029/emergency-powers-in-the-time-of-coronaand-beyond/ [https://perma.cc/4MN2-HDFN].
[120] THE FEDERALIST NO. 23 (Alexander Hamilton).
[121] *Id.*

of which is a germ of unnecessary and multiplied repetitions."[122] As a result, the text of the Constitution is largely silent regarding emergency powers.[123]

The U.S. Supreme Court has had little occasion to consider the nature of emergency powers, but *Youngstown Sheet & Tube v. Sawyer* rejected executive branch arguments for broad emergency powers by preventing the President from seizing a steel mill to facilitate production of armaments during the Korean War.[124] In his influential concurring opinion, Justice Jackson interpreted the Constitution's lack of explicit reference to emergencies to imply a limit on the scope of presidential assertions of inherent emergency power:

> [The framers] knew what emergencies were, knew the pressures they engender from authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise or extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so….[125]

Rather, Justice Jackson emphasized that the primary mechanism for addressing emergencies must be through enactments of Congress. Otherwise, the President's emergency power "either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in the wrong direction."[126]

b. Statutory Framework

---

[122] THE FEDERALIST NO. 41 (James Madison).

[123] The Constitution does provide for war powers to be exercised both by Congress (such as the powers to declare war, raise and support an army and navy, and regulate the armed forces), U.S. CONST. art. I, § 8, and the President (such as the commander-in-chief power), *id.* art. II, § 2. The Constitution also provides for two instances in which Congress can act in emergency-type situations: The Suspension Clause provides that the writ of habeas corpus may be suspended "when in cases of rebellion or invasion the public safety may require it," *id.* art. I, § 9, cl. 2, and the Calling Forth Clause authorizes Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.* art. I, § 8, cl. 15. Finally, two Constitutional provisions address emergencies within states: Under Article I, Section 10, Clause 3, a state may not wage war "unless actually invaded, or in such imminent danger as will not admit of delay," and Article IV, Section 4 provides that the United States must protect a state from "domestic violence" if the state legislature or executive (if the legislature cannot be convened) request it.

[124] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 587–89 (1952).

[125] *Id.* at 650 (Jackson, J., concurring).

[126] *Id.* at 653 (Jackson, J., concurring).

The primary statutory framework regulating emergencies is the National Emergency Act (NEA), enacted in 1976 in response to perceived abuse of emergency powers by President Nixon.[127] Under the NEA, the President must declare a "national emergency" in order to activate standby emergency statutes that authorize the President to take a wide variety of actions that would be impermissible absent a crisis.[128] If the President declares a national emergency, the President must also indicate any specific statutory authorities he or she intends to exercise[129] and notify Congress by publishing the proclamation of national emergency in the Federal Register and transmitting it to Congress.[130] Further, the President must maintain and transmit to Congress all rules promulgated to carry out emergency authorities[131] and also provide an accounting every six months.[132] Any emergency declaration terminates automatically after one year, unless the President affirmatively issues a statement to extend it, in which case the President again must also notify Congress and publish the extension in the Federal Register.[133] Finally, Congress may terminate an emergency via joint resolution, which requires presentment to the President and which, if the President vetoes, Congress must override.[134]

The Brennan Center for Justice has identified 137 statutory authorities that may become available to Presidents after the declaration of a national emergency.[135] These statutes allow executive branch officials to engage in actions that would not otherwise be permissible, such as suspending regulation of hazardous waste, allowing the government to take over land to manufacture explosives, lifting protections on farmland, waiving restrictions on maintaining the defense industrial base, undertaking military construction projects from unobligated funds, postponing assessment of military sexual harassment, seizing assets, selling alien property, prohibiting agricultural exports, or keeping patents secret.[136]

---

[127] For example, the Nixon Administration had relied on the Feed and Forage Act of 1861, originally intended to provide fodder for cavalry horses, to finance the secret invasion of Cambodia. Frank Church, *Ending Emergency Government*, 63 AM. BAR ASS'N J. 197, 197 (1977).
[128] 50 U.S.C. §§ 1601–51.
[129] 50 U.S.C. §§ 1621, 1631.
[130] 50 U.S.C. §§ 1601–51.
[131] 50 U.S.C. § 1641.
[132] *Id*.
[133] 50 U.S.C. § 1622(d).
[134] 50 U.S.C. § 1622(b). The original version of the NEA specified that Congress could terminate an emergency just by concurrent resolution, but that provision was invalidated after the U.S. Supreme Court's decision in *INS v. Chadha*, which struck down legislative vetoes. INS v. Chadha, 462 U.S. 919 (1983); Kevin Rizzo, *Polarization and Reform: Rethinking Separation of Emergency Powers*, 5 CARDOZO INT'L & COMP. L. REV. 671, 681–83 (2022).
[135] *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE, (last updated June 11, 2024), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/XA4F-H3NV].
[136] *Id*.

One of the key authorities that the President may activate under the NEA is the International Emergency Economic Powers Act (IEEPA). Enacted in 1977 just after the NEA, IEEPA gives Presidents a broad set of economic powers if they make a declaration of a "national emergency,"[137] and it lies at the heart of the U.S. sanctions regime. In order to invoke IEEPA, the President must declare a "national emergency" under the NEA and also make a finding of an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[138] In addition to the requirements of the NEA, IEEPA provides several further procedural restrictions. First, IEEPA requires the President to consult with Congress "in every possible instance"[139] before exercising any of the authorities granted. And, if a President declares a national emergency invoking IEEPA, he or she must "immediately" transmit a report to Congress explaining the reasons for invoking IEEPA's authorities, including "why the President believes [the]. . . circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[140] The President must specify the authorities to be exercised and the actions to be taken,[141] explain why those actions are necessary, and identify any foreign countries with respect to such actions.[142] Furthermore, the President must report every six months on the actions taken under IEEPA.[143]

Presidents have used IEEPA extensively. As of January 2024, Presidents have declared 69 national emergencies invoking IEEPA, 39 of which are still in effect.[144] On average, emergencies under IEEPA span over nine years.[145] Some, however, have lasted much longer. For example, the emergency that President Carter declared during the hostage crisis in 1979 is still in effect 45 years later.[146]

---

[137] 50 U.S.C. §§ 1701–09.
[138] 50 U.S.C. § 1701.
[139] 50 U.S.C. § 1703(a).
[140] 50 U.S.C. § 1703(b)(2).
[141] 50 U.S.C. § 1703(b)(3).
[142] 50 U.S.C. § 1703(b)(4-5).
[143] 50 U.S.C. § 1703(c).
[144] *See* Christopher Casey et al., *International Emergency Economic Powers Act: Origins, Evolution, and Use*, CONG. RSCH. SERV., R45618, at 15-16 (2024), https://crsreports.congress.gov/product/details?prodcode=R45618 [https://perma.cc/5J76-5TEY]; *see also* Elizabeth Goitein, *Statement Before the U.S. Committee on Homeland Security and Governmental Affairs, Hearing on Restoring Congressional Oversight Over Emergency Powers: Exploring Options to Reform the National Emergency Ac*t, at 9, (May 22, 2024) (identifying 72 emergencies declared under IEEPA as of May, 2024 using slightly different methodology from Casey et al., *supra*), https://www.hsgac.senate.gov/wp-content/uploads/Testimony-Goitein-2024-05-22.pdf [https://perma.cc/AJ6W-CVVZ].
[145] Christopher Casey et al., *supra* note 144, at 17, 22.
[146] *Id*.

And, until 2023, Congress had never attempted to end an emergency under IEEPA.[147]

2. Risk of Abuse

The risk that U.S. Presidents of both parties might abuse emergency powers has long been a concern. Although commentators recognize the need for Presidents to exercise broad powers in times of crises, they have worried that Presidents might over-use these powers.[148] Such concerns are most acute with regard to unilateral presidential assertions of inherent emergency powers, the scope of which the U.S. Supreme Court has discussed, but never definitively adjudicated.[149] But even when Presidents act pursuant to emergency legislation enacted by Congress, there are serious risks that Presidents may invoke the legislation too readily or may stretch the statutory framework to cover a contemporary crisis that seems to have little to do with the original context for the statute, as President Nixon did when he relied on the Feed and Forage Act for the authority to bomb Cambodia,[150] or, as some commentators have argued President Obama did when he declared an emergency under IEEPA in order to impose sanctions on Venezuela.[151] In addition, there is a risk that, if emergencies are not time-limited, they can remain on the books for years and become "entrenched."[152]

Perhaps the most egregious use of presidential emergency power was President Franklin Roosevelt's executive order during World War II authorizing the segregation of military zones within the United States, an order that served as the basis for multiple military orders forcing more than 110,000 individuals of Japanese descent, including 70,000 U.S. citizens, into internment camps.[153] The U.S. Supreme Court upheld this assertion of presidential emergency power in *Korematsu v. United States*.[154] Subsequently, however, Congress acknowledged the wrongs effected by the exclusion orders, enacting a law in 1948 authorizing payment of up to $100,000 to each internee, and, in 1988 issuing an apology and authorizing an additional $20,000 to be paid.[155] President Gerald Ford revoked the executive order that was the basis for the exclusion orders in 1976,[156] and President George H. W. Bush formally apologized for the injustices of the internment in

---

[147] *Id*. at 54.
[148] *See*, *e.g.*, Goitein & Nunn, *supra* note 49; Mark Medish & Joel McCleary, *The Looming Crisis of Emergency Powers and Holding the 2020 Election*, JUST SECURITY (May 4, 2020), https://www.justsecurity.org/69996/the-looming-crisis-of-emergency-powers-and-holding-the-2020-presidential-election/ [https://perma.cc/PKY2-V52C].
[149] *See* In re Neagle, 135 U.S. 1, 65–68 (1890).
[150] *See* Church, *supra* note 127, at 197.
[151] *See* Goitein & Nunn, *supra* note 49.
[152] *See* Gross, *supra* note 119.
[153] Exec. Order No. 9066, 7 Fed. Reg. 93 (Jan. 6, 1942).
[154] Korematsu v. United States, 323 U.S. 214, 219, 223-24 (1944).
[155] Japanese American Evacuation Claims Act, 62 Stat. 1231 (1948); 50 U.S.C. §§ 4201–51.
[156] Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976).

1990.[157] One of the most strongly criticized cases in U.S. history, *Korematsu* was finally repudiated by the U.S. Supreme Court decades later in *Trump v. Hawaii*, when Chief Justice Roberts' majority opinion took the occasion "to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution."[158]

During his first presidency, Donald Trump's use and threatened use of emergency powers sparked particular criticism.[159] The most significant allegations of overreach sprang from his decision to declare an emergency at the U.S. southern border.[160] Trump relied on this emergency declaration to unlock a variety of standby statutory authorities in order to spend money to build a border wall even after Congress had specifically rejected most appropriations for that purpose.[161] Commentators argued that Trump had exceeded the authority conferred under the NEA because an increase in families crossing the border might be a "policy challenge," but was not an emergency.[162] Indeed, the emergency declaration prompted significant litigation in which a variety of plaintiffs argued that Trump had exceeded his emergency authorities,[163] although ultimately the litigation was withdrawn as moot after President Biden assumed office.[164]

President Trump's declaration of national emergencies under IEEPA also prompted significant critique. Relying on IEEPA, he declared an emergency to "secur[e] the information and communications technology and services supply

---

[157] Letter from Pres. George H.W. Bush to Internees (1990), https://www.digitalhistory.uh.edu/active_learning/explorations/japanese_internment/bush.cfm [https://perma.cc/9KT5-2WBR].

[158] Trump v. Hawaii, 585 U.S. 667, 710 (2018) (internal quotations omitted).

[159] *See*, *e.g.*, Elizabeth Goitein, *Trump Showed How Easily Presidents Can Abuse Emergency Powers. Here's How Congress Can Rein Them In*, POLITICO (Jan. 22, 2021), https://www.politico.com/news/magazine/2021/01/22/trump-presidents-abuse-emergency-powers-congress-rein-in-461293 [https://perma.cc/Z9DQ-M37N]; Joshua Geltzer, *Blame Trump, Not the U.S. Code, for His Abuse of Emergency Authority: Our Laws Could Better, But Trump Is Breaking the Ones We Have*, JUST SECURITY (Aug. 26, 2019), https://www.justsecurity.org/65978/blame-trump-not-the-u-s-code-for-his-abuse-of-emergency-authority/ [https://perma.cc/J2EX-XBH9]; Elizabeth Goitein & Joseph Nunn, *An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse*, 13 J. NAT'L SECURITY L. & POL'Y 355 (2023); David Landau, *Rethinking the Federal Emergency Powers Regime*, 84 OHIO ST. L.J. 603 (2023).

[160] *See*, *e.g.*, Landau, *supra* note 159.

[161] *See* Goitein, *supra* note 116.

[162] Geltzer, *supra* note 159.

[163] *See*, *e.g.*, California v. Trump, 407 F. Supp. 3d 869, 890 (N.D. Cal. 2019), vacated and remanded sub nom. Biden v. Sierra Club, 142 S. Ct. 56 (2021); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 30 (D.D.C. 2020).

[164] Biden v. Sierra Club, 142 S. Ct. 46 (Mem) (2021). On his first day in office, President Biden terminated President Trump's proclamation of an emergency at the U.S. southern border. Proc. No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021). But he soon declared a national emergency related to "international drug trafficking" that encompassed actions at the border. Exec. Order No. 14,059, 80 Fed. Reg. 71,549 (Dec. 15, 2021).

chain" and then used the authorities unlocked under IEEPA to place the Chinese technology company Huawei on a trade blacklist.[165] Critics argued that Trump's "escalation of a self-initiated trade war with China and inability to cut whatever deal might be necessary to end it are hardly the type of threat" falling within IEEPA's text, however broad.[166] Critics also pointed to Trump's invocation of IEEPA to sanction personnel from the International Criminal Court as an example of overreach.[167] Beyond these actual emergency declarations, Trump also threatened to invoke IEEPA to order U.S. companies to leave China,[168] and one of his associates suggested relying on that statute to seize voting machines after the 2020 election, based on false claims that one of the companies that had manufactured the machines had ties to a foreign country.[169] Finally, because there is nothing in the IEEPA sanctions regime that limits its terms to foreign nationals, there is concern that a rogue President might use IEEPA's emergency powers to place sanctions on U.S. citizens.[170]

It is important to recognize, however, that both Democratic and Republican Presidents have been faulted for overbroad assertions of emergency power. In addition to the instances noted above, for example, President Bill Clinton declared a national emergency to address the downing of aircraft in Cuba,[171] and President Obama declared a national emergency relating to unrest in Burundi.[172] Commentators have observed that whether or not those really counted as U.S. emergencies at the time, they certainly do not seem like emergencies today, despite the fact that Presidents continue to renew them, and all remain in effect.[173] More recently, the U.S. Supreme Court rejected President Biden's invocation of emergency powers to cancel student loan debt under congressional legislation adopted after 9/11.[174]

B. Possible Legislative Reforms and Executive Branch Action

---

[165] Exec. Order No. 13,873, 84 Fed. Reg. 22689 (May 15, 2019).
[166] Geltzer, *supra* note 159; *see also* BAUER & GOLDSMITH, *supra* note 9, at 342-43 (using this example to criticize IEEPA's overbroad language).
[167] Elizabeth Evenson, *Donald Trump's Attack on the ICC Shows His Contempt for the Global Rule of Law*, HUMAN RTS. WATCH (July 6, 2020), https://www.hrw.org/news/2020/07/06/donald-trumps-attack-icc-shows-his-contempt-global-rule-law [https://perma.cc/QP4Y-DQB6]; Exec. Order No. 13,928, 85 Fed. Reg. 36139 (June 11, 2020).
[168] Rachel Layne, *Can Trump Force U.S. Companies out of China?*, CBS NEWS (Aug. 26, 2019) https://www.cbsnews.com/news/can-trump-force-u-s-companies-out-of-china-not-technically-but-he-can-make-it-very-hard-to-stay/ [https://perma.cc/Q53P-SDHN].
[169] *See* Goitein, *supra* note 116.
[170] Gene Healy, *Emergency Powers*, CATO INST. (2022), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/emergency-powers-reform [https://perma.cc/7558-XLQM].
[171] Proclamation No. 6867, 61 Fed. Reg. 8843 (Mar. 1, 1996).
[172] Exec. Order No. 13,712, 80 Fed. Reg. 73633 (Nov. 22, 2015).
[173] BAUER & GOLDSMITH, *supra* note 9, at 341.
[174] *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023).

Because the President's emergency powers largely derive from congressional statutes,[175] Congress has the power to amend its statutes to substantively define, and thereby limit, the scope of emergency power and to add greater procedural requirements to ensure that Congress can play a meaningful role in checking a rogue President. Significantly, neither the NEA nor IEEPA currently define what qualifies as an "emergency." Thus, some have argued that the "test for when a national emergency exists" could be interpreted as "completely subjective – anything the President says is a national emergency is a national emergency."[176] The statutes should therefore be amended to "include a definition of 'national emergency' that is broad enough to cover a wide range of circumstances while clarifying that it does not give the President a blank check."[177] Such a definition might include requirements that the situation being addressed involve a grave event that is "sudden, unforeseen, and [of] unknown duration, with potential dangers and threats to "life and wellbeing," and the need for "immediate" and "unanticipated" action.[178]

In addition, the existing procedures surrounding presidential emergency declarations should be amended. For example, Congress could refine the NEA to require that, for each emergency declaration, the President provide Congress with a full explanation of why the situation being addressed satisfies the statutory definition of "emergency." Congress could also impose a requirement that it must approve any presidential emergency declaration, setting a "clock" similar to the 60-day clock that runs pursuant to the War Powers Resolution when the President introduces armed forces into hostilities. Under the WPR, unless Congress issues a specific use-of-force authorization within the time period, Congress cannot be deemed to have approved the use of force.[179] With respect to the NEA, a 20-, 30-, or 90-day clock could run each time a President makes a declaration of emergency. If Congress does not then specifically authorize the emergency within that time period, the emergency would be automatically terminated.[180] Finally, scholars have suggested that "the executive branch should be required to explain and defend each

---

[175] Although the President may also retain inherent emergency powers even in the absence of congressional authorization, the extent of those powers—to the extent they exist—has never been comprehensively defined by the courts. Because IEEPA in particular touches on foreign affairs, it is conceivable that courts might bar Congress from placing statutory restrictions on presidential emergency power, but such an outcome is sufficiently uncertain that it should not deter Congress from defining what qualifies as an emergency under the statute.

[176] *See*, *e.g.*, Glenn E. Fuller, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers and the Need for Accountability*, 52 CAL. L. REV. 1453, 1548 (1979).

[177] Letter from the Brennan Center for Justice at NYU School of Law, to Senators McConnell and Schumer and Representatives Pelosi and McCarthy, Brennan Center for Justice (May 10, 2019), https://www.brennancenter.org/our-work/research-reports/brennan-center-calls-fundamental-reform-national-emergencies-act-1976 [https://perma.cc/9ZCE-6C9A].

[178] *See* L. Elaine Halchin, *National Emergency Powers*, CONG. RSCH. SERV., 98-505, at 3-4 (2019). Halchin also identifies procedural factors, including who decides and the nature of the response. *Id*.

[179] *Id.*

[180] Goitein, *supra* note 116; Healy, *supra* note 170.

renewal each year in written reports to Congress and in hearings before the renewal becomes effective."[181] Such a requirement might "bring significant discipline to the practice of automatic renewals and morphing emergency declarations that have become common practice."[182] And, with respect to IEEPA, which does include some of the procedural elements described above, Congress could further refine the statute to include a time limit or sunset provision. The goal of these procedural reforms would be to spur the President to engage in dialogue with Congress and give Congress a greater role in addressing emergencies both at the outset and in an ongoing way, thereby creating stronger checks on the President.

Absent legislative reform, the executive could issue an OLC opinion, an executive order, or a policy declaration that voluntarily adopts a limited definition of what constitutes an emergency. For example, such a statement might conclude that the statutory term "emergency" should be understood in light of its plain meaning to encompass only sudden, unforeseen crises with significant threats to life or wellbeing that necessitate immediate action, or, alternatively, adopt such a definition as a matter of policy. An executive branch statement could also outline best practices regarding consultation with Congress about emergency declarations, as a matter of policy.

Alternatively, courts could give content to the word "emergency" as used in the statutes. For example, in the litigation regarding President Trump's declaration of an emergency to justify building a border wall, plaintiffs argued that the situation at issue did not qualify as an emergency within the meaning of the NEA and asked the court to address the statute's meaning directly. Although some district courts concluded that the question of whether an emergency "truly exists" within the meaning of the statute is a nonjusticiable political question,[183] others concluded that the executive branch had exceeded the scope of statutory authorities and raised constitutional concerns.[184] As noted above, this litigation became moot when Joe Biden became President,[185] but similar litigation might be brought to challenge emergency declarations in the future. Arguably, though, interpreting the plain meaning of a statute is a core judicial competence, even if judicial interpretation limits presidential authority in a time of asserted emergency.[186] Of course, it would be preferable for Congress to amend the relevant statutes and provide a definition of emergency, but if Congress fails to act, the executive branch or the courts could take such steps to provide guardrails against the possibility that

---

[181] BAUER & GOLDSMITH, *supra* note 9, at 343.
[182] *Id.*
[183] *See*, *e.g.*, California v. Trump, 407 F. Supp. 3d 869, 890-91 (N.D. Cal. 2019), vacated and remanded sub nom. Biden v. Sierra Club, 142 S. Ct. 56 (2021); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 31-33 (D.D.C. 2020).
[184] *See*, *e.g.*, Sierra Club v. Trump, 379 F. Supp. 3d 883, 919 (N.D. Cal. 2019) (concluding that reprogramming of funds violated statutory authority and raised serious constitutional concerns), vacated and remanded sub nom. Biden v. Sierra Club, 142 S. Ct. 56 (2021).
[185] *See generally* Biden v. Sierra Club, 142 S. Ct. 56 (Mem) (2021).
[186] *Cf.* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 587-88 (1952).

a rogue President will assert sweeping powers that are not justified by any true emergency.

C. Constitutional Issues

Statutory reforms to constrain assertions of emergency powers, at least in the domestic context absent war on U.S. soil, are unlikely to generate significant constitutional concerns. The *Youngstown* decision, for example, can be read as giving broad scope to Congress to limit the executive branch even in times of emergency.[187] It is perhaps noteworthy that the recent Supreme Court case invalidating the student loan forgiveness program that President Biden implemented based on a provision for emergencies in the HEROES Act did not entertain an argument that the President could have acted based on inherent emergency powers.[188] To be sure, enforcement of any such terms may pose challenges, as courts could potentially conclude that some issues in the litigation constitute nonjusticiable political questions,[189] and plaintiffs may struggle to establish standing.[190] Nonetheless, congressional reforms to add greater procedural and even substantive limitations on presidential assertions of emergency powers are unlikely to face significant constitutional challenges.

Statutory reforms to IEEPA pose greater constitutional concerns, due to broader constitutional scope for the President's foreign affairs powers. However, the U.S. Supreme Court in recent years has refused to adopt a sweeping view of the President's unilateral foreign affairs powers. To the contrary, in *Zivotofsky v. Kerry*, the majority explicitly rejected the executive branch's broad assertion of exclusive authority over all areas of foreign affairs.[191] Instead, although the majority ultimately invalidated Congress's attempt to regulate the identification of birthplace on passports, it did so based solely on the President's specific power to recognize foreign governments, not a general plenary authority over all foreign affairs.[192] Thus, although significant substantive constraints on the President's ability to sanction foreign governments or individuals might be invalidated, enhanced procedural constraints are more likely to survive any challenge, as procedural limits have long been included in the statutory framework. Furthermore, even if the President has broad constitutional authority to sanction foreign

---

[187] *Id.*
[188] Biden v. Nebraska, 143 S. Ct. 2355 (2023).
[189] *See*, *e.g.*, California v. Trump, 407 F. Supp. 3d 869, 890-91 (N.D. Cal. 2019), vacated and remanded sub nom. Biden v. Sierra Club, 142 S. Ct. 56 (2021); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 31-33 (D.D.C. 2020).
[190] *Cf.* Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 29 (D.D.C. 2020) (concluding that some plaintiffs lacked standing to challenge border wall construction under a variety of statutes).
[191] Zivotofsky v. Kerry, 576 U.S. 1, 20 (2015).
[192] *Id*.

governments or individuals, IEEPA on its face[193] permits the President to sanction U.S. citizens, and Presidents have done so (albeit infrequently).[194] There should be no concern with Congress enacting substantive restrictions to protect Americans' constitutional rights, nor should there be any questions about justiciability, as courts have reviewed designations of U.S. persons under IEEPA.

III. THE PARDON POWER

A. Overview and Risk of Abuse by a Rogue President

The text and history of the pardon power suggest a capacious, largely unreviewable, presidential power, at least as to federal crimes. The language of the clause itself, found in Article II of the U.S. Constitution, is drafted in expansive terms: "The President… shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[195] The U.S. Supreme Court, although it has had few occasions to address the pardon power, has described it in broad terms, emphasizing that the power is "unlimited" and extending "to every offense known to the law."[196] The power encompasses a wide range of actions granting clemency, which is a "broad term that applies to the President's constitutional power to exercise lenience toward persons who have committed federal crimes"[197]; it therefore includes not only the power to grant a full pardon, which expunges a criminal record and its legal consequences, but also other actions such as a reprieve (a temporary stay of a sentence) or commutation (a reduction of a sentence).[198] Furthermore, the Court has stated categorically that the pardon power is "not subject to legislative control" and that "Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders."[199]

The broad scope of the President's pardon power obviously raises the possibility of executive branch overreach and abuse.[200] President Trump's use of the pardon power in the military context, however, raises distinct, national security-related, concerns. In particular, Trump granted clemency to four individuals who

---

[193] *See*, *e.g.*, 15 U.S.C. § 1702 (authorizing the President to block "transactions involving any property in which any foreign country or a national thereof has any interest by *any person* … subject to the jurisdiction of the United States" (emphasis added); see also Andrew Boyle, *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers* Act 8-14, Brenn. Ctr. for Just. (June 10, 2021).
[194] Christopher Casey et al., *supra* note 144, at 21-23.
[195] U.S. CONST., art. II, § 2, cl. 1.
[196] Ex Parte Garland, 71 U.S. 333, 380 (1866).
[197] U.S. Dep't of Justice, Office of the Pardon Att'y, *Frequently Asked Questions*, https://www.justice.gov/pardon/frequently-asked-questions [https://perma.cc/YG35-XN9D].
[198] *Id*.
[199] *Garland,* 71 U.S. at 380. In another case, the Court referred to the President as having "full discretion" to exercise the pardon power. Ex Parte Grossman, 267 U.S. 87, 121 (1925).
[200] *See*, *e.g.*, Frank O. Bowman, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL. 425, 458-61 (2023).

had either been accused or convicted of war crimes: he granted full pardons to First Lieutenant Michael Behenna, who had been paroled following a military conviction for murdering an Iraqi man in US custody;[201] Major Mathew L. Golsteyn, an army Special Forces officer charged with murder for "killing an unarmed Afghan he believed was a Taliban bomb maker";[202] and Clint Lorance, a former Army lieutenant who had been "serving a 19-year sentence for the murder of two civilians."[203] In addition, he reversed the demotion of Edward Gallagher, a Navy SEAL "acquitted of murder … but convicted of a lesser offense in a high-profile war crimes case."[204]

Many scholars and commentators, including senior civilian and military officials, along with rank-and-file service members, sharply criticized President Trump's clemency decisions as highly unusual and as distinctively damaging to U.S. military and national security.[205] These critics focused on several aspects of the Trump pardons that arguably went far beyond the use of the power in the past. To begin with, critics noted that a presidential pardon of service members for violent offenses is exceedingly rare.[206]Although Presidents have granted clemency to service members in a variety of ways, including by issuing pardons to draft-dodgers during the Vietnam War, use of the full pardon power to expunge violent offenses committed by the armed forces is virtually unprecedented. Gary Solis, for example, has noted that even in the outlier case of Lieutenant Calley, who was convicted of killing civilians in the My Lai Massacre in Vietnam, President Nixon used the clemency power merely to grant Calley parole, not a full pardon.[207] Critics also emphasized that it is virtually unprecedented for a President to grant clemency to a member of the armed forces for acts that might constitute war crimes, as was the case in all four of these cases.[208] Furthermore, it is especially unusual to grant clemency in the military justice system prior to an actual conviction (as with Golsteyn), [209] and also extremely rare for a President to grant clemency in the

---

[201] Mihir Zaveri, *Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man*, N.Y. TIMES (May 6, 2019), https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html [https://perma.cc/L2TP-PW5C].
[202] Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/11/15/us/trump-pardons.html [https://perma.cc/XZY2-KWK7].
[203] *Id*.
[204] *Id*.
[205] *See* Ellen Ioanes, *Military Leaders are Worried that Trump Pardoning Troops Accused of War Crimes will Impair the Justice System and Undermine Overseas Bases*, BUSINESS INSIDER (Nov. 15, 2019), https://www.businessinsider.com/military-leaders-worry-that-trump-pardons-will-impair-justice-system-2019-11 [https://perma.cc/CLG4-XYA5].
[206] *See* Phillipps, *supra* note 202.
[207] *Id*.
[208] *See, e.g.*, Dan Maurer, *Should There be a War Crime Pardon Exception?*, LAWFARE (Dec. 3, 2019), https://www.lawfaremedia.org/article/should-there-be-war-crime-pardon-exception [https://perma.cc/H9ZH-TDJG].
[209] Chris Jenks, *Sticking It To Yourself: Preemptive Pardons for Battlefield Crimes Undercut Military Justice and Military Effectiveness*, JUST SECURITY (May 20, 2019),

military context over the objections of senior military and civilian leaders, as was true in all four of these cases.[210]

Multiple harms can flow from such grants of clemency. First, such grants significantly undermine the U.S. military's capacity to impose order and discipline internally. Indeed, President Trump's own Defense Secretary Mark Esper and his Army Secretary Ryan McCarthy argued that the clemency decisions "undermine[d] the military code of justice" and served as a "bad example to other troops in the field."[211] Gary Corn and Rachel Vanlandingham have condemned Trump's interference in many aspects of the Gallagher case for similar reasons, stating that the President displayed "overt disdain for the military justice system" and that "his misguided actions risk not only undermining the authority of his commanders but also eroding the honor and integrity of the U.S. armed forces."[212] Dan Maurer has contended that grants of clemency for acts that would constitute war crimes pose a distinctive threat to military justice because "other service members … may view that validation as permissive precedent."[213] And, he reasons, for war crimes the normal rationale for pardons in the civilian context—the criminalization of an act that should not be a crime or the injustice of an unfair sentence, for example—do not apply because "nobody can say that it is unjust to criminalize the killing of unarmed detainees without due process, and most military crimes carry no minimum sentence."[214] Some experts have also emphasized that grants of clemency prior to conviction are particularly problematic because they truncate the military justice process and especially "undercut…military effectiveness."[215]

Second, Trump's grants of clemency harm U.S. standing in the world and put U.S. forces at risk.[216] As Martin Dempsey, former Chairman of the Joint Chiefs of Staff, argued on Twitter, "[a]bsent evidence of innocence or injustice the wholesale pardon of US servicemembers accused of war crimes signals our troops and allies that we don't take the Law of Armed Conflict seriously. Bad Message. Bad Precedent. Abdication of moral responsibility. Risk to us."[217] Chris Jenks has elaborated on this point, arguing that these unprecedented military pardons, besides undermining the military justice system, threaten the efficacy of the military as a

---

https://www.justsecurity.org/64185/sticking-it-to-yourself-preemptive-pardons-for-battlefield-crimes-undercut-military-justice-and-military-effectiveness/ [https://perma.cc/F7NB-BWR7].

[210] *See* Maurer, *supra* note 208.

[211] *See id*.

[212] Geoffrey S. Corn and Rachel E. Van Landingham, *The Gallagher Case: President Trump Corrupts the Profession of Arms*, LAWFARE (Nov. 26, 2019), https://www.lawfaremedia.org/article/gallagher-case-president-trump-corrupts-profession-arms [https://perma.cc/NA5H-ZT34].

[213] Maurer, *supra* note 208.

[214] *Id*.

[215] Jenks, *supra* note 209.

[216] *See*, *e.g.*, Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals*, LAWFARE (May 27, 2019), https://www.lawfaremedia.org/article/when-presidents-intervene-behalf-war-criminals [https://perma.cc/626L-BQBS].

[217] *See* Phillipps, *supra* note 202 (as quoted).

fighting force and thereby national security: "The link between a fair and effective military justice system and national security is undeniable."[218] As an example, he notes that "the gross misbehavior of U.S. troops can lead to an upsurge of anti-American sentiment in the areas in which our military operates."[219] Similarly, former DOJ pardon attorney Margaret Love has contended that "pardons issued to servicemen charged with murder of civilians on foreign soil would prejudice international relations and potentially jeopardize the safety of U.S. personnel abroad."[220]

B. Possible Legislative Reforms

Because the President's pardon power is broad, it is unlikely that Congress could place direct substantive limits on that power.[221] However, Congress is not necessarily completely without recourse. In particular, although Congress could not block the pardon of someone who committed a war crime, it could enact legislation clarifying that the act of pardoning a war criminal is itself a war crime. And even if the President is ultimately deemed immune from criminal prosecution for such a war crime under the U.S. Supreme Court's unfortunate decision in *Trump v. United States*,[222] which is still an open question, a public congressional investigation and subsequent impeachment proceedings would nevertheless be possible.

Scholars have argued that when Presidents abuse the pardon power to engage in criminal bribery, obstruction of justice, or related offenses, even if such a pardon is effective for the beneficiary, it should not protect the President from impeachment or prosecution.[223] Indeed, the Office of Legal Counsel has concluded that the federal statute criminalizing bribery by public officials applies to the President because the Constitution "confers no powers on the President to receive bribes," specifically noting that the President may be impeached for bribery and

---

[218] Jenks, *supra* note 209 (citing U.S. Manual for Courts Martial).
[219] *Id*.
[220] Margaret C. Love, *War Crimes, Pardons and the Attorney General*, LAWFARE (May 22, 2019), https://www.lawfaremedia.org/article/war-crimes-pardons-and-attorney-general [https://perma.cc/K87S-EPQ4].
[221] Dan Maurer has suggested that Congress could go so far as to amend the UCMJ to specify that pardons cannot be granted for offenses that would constitute war crimes involving the use of force, pursuant to its Article I, section 8 power to regulate the armed forces. Maurer, *supra* note 208. However, it is not clear whether Congress could constitutionally limit the President's substantive pardon power.
[222] *See generally* Trump v. United States, 144 S. Ct. 2312 (2024).
[223] Bob Bauer & Jack Goldsmith, *How to Reform the Pardon Power*, LAWFARE (Feb. 26, 2020), https://www.lawfaremedia.org/article/how-reform-pardon-power [https://perma.cc/66VL-TPUG]; Andrew Kent, *Can Congress Do Anything about Trump's Abuse of the Pardon Power?*, LAWFARE (July 24, 2020), https://www.lawfaremedia.org/article/can-congress-do-anything-about-trumps-abuse-pardon-power [https://perma.cc/X28P-W53Q].

observing that individuals who are impeached may be prosecuted for the acts giving rise to impeachment.[224]

Presidential clemency for war crimes could function similarly to bribery and therefore form a similar basis for investigation, impeachment, and later prosecution. To begin with, pardoning a war criminal is likely illegal under international humanitarian law. The Geneva Conventions provide that states parties must enact legislation criminalizing grave breaches (war crimes) and "search for persons alleged to have committed or to have ordered to be committed … grave breaches, and shall bring such persons … before its own courts" or turn over such persons to another state party for prosecution.[225] This treaty text therefore imposes an obligation on states—including commanders and superiors—to investigate and criminally prosecute individuals implicated in war crimes.[226] Additional Protocol I to the Conventions elaborates further and operationalizes the obligation to investigate and prosecute,[227] making it clear that commanders must "identify and prosecute offenders."[228] Furthermore, it is well-established that commanders may be held criminally responsible for the criminal acts of their subordinates if they know or have reason to know that crimes were committed and fail to take reasonable steps to prevent or punish those crimes.[229] In short, commanders likely commit war crimes when they fail to punish the war crimes of their subordinates.

---

[224] Walter Dellinger, Office of Legal Counsel, *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, Memorandum Opinion for the Counsel to the President, at 357 n.11 (Dec. 18, 1995), [https://perma.cc/ESU9-3M56]. Some scholars reject the idea that any form of bribery related to pardons may be criminalized because they see such a broadly construed crime as inconsistent with the Pardon Power. *See*, *e.g.*, Josh Blackman & Seth B. Tillman, *The Abuse of the Pardon Prevention Act Would Criminalize Politics*, LAWFARE (Aug. 20, 2020), https://www.lawfaremedia.org/article/abuse-pardon-prevention-act-would-criminalize-politics [https://perma.cc/9DFY-7KTJ]. However, even these scholars concede that some forms of bribery, such as "suitcase full of cash" bribery, fall outside the President's Article II powers and therefore could likely be criminally prosecuted.

[225] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[226] *See* Mike Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31, 37–40 (2011).

[227] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict art. 87, June 8, 1977, 1125 U.N.T.S. 3.

[228] Schmitt, *supra* note 226, at 41.

[229] For an overview of these well-established rules in international criminal law, *see* Stuart Ford, *Has President Trump Committed a War Crime by Pardoning War Criminals?* 35 AM. U. INT'L L. REV. 757 (2020).

Applying this standard, Trump might have committed a war crime in at least some of the four cases.[230] Stuart Ford has argued that Trump very likely committed a war crime in granting clemency to Golsteyn, and possibly also by granting clemency to Behenna and Lorance.[231] Golsteyn admitted to the deliberate execution of a prisoner under his control, which if proved would be a war crime, and he was charged with premeditated murder under the Uniform Code of Military Justice.[232] As President, Trump was the Commander-in-Chief of the armed forces and therefore was Golsteyn's superior. Accordingly, Trump knew of the underlying crime, but by pardoning Golsteyn before trial, thwarted the process that would punish him if he were convicted. Thus, "there is a strong argument that the pardon of Major Golsteyn does constitute a failure to punish" and would be criminal.[233] Notably, as Ford argues, "while a commander has discretion in determining which steps to take to prevent or punish violations, that discretion is not unlimited," and, above all, "cannot render the possibility of punishment impossible."[234] Therefore, a reasonable argument can be made that Trump committed a war crime when he pardoned Golsteyn before trial because he effectively rendered punishment impossible. In Ford's view, the cases of Behenna and Lorance are a closer call because both men spent time in prison, so the pardons "did not make punishment impossible."[235] Additionally, with regard to Gallagher, Trump only reversed a demotion, so that would probably not rise to the level of a war crime under Ford's approach.[236] The bottom line is that a grant of clemency could constitute a crime under international law if the clemency rendered the punishment of the crime impossible or disproportionate.[237]

Pardoning war criminals is not only potentially a crime under international law; it could constitute a crime under domestic law as well. The War Crimes Act has long made the commission of war crimes a federal crime that may be prosecuted in civilian courts if the perpetrator or victim is a U.S. national.[238] And, in early 2023 Congress amended the statute to permit prosecutions even when neither the perpetrator nor the victim is a U.S. national, so long as the perpetrator is present in the United States.[239] Covered crimes include grave breaches of the Geneva Conventions and likely would include the possibility of convictions under a theory

---

[230] *See*, *e.g.*, Gabor Rona, *Can a Pardon Be a War Crime?: When Pardons Themselves Violate the Laws of War*, JUST SECURITY (Dec. 24, 2020), https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/ [https://perma.cc/NXP5-B6U6] (arguing that these grants of clemency by the President, as Commander-in-Chief of the U.S. Armed Forces, would constitute war crimes under a theory of command responsibility).
[231] *See* Stuart Ford, *Has Trump Committed a War Crime by Pardoning War Criminals?*, 35 AM. U. INT'L L. REV. 757, 759 (2020).
[232] *Id.* at 785.
[233] *Id*. at 786.
[234] *Id*. at 786–87.
[235] *Id*. at 787.
[236] *Id*.
[237] *Id*.
[238] 18 U.S.C. § 2441(a).
[239] 18 U.S.C. § 2441(b)(2)(B) (as amended by Pub. L. 117–351, § 2, Jan. 5, 2023, 136 Stat. 6265).

of command responsibility,[240] which, as noted above, could encompass some grants of clemency for war crimes.

Because some war crimes pardons could violate domestic criminal law, such pardons would raise similar issues to the context discussed above regarding bribery and corruption in the grant of pardons: although a presidential pardon would still have full effect under the Pardon Clause, the President (or other persons involved) could still potentially be investigated, impeached, and subsequently prosecuted based on criminality in the award of the pardon. To be sure, because the War Crimes Act does not by its terms explicitly include the President, it is possible that a court might conclude that prosecution is not possible because of the statutory presumption against applicability to the President without a clear statement to the contrary.[241] Congress could, however, amend the statute to make its applicability to the President explicit, which would render any prosecution of the President under the Act more feasible. Congress could also clarify that the statute would apply to theories of liability based on command responsibility and that pardons could form the basis for criminal responsibility under such a theory.

It is true that any such prosecution of the President could occur only after the President leaves office.[242] And of course the Supreme Court's decision in *Trump v. United States* now grants the President broad immunity for crimes committed while in office,[243] absent impeachment.[244] Indeed, it is possible that courts could deem war crimes pardons to fall within the President's exclusive Commander-in-Chief power, to which *Trump v. United States* appears to afford near-absolute presidential immunity.[245]

---

[240] *See In re* Yamashita, 327 U.S. 1, 15–17 (1946) (finding that military governor had affirmative duty as commander to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population" from the soldiers he commanded); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 604 n.36 (2006) ("[T]his Court has read the Fourth Hague Convention of 1907 to impose 'command responsibility' on military commanders for acts of their subordinates.").

[241] *See* Dellinger, *supra* note 224.

[242] The Department of Justice Office of Legal Counsel has concluded that the criminal prosecution of an incumbent President is unconstitutional. *See* A SITTING PRESIDENT'S AMENABILITY TO INDICTMENT AND CRIM. PROSECUTION, 24 Op. OLC 222 (Oct. 16, 2000); MEMORANDUM ON AMENABILITY OF THE PRESIDENT, VICE PRESIDENT, AND OTHER CIVIL OFFICERS TO FEDERAL CRIMINAL PROSECUTION WHILE IN OFFICE from Robert G. Dixon, Jr. Assistant Att'y Gen. Off. Of Legal Couns. (Sept. 24, 1973). Although Saikrishna Prakash has challenged the OLC position, *see* Saikrishna Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEXAS L. REV. 55, 60 (2021) (calling "that orthodoxy into question," noting that sitting Presidents may be criminally investigated, and arguing that they may be criminally prosecuted as well), Prakash's position is likely foreclosed by the Supreme Court's decision in *Trump v. United States*.

[243] *See* Trump v. United States, 144 S. Ct. 2312, 2327–32 (2023).

[244] *See id*. at 2342 (noting that the Impeachment Clause clarifies that notwithstanding an impeachment conviction, subsequent prosecution may proceed).

[245] 144 S. Ct. at 2327–28.

On the other hand, Article I, Section 8 specifically grants the legislature the power to regulate the armed forces. And the U.S. Supreme Court has acknowledged that Congress does indeed regulate the exercise of the pardon power with regard to the military "in virtue of the constitutional power of Congress to make rules and regulations for the government of the army and navy."[246] Because Congress's oversight powers in this domain stem in part from a specific Article I grant, war crimes pardons might receive only "presumptive" immunity under *Trump v. United States*.[247] This classification seems to allow for criminal prosecution, but only if prosecutors can show that the prosecution "would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[248] Alas, this seems to be a difficult standard to meet with regard to presidential pardons, even if those pardons constitute war crimes.

Nevertheless, regardless of whether the President or former President were ever actually prosecuted for criminal acts in the grant of a pardon, the underlying potential criminality of such acts could serve as a basis for Congress to impeach the President or at least impose additional procedural requirements regarding such pardons. For example, Congress could require that the executive branch notify Congress before issuing a pardon for an offense that would constitute a war crime and could, in addition, require the executive branch to submit justifications for any such pardons. This sort of procedural demand would not restrict the actual exercise of the President's pardon power, and so it would be more difficult to argue that a notification requirement truly encroaches on that power.[249] Indeed, it is worth noting that when the U.S. Supreme Court has expressed concern about congressional limitations on the pardon power, it has generally been in the context of substantive limitations,[250] not procedural ones.

Furthermore, even if a general notification requirement were deemed problematic, there is constitutional justification for imposing a notification requirement applicable solely to pardons for military offenses that would constitute war crimes. Any congressional requests for information about military pardons can

---

[246] *Ex Parte* Wells, 59 U.S. 307, 309 (1855); *see also* Todd Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1233 (2003).
[247] 144 S. Ct. at 2328–32.
[248] *Id.* at 2331–32.
[249] *But see* Peterson, *supra* note 246, at 1250–52 (arguing that even procedural requirements on the President might violate the pardon power). It is worth noting, however, that Peterson does acknowledge that Congress might still be able to regulate the pardon power in the military context specifically. *See id*. at 1233 (acknowledging that the U.S. Supreme Court has, "at least in dicta… recognized Congress's authority to regulate clemency in the military"). Peterson also subsequently softened his position on such procedural requirements. *See* Todd Peterson, *Procedural Checks: How the Constitution (And Congress) Control The Power Of The Three Branches,* 13 DUKE J. CONST. L. & PUB. POL'Y 211 (2017). Although the later article does not address pardons directly, it does argue that Congress has broad power to regulate the procedures utilized by the executive branch even when the executive is exercising his or her substantive authority.
[250] *See*, *e.g.*, *Ex Parte* Garland, 71 U.S. 333, 380 (1866).

be distinguished both from other notification requirements concerning pardons and from other forms of document requests involving the President. For example, in the U.S. Supreme Court case of *Trump v. Mazars*,[251] Congress sought President Trump's non-privileged personal financial information from third parties, but the Court emphasized that judges must evaluate whether the demand can be linked to a "legislative purpose," and whether that legislative purpose "warrant[s] the significant step" of involving the President, is no broader than necessary, and considers the burdens imposed on the President.[252] Arguably, Congress's special and distinctive constitutional role in overseeing military justice means that this demanding standard would be met, particularly in the narrow context of information related to presidential pardons of military offenses.

For the same reasons, Congress could also potentially enact legislation imposing after-the-fact procedural requirements on the executive branch with respect to pardons in this narrow category of cases. Such requirements could include notification regarding all presidential pardons in this domain, inclusion of supplemental documents, and justification or explanation of the rationale for the pardons. Such *post hoc* requirements would be even less intrusive than *ex ante* requirements and are very much in keeping with general legislative oversight, which often involves extensive examination of executive branch pardons after the fact.[253]

Several bills imposing such after-the-fact procedural requirements concerning pardons have been introduced in Congress over the past few years. For example, one bill would require the President, no later than three days after any pardon or reprieve, to publish information about the pardon or reprieve in the Federal Register, including the name of the person, the date of the pardon or reprieve, and the full text of the pardon or reprieve.[254] A second bill would require, for certain categories of pardons or other clemency grants, that the President or Attorney General submit within 30 days to the House and Senate Judiciary Committees materials obtained or produced by the Executive Office of the President and the Department of Justice related to the pardon or other act of clemency.[255] The bill also would amend the federal offense of bribery to make it clear that the President and Vice President may be prosecuted for bribery in the grant of pardons or other grants of executive clemency, while also prohibiting presidential self-pardons.

---

[251] *See generally* Trump v. Mazars, 591 U.S. 848 (2020).
[252] *Id*. at 869.
[253] *See* MICHAEL A. FOSTER, CONG. RSCH. SERV., R46179, PRESIDENTIAL PARDONS: OVERVIEW AND SELECTED LEGAL ISSUES 16–17 (2020), https://crsreports.congress.gov/product/pdf/R/R46179 [https://perma.cc/VTU5-X3Y6].
[254] Presidential Pardon Transparency Act of 2019, H.R. 1348, 116th Cong. § 2 (2019); Presidential Pardon Transparency Act of 2021, H.R. 252, 117th Cong. § 2 (2021).
[255] Pardon Power Prevention Act, H.R. 8363, 116th Cong. (2020) (Part I of Protecting Our Democracy Act).

In my view, the rationale underlying these proposed bills would likewise support legislation imposing procedural requirements on pardons of military offenses that would constitute war crimes. Indeed, such *post hoc* procedural requirements imposed by Congress are de minimus, are not a burden on the pardon power itself, and are surely related to the longstanding practice of congressional oversight of pardons, particularly given Congress's specifically delineated constitutional role to regulate the armed forces. Thus, even if impeachment proceedings or criminal prosecutions were never pursued, the mere fact that the act of clemency for war crimes is defined as criminal provides justification for Congress to impose various notification requirements with regard to these crucial pardons. In addition, a criminal designation would prevent executive branch officials involved in processing the pardon from later claiming that they believed their actions were lawful.

C. Possible Executive Branch Action

Even without congressional action, the outgoing administration (or any administration inclined to delineate the outer bounds of executive power) could take steps unilaterally to embed the idea that there are some limits to the President's broad pardon power. First, the executive branch could issue a new legal opinion clarifying that Congress retains at least an oversight role with regard to military pardons. Thus, the executive could acknowledge the ability of Congress to request notification and documentation related to such pardons. An OLC opinion would be a well-established vehicle for such an acknowledgement, although the White House counsel or the Attorney General could, as they have done in some other contexts,[256] issue a written statement on the topic.

In the past, Congress has obtained information about pardons from the executive branch when requested, including through direct presidential testimony.[257] The attorney general has stated, however, that the executive branch has complied with any such congressional requests "only voluntarily and without conceding congressional authority to compel disclosure."[258] This view is also reflected in the Code of Federal Regulations (CFR) provisions that set forth executive branch procedures related to pardons.[259] Although the provisions do not refer specifically to congressional requests for information, a provision entitled

---

[256] *See*, *e.g.*, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS (2013) (exemplifying executive branch compliance with statute mandating annual reporting to Congress). https://www.justice.gov/archive/ag/annualreports/agreporthumantrafficking2013.pdf [https://perma.cc/DG4X-MY6S].

[257] *See*, *e.g.*, Foster, *supra* note 253, at 16.

[258] Letter from Janet Reno, Att'y Gen. to President Bill Clinton (Sept. 16, 1999) (quoted in H.R. Rep. No. 106-488, at 120 (1999)); *see also* Foster, *supra* note 253, at 16 & n. 122.

[259] 28 C.F.R. §§ 1.1–1.11.

"Disclosure of files" suggests that the attorney general retains the discretion to disclose pardon materials: any "petitions, reports, memoranda, and communications submitted or furnished in connection with the consideration of a petition for executive clemency…may be made available for inspection, in whole or in part, when in the judgment of the Attorney General their disclosure is required by law or the ends of justice."[260] None of these assertions, however, pertains to requests relating to military pardons, so a new OLC opinion could at least address that context specifically, without dislodging the executive's general prerogatives.

Second, even if the executive branch decided not to issue such a legal opinion, it could establish a general policy of notifying and providing information to Congress concerning military pardons, and it could formalize this policy in the CFR or a Presidential Decision Directive. Although such a policy would not be legally binding and could be subject to change even more readily than an executive branch legal opinion, it would set an important norm that could be "sticky" as a practical matter.

Third, the DOD could issue more detailed guidelines and procedures for military pardons, including substantive guidance that war crimes offenses should not be pardoned, that Congress should receive advance notification of any such pardons, and that there should be extensive consultation within the executive branch before any such pardons are granted. The guidance could emphasize the key reasons for disfavoring pardons in this area: the special role that prosecution for such offenses plays in military order and discipline, the need for U.S. military action abroad to be perceived as legitimate, and the protection of U.S. service members from attacks. Furthermore, the regulations could note that full pardons, and in particular full pardons prior to conviction, are especially problematic as compared to other forms of executive clemency, such as the commutation of a sentence after conviction and time served. These regulations could also note the obligation, under international humanitarian law, to investigate and punish war crimes, and the risk that pardons (particularly pre-emptive pardons) could run afoul of that obligation.

None of these regulations would be enforceable due to the breadth of the pardon power, but, as in the case of the CFR, they would set a best practice standard and establish normative guidelines for military pardons. Such regulations can serve as an important framework that shapes action. And, although a rogue President might ignore such regulations, departure from standard practice would at a minimum spark public debate and discussion.

Finally, the current President, or a future President inclined to do so, should denounce President Trump's decision to grant executive clemency to the four

[260] *Id*. § 1.5.

service members. The President could issue the denunciation in a speech or even in more informal remarks, for example in a press briefing. Such a statement could articulate the harms of executive clemency for violent war crimes noted above. It could also focus on the particular harms of granting clemency prior to conviction within the military justice system. It is true that a presidential statement condemning the clemency grants would not have any legal impact. Nonetheless, such a statement would at least send a strong message about norms and the appropriate scope of presidential pardons in the military context.

D. Constitutional Issues

Due to the breadth of the President's pardon power, any actions that might be deemed to limit its exercise, whether in the military pardon context or in other contexts, present constitutional risks. Legislation substantively limiting the scope of the President's pardon power would clearly be unconstitutional. With respect to military pardons, in particular, the breadth of the President's Commander-in-Chief and foreign affairs powers would provide added justification for concluding that substantive constraints on the power are impermissible.

A reasonable argument can be made, however, that Congress can criminalize corrupt pardons and, by similar logic, criminalize pardons that are war crimes under international law. To be sure, it may be unlikely that the President would be prosecuted for granting such pardons, and it is possible that the President is immune from prosecution for such official acts. Still, the potential criminality of such pardons supplies a basis for either executive branch or legislative branch investigation, as well as possible impeachment proceedings.

Likewise, legislating procedural requirements related to the President's exercise of the pardon power, such as requirements to provide documentation to Congress either before or after the pardon, can be constitutionally justified. Such legislation could face constitutional challenge as an undue intrusion into the President's pardon power. And even acts of congressional oversight that might seem ordinary in other contexts, such as *post hoc* hearings seeking testimony and other information about pardons, might be subject to this sort of challenge. Nonetheless, in particular instances where the pardon grant may be deemed criminally corrupt or a war crime, the Constitution arguably permits legislatively mandated procedures or other congressional oversight.

IV. INSPECTORS GENERAL

Inspectors General (IGs) are lodged within federal agencies and play a crucial role in investigating waste, fraud, and other abuse. Although IGs exist throughout the federal government, they play a particularly important role in

national security agencies because courts are generally less likely to intervene to review the legality of executive branch actions relating to national security. As I have argued elsewhere, they offer an important avenue of what might be termed "administrative accountability."[261] And, as Shirin Sinnar has demonstrated, despite IGs' lack of enforcement power and their relatively weak investigative tools, they have conducted important investigations within national security agencies and provided critical, public accounts of executive branch misconduct.[262] Indeed, Sinnar has argued that in some contexts, national security IGs have provided *more* oversight of executive branch wrongdoing and greater protection for individual rights than the courts.[263] She has observed that, "[a]t their strongest, IG reviews provided impressive transparency on national security practices, identified violations of the law that had escaped judicial review, and even challenged government conduct where existing law was ambiguous or undeveloped."[264]

Under the existing legislative framework, a rogue President has significant ability to disrupt the functioning of these IGs. Congress should therefore provide important checks by enacting greater protections for IGs. For example, Congress could require that IGs can only be removed "for cause" and impose enhanced obligations for the President to notify Congress before removing an IG. In addition, Congress could provide more detailed qualifications for IGs so that a President would find it difficult to appoint an unqualified political lackey to this crucial oversight role. Significantly, Congress did take some strides in 2022 by imposing stronger qualification and notification requirements,[265] but these reforms stopped short of imposing for-cause removal restrictions, which are crucial to protect IGs' independence. And though there are some constitutional concerns about the extent to which Congress can legislate for-cause removal protections (discussed below), they are not insurmountable. Finally, even in the absence of new legislation, the executive branch could take unilateral measures to strengthen IGs' independence.

A. Overview and Risk of Abuse by a Rogue President

1. History and Purpose of Inspector General Statutes

---

[261] *See generally* Laura A. Dickinson, *Lethal Autonomous Weapons Systems: The Overlooked Importance of Administrative Accountability*, *in* THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 69, 83-94 (Ronald T.P. Alcala & Eric Talbot Jensen eds., 2019).
[262] *See*, *e.g.*, Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).
[263] *Id*. at 1031, 1074.
[264] *Id*. at 1031. For an argument that Inspectors General provide important oversight functions but currently lack sufficient protections to ensure independence, *see* Heidi Kitrosser, *"A Government that Benefits from Expertise": Unitary Executive Theory and the Government's Knowledge Producers*, 72 SYR. L. REV. 1473, 1486-88 (2022).
[265] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395, Title LII (hereinafter FY2023 NDAA).

The current legal framework for federal IGs in the United States dates to the post-Watergate era.[266] Although IGs have existed in the military since the country's founding, and the rise of the administrative state in the 20th century brought internal agency audits and officials to run them,[267] the modern inspector general statute[268] has its origins in a 1978 law that, in part, responded to President Nixon's executive branch overreach.[269] These watchdogs investigate agencies and report to the agency head as well as Congress in order to provide important oversight and accountability.[270]

Currently, 74 statutory IGs operate across the federal government, with most of them deriving their authority from the post-Nixon-era Inspector General Act, and a few established through separate statutory regimes.[271] They are intended to be "independent, nonpartisan officials" who work to prevent and detect waste, fraud, and abuse in the federal government.[272] The Offices of the IGs (OIGs) conduct reviews of agency programs and operations through audits, investigations, inspections, and evaluations, and they provide findings and recommendations for improvement, including reports to Congress.[273]

The statutory IGs are often classified into four types: establishment, designated federal entity (DFE), other permanent, and special.[274] The majority of IGs are either establishment or DFE and are governed by the Inspector General Act of 1978, as amended.[275] The distinction between establishment and DFE IGs turns primarily on how they are appointed. Establishment IGs are appointed by the President with the advice and consent of the Senate,[276] while DFE IGs are appointed by the agency head.[277] Establishment IGs are generally assigned to cabinet

---

[266] *See*, *e.g.*, *Organizations Call on Congress to Urgently Pass Inspector General Removal Protections*, PROJECT ON GOV'T OVERSIGHT, (Apr. 10, 2020), https://www.pogo.org/policy-letters/organizations-call-on-congress-to-urgently-pass-inspector-general-removal-protections [https://perma.cc/S9DQ-YWWT] (noting that Inspectors General were created in the wake of the Watergate scandal to provide independent oversight of agency waste, fraud, and abuse).
[267] *See* BEN WILHELM, CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 1 (2013), https://crsreports.congress.gov/product/pdf/R/R45450 [https://perma.cc/LT2C-CXDM].
[268] 5 U.S.C. §§ 401–23.
[269] *See*, *e.g.*, *Organizations Call on Congress to Urgently Pass Inspector General Removal Protections, supra* note 266.
[270] *See* Ellen Nakashima, *Trump Removes Inspector General Who Was to Oversee $2 Trillion Stimulus Spending*, WASH. POST (Apr. 7, 2020), https://www.washingtonpost.com/national-security/trump-removes-inspector-general-who-was-to-oversee-2-trillion-stimulus-spending/2020/04/07/2f0c6cb8-78ea-11ea-9bee-c5bf9d2e3288_story.html [https://perma.cc/K32C-3FMC].
[271] WILHELM, *supra* note 267, at 5.
[272] *Id*. at 1.
[273] *Id.*
[274] *Id.* at 4.
[275] *Id.* at 5.
[276] *Id.* at 12.
[277] *Id.*

departments, cabinet-level agencies, and larger agencies in the executive branch, whereas DFEs are assigned to smaller entities, including specific intelligence agencies that are sub-entities within DOD.[278] Other permanent IGs are governed by separate IG-specific statutes distinct from the Inspector General Act of 1978, as are special IGs, except that special IGs are not permanent in duration.[279]

Here, I focus on permanent statutory IGs in agencies whose missions relate directly to national security. These include establishment IGs in the Department of State (DOS), DOD, the National Security Agency (NSA), the DOJ, the Department of Homeland Security, the Treasury Department, the Department of Energy, the Department of Commerce (DOC), and the National Reconnaissance Office.[280] In addition, I include DFE IGs in the Defense Intelligence Agency and the National Geospatial Intelligence Agency.[281] Finally, I include the IGs in the Central Intelligence Agency (CIA) and the Intelligence Community (IC), both of which are permanent IGs governed by separate statutes.[282]

The various statutory frameworks for IGs can be viewed as protecting the core rule-of-law values the IGs are meant to serve: independence (and impartiality), transparency, and accountability. Due to the unique position of IGs as both serving the agency in which they are situated and reporting to Congress, they also play an important role in fostering inter-branch dialogue between the executive and legislative branches. Key statutory elements that protect these values include qualifications criteria and procedures for IG appointment, restrictions on removal of IGs, and requirements to notify and report to Congress and the public.

2. Appointment of Inspectors General

Most IGs must meet specific statutory criteria. For example, the Inspector General Act of 1978, as amended, provides that they are to be appointed "without regard to political affiliation" and on the basis of "integrity" and "demonstrated ability."[283] The separate statutes establishing the IC IG[284] and CIA IG[285] include the same qualifications language and also require that the appointments must "be made on the basis of compliance with the security standards" of the agency and "prior experience."[286] Half of the IGs are appointed by the President with the advice and

---

[278] *Id.* at 4.
[279] *Id.*
[280] 5 U.S.C. § 401(1).
[281] WILHELM, *supra* note 267, at 5–6.
[282] 50 U.S.C. §§ 3517, 3033. I do not focus on the Special Inspector General for Afghanistan Reconstruction, although its work concerns national security, because it is not a permanent IG.
[283] 5 U.S.C. §§ 403(a) (establishment IGs), 415(c) (DFE IGs).
[284] 50 U.S.C. § 3517(b)(1).
[285] 50 U.S.C. § 3033(c)(2).
[286] The supplemental qualifications language for the IC IG and the CIA IG differs slightly; the IC IG must also be appointed on the basis of "integrity," the "security standards of the intelligence community," and "experience in the field of intelligence or national security," 50 U.S.C. §

consent of the Senate,[287] including the IC IG[288] and CIA IG,[289] while half are appointed by the head of the affiliated federal entity.[290] In 2022, Congress amended the primary statutory framework to limit those who may serve as IGs in an acting capacity when a vacancy occurs, requiring that only certain officials within the IG community may fill the position.[291] This reform helps to ensure that only qualified individuals can serve in the IG role.

3. Removal of Inspectors General

The primary IG statute imposes various procedural requirements on the executive branch related to the removal of an IG. The statute requires the appointing authority to notify Congress of the removal (or transfer) and supply the reasons for removal (or transfer) to Congress in writing, 30 days in advance of the removal.[292] In the case of establishment IGs, the President may remove the IG, and in the case of DFEs, it is the head of the DFE (which in some cases may be a Board or Commission). The IC IG and the CIA IG statutes are worded similarly to the Inspector General Act, providing that the President may remove the IC IG, but must notify the congressional intelligence committee in writing no later than 30 days prior to the effective date of the removal and must "communicate . . . the substantive rationale, including detailed and case-specific reasons, for . . . removal."[293]

The current statutes do not, however, *substantively* constrain removal authority, for example by imposing a "for-cause" standard.[294] After considering legislative proposals to include such a "for-cause" restriction on removal in 2008[295] and again in 2022, Congress ultimately failed to do so.[296] The legislative history suggests that members of Congress believed that the notification provision would serve as a sufficient bulwark for IG independence by fostering inter-branch

---

3033(c)(2), whereas the CIA IG must be appointed on the basis of the intelligence standards of the "Agency" and experience in the field of "foreign intelligence," 50 U.S.C. §3517(b)(1).

[287] WILHELM, *supra* note 267, at 12.

[288] 50 U.S.C. § 3033(c)(1).

[289] 50 U.S.C. § 3517(b)(1).

[290] WILHELM, *supra* note 267, at 12.

[291] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, § 5203, 136 Stat. 3227, 3228–29 (2022).

[292] 5 U.S.C. § 403(b) (establishment IGs); 5 U.S.C. § 415(e) (DFE IGs); Inspector General Reform Act of 2008, Pub. L. No. 110-409, § 3, 122 Stat. 4302 (2008).

[293] 50 U.S.C. § 3033(c)(4)(A); 50 U.S.C. § 3517(b)(6)(A).

[294] CRS LEGAL SIDEBAR, CONG. RSCH. SERV., LSB10476, *PRESIDENTIAL REMOVAL OF IGS UNDER THE INSPECTOR GENERAL ACT 2* (2020) (hereinafter CRS LEGAL SIDEBAR).

[295] Improving Government Accountability Act, H.R. 928, 110th Cong. § 2(a) (2008). (The proposed provision, entitled "Enhancing Independence of Inspectors General," would mandate that an IG could be removed only for "[p]ermanent incapacity," "[i]nefficiency," "[n]eglect of duty," "[m]alfeasance," "[c]onviction of a felony or conduct involving moral turpitude," "[k]nowing violation of a law, rule, or regulation," "[g]ross mismanagement," "[g]ross waste of funds," or "abuse of authority.")

[296] *See* CRS LEGAL SIDEBAR, *supra* note 294, at 3.

dialogue.[297] And the 2022 reforms did fortify the notification requirements somewhat, by mandating that the appointing authority must provide to Congress, prior to IG removal, a "substantive rationale, including detailed and case-specific reasons."[298]

4. Reporting Requirements

The IG statutes also mandate that IGs conduct investigations and prepare reports, which serve as a mechanism for ensuring transparency and oversight, as well as protecting IG independence. The primary IG Act requires both establishment and DFE IGs to issue semi-annual reports summarizing the activities of their offices and to make these reports available to the affiliated agency head, Congress, and the public.[299] The establishment IGs must also immediately report any "serious or flagrant problems" to the agency head, who in turn must transmit any such report to the appropriate congressional committees within seven days.[300] And, in general, agency IGs must keep both the head of the agency and Congress "fully and currently informed" of any "fraud and other serious problems, abuses and deficiencies" relating to agency programs or operations.[301]

The special statutes regulating the IC IG[302] and the CIA IG[303] include similar reporting requirements, with a few notable differences. The content of the reports may be classified, and therefore more limited, although the statutes specify that the congressional intelligence committees must receive certain minimal information.[304] There is also no requirement that the IC and CIA IGs make their reports public. However, Congress has imposed additional reporting mandates on the CIA IG and the IC IG. For example, the statutes require that these IGs must have access to information (including classified information) and personnel necessary to their work[305] and must certify to Congress that they have had "full and direct access to all information relevant to the performance of [their] functions."[306]

---

[297] *See* S. REP. NO. 110-262, at 4 (2008); *see also* CRS Legal Sidebar, *supra* note 294, at 2.
[298] FY2023 National Defense Authorization Act § 5202. The amendments also both mandated that information related to an executive branch inquiry concerning an IG's removal must be provided to Congress and clarified that congressional notification is also required before the placing of an IG on non-duty status, except in limited circumstances. *Id*.
[299] 5 U.S.C. §§ 405(b)–(d) (establishment IGs), 415(g) (DFE IGs); s*ee also* WILHELM, *supra* note 267, at 16–17.
[300] 5 U.S.C. §§ 405(e) (establishment IGs), 415(g) (DFE IGs); s*ee also* WILHELM, *supra* note 267, at 17.
[301] 5 U.S.C. §§ 404(a)(5) (establishment IGs), 415(g) (DFE IGs).
[302] 50 U.S.C. §§ 3033(k)(1) (semi-annual reporting requirement), 3033(k)(2) (serious or flagrant abuse reporting requirement).
[303] 18 U.S.C. § 3517(d) (mandating that the CIA IG provide semi-annual classified reports to the CIA Director and that the Director provide these reports, along with any pertinent comments, to the congressional intelligence committees, no later than 30 days after receiving them).
[304] *See* 50 U.S.C. § 3033 (k)(B) – (C) (IC IG); 50 U.S.C. § 3517 (d)(1) (CIA IG).
[305] *See* 50 U.S.C. § 3033 (g)(2) (IC IG); 50 U.S.C. § 3517 (e)(1)-(2) (CIA IG).
[306] 50 U.S.C. § 3033 (k)(1)(B)(v) (IC IG); 50 U.S.C. § 3517 (d)(1)(D).

In addition, beyond the obligation to immediately report serious or flagrant abuse, both the IC IG[307] and the CIA IG[308] must also immediately report directly to the congressional intelligence committees if there is a dispute between the IG and the Director of National Intelligence (DNI) or the CIA Director, respectively. Furthermore, the chair or ranking minority member of the congressional intelligence committees are entitled to request investigations by either the IC IG[309] or the CIA IG,[310] and based on such requests the DNI or CIA Director, as the case may be, must provide reports of those investigations to Congress.

The dual role of IG reporting to the agency (or DFE) and to Congress is a distinctive feature of IGs. As noted by the Project on Government Oversight, "That's what made that law so special. . . The inspector general is unlike any other position in government, where a member of the executive branch is authorized to speak directly to Congress."[311] The right of IGs to confer with Congress directly confers a measure of independence and facilitates congressional oversight of agencies. And transparency is served by the requirement that the IGs make reports available to the public semi-annually.[312]

5. Risk of Abuse

As currently written and interpreted, the IG statutes are ripe for abuse by a rogue President. The risks are manifold. First, the applicable statutes do not currently require that IGs can be removed only "for-cause," leaving IGs vulnerable to politically motivated firing. Second, statutory ambiguities have permitted agency heads to block IG investigations. Third, in multiple administrations, the executive branch has taken positions undermining even the relatively weak statutory requirements that the President notify Congress in advance and provide justifications before removing an IG. Instead, the executive branch has interpreted the statutes as requiring only pro forma, non-substantive notification. Thus, the existing legal framework allows Presidents to interfere with the important work of the IGs, eviscerating their independence.

During his first presidency, President Trump's attacks on IGs in the national security domain illustrate these risks. Here, I focus on his treatment of the IC IG, the DOD IG, and the DOS IG, which violated longstanding norms and interfered with the independence of these officials, independence that is especially crucial in the national security realm.

---

[307] 50 U.S.C. § 3033 (k)(3).
[308] 50 U.S.C. § 3517 (d)(2).
[309] 50 U.S.C. § 3033 (k)(4).
[310] 50 U.S.C. § 3517 (d)(4).
[311] Nakashima, *supra* note 270.
[312] *See* WILHELM, *supra* note 267, at 17.

a. Firing of Intelligence Community Inspector General

Of all his attacks on IGs, Trump's treatment of IC IG Michael Atkinson was probably the most egregious. Atkinson, a Trump appointee, set in motion the chain of events that led to Trump's first impeachment when he informed Congress that he had received an "urgent" complaint from an intelligence community whistleblower regarding Trump's communications with Ukrainian President Volodymyr Zelensky.[313] The complaint sparked allegations that Trump had solicited interference in the 2020 election by asking Ukraine's President to investigate Trump's political opponents, including Joe Biden.[314] The U.S. House of Representatives impeached President Trump in late 2019,[315] but the U.S. Senate acquitted him in early 2020.[316] Shortly thereafter, on April 3, 2020, Trump fired Atkinson, placing him on administrative leave in order to skirt the statutory requirement that the President provide 30 days' notice of the termination to congressional intelligence committees.[317] In a letter to Senate and House Intelligence Committees notifying them of his intent to fire Atkinson, Trump stated,

> As is the case with regard to other positions where I, as 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 this Inspector General.[318]

In a press conference the following day, Trump made a more direct statement suggesting he was retaliating against Atkinson for his handling of the whistleblower complaint: "He took a whistleblower report, which turned out to be a fake report—it was fake. It was totally wrong. It was about my conversation with the President

---

[313] Natasha Bertrand & Andrew Desiderio, *Trump Fires Intelligence Community Watchdog Who Defied Him on Whistleblower Complaint*, POLITICO (Apr. 3, 2020), https://www.politico.com/news/2020/04/03/trump-fires-intelligence-community-inspector-general-164287 [https://perma.cc/7ZYQ-TZCC].

[314] *Id.*

[315] Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Dec. 18, 2019), https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html [https://perma.cc/9B5P-UX97].

[316] 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 [https://perma.cc/XE5V-HXCF].

[317] Bertrand & Desiderio, *supra* note 313.

[318] Letter from President Donald Trump to Sen. Richard Burr, Chair, S. Select Comm. on Intel., Sen. Mark Warner, Vice Chair, S. Select Comm. on Intel., the Hon. Adam Schiff, Permanent Chair, H.R. Permanent Select Comm. on Intel., and the Hon. Devin Nunes, Ranking Member, H.R. Permanent Select Comm. on Intel. (Apr. 3, 2020), https://www.politico.com/f/?id=00000171-4308-d6b1-a3f1-c7d8ee3f0000 [https://perma.cc/M6EQ-SJ5X].

of Ukraine. He took a fake report, and he brought it to Congress, with an emergency. Okay? Not a big Trump fan—that, I can tell you."[319]

The firing drew swift, bipartisan condemnation. Sen. Mark Warner, the vice chair of the Senate Intelligence Committee, called Atkinson's termination "unconscionable" and an attempt to "undermine the integrity of the intelligence community."[320] House Intelligence Committee Chairman Rep. Adam Schiff described the firing as "retribution" coming in the "dead of night" and called it "yet another blatant attempt by the President to gut the independence of the intelligence community and retaliate against those who dare to expose presidential wrongdoing."[321] A bipartisan group of eight Senators sent a letter to President Trump noting that "Congress intended that Inspectors General only be removed when there is clear evidence of wrongdoing or failure to perform the duties of the office, and not for reasons unrelated to their performance, to help preserve IG independence."[322] Sen. Charles E. Grassley, chair of the Senate Whistleblower Protection Caucus, raised serious questions about the President's treatment of Atkinson and demanded more information on Atkinson's removal.[323] Grassley emphasized that inspectors general "often serve as an outlet to whistleblowers" who "shine a light" on problems in government.[324] A few weeks later, after Trump fired the DOS IG as well, Grassley's condemnation grew even more pointed: "If the President has a good reason to remove an inspector general, just tell Congress what it is. Otherwise, the American people will be left speculating whether political or self interests are to blame."[325] Michael Horowitz, chair of the Council of the Inspectors General on Integrity and Efficiency, also strongly criticized Atkinson's firing and extolled Atkinson's "integrity, professionalism, and commitment to the rule of law and independent oversight," including "his actions in handling the Ukraine whistleblower complaint, which the then Acting Director of National

---

[319] Aaron Blake, *Inspector General Fired by Trump Sends Warning Signal for American Democracy*, WASH. POST (Apr. 6, 2020), https://www.washingtonpost.com/politics/2020/04/06/inspector-general-fired-by-trump-sends-warning-signal-american-democracy/ [https://perma.cc/WT5F-EE8K].

[320] Bertrand & Desiderio, *supra* note 313.

[321] *Id*.

[322] Letter from Bipartisan Senators to President Trump, 1–2 (Apr. 8, 2020), https://www.grassley.senate.gov/imo/media/doc/2020-04-08%20CEG%20et%20al%20to%20POTUS%20(IC%20IG%20removal).pdf [https://perma.cc/7QJ2-4LZY].

[323] Ellen Nakashima, *Inspector General who Handled Ukraine Whistleblower Complaint Says 'It Is Hard Not to Think' Trump Fired Him for Doing His Job*, WASH. POST (Apr. 6, 2020), https://www.washingtonpost.com/politics/inspector-general-who-handled-ukraine-whistleblower-complaint-says-its-hard-not-to-think-he-was-fired-by-trump-for-doing-his-job/2020/04/06/083166de-77b4-11ea-b6ff-597f170df8f8_story.html [https://perma.cc/SWG6-PAAS].

[324] *Id*.

[325] Andrew Desiderio, *Grassley Says White House 'Failed' on Watchdog Firings*, POLITICO (May 26, 2020), https://www.politico.com/news/2020/05/26/grassley-watchdog-white-house-283324 [https://perma.cc/5EQ5-SVS6].

Intelligence stated in congressional testimony was done 'by the book' and consistent with the law."[326]

Trump's termination of Atkinson also may well have violated the existing removal provisions in the statute because the President arguably did not provide sufficient notice or explanation of the termination. Senator Grassley adopted this view, contending, for example, that the President violated the statute's 30-day notice requirement and failed to give an adequate justification for the action.[327] Further, he criticized the President's decision to fill the vacant IG slot with a political appointee in an "acting capacity," arguing that such appointments create an appearance of a "glaring conflict of interest."[328] He emphasized that "Congress established inspectors general to serve the American people — to be independent and objective watchdogs, not agency lapdogs."[329] This line of argument implied that filling an IG slot with a political appointee on an acting basis contravened the spirit of the statute, which highlights the need for IG independence and specifically states that appointments should be made "without regard for political affiliation."[330]

White House Counsel Pat Cipollone defended the removal, emphasizing that the statute grants the President discretion to terminate an IC IG for any reason and does not impose a "for-cause" standard.[331] Cipollone noted that the President also did not violate the notice requirement because, technically, he did not fire Atkinson immediately. Rather, he placed Atkinson on administrative leave and informed Congress of his future intent to fire the IG, thereby complying with the 30-day notice rule. Furthermore, Cipollone emphasized that, "[w]hen the President loses confidence in an inspector general, he will exercise his constitutional right and duty to remove that officer."[332] Cipollone maintained that if the statute is interpreted to provide limitations on the President's discretion, it might unconstitutionally intrude into the President's Article II authority.[333]

---

[326] Bertrand & Desiderio, *supra* note 313.
[327] Desiderio, *supra* note 325.
[328] *Id*.
[329] *Id*.
[330] 5 U.S.C. §§ 403(a) (establishment IGs), 415(c) (DFE IGs).
[331] Letter from White House Couns. Pat Cipollone to Sen. Charles Grassley, Chair, S. Comm. on Fin., (May 26, 2020) (hereinafter Cipollone Letter), at 2, https://www.grassley.senate.gov/imo/media/doc/2020-05-26%20White%20House%20Counsel%20to%20CEG%20(IC%20IG%20and%20State%20IG).pdf [https://perma.cc/GN3B-D9DD]. (Cipollone cited a D.C. Circuit's decision concluding that President Obama had complied with the IG statute in a similar situation, providing an explanation to Congress only *after* placing the IG on administrative leave and ultimately firing him. Walpin v. Corp. for Nat'l Cmty. Servs., 630 F.3d 184, 187 (D.C. Cir. 2011).
[332] *Id*. at 1.
[333] *Id.* at 1–2.

b. Firing of Department of Defense Inspector General

A few days after firing Atkinson, the President ousted acting DOD IG Glen Fine.[334] Fine, appointed by President Obama, was a career official who had served in Republican and Democratic administrations and had previously held the position of DOJ IG for eleven years.[335] Fine received no advance notice or explanation for his termination. After announcing the decision, Trump indicated he terminated Fine for political reasons: "We have a lot of IGs in from the Obama era…And as you know, it's a presidential decision. And I left them… But … we have, you know, reports of bias."[336]

Trump's firing of Fine, coming on the heels of the Atkinson termination, drew sharp condemnation as an assault on the independence of inspectors general. Democrats in Congress criticized the move, with U.S. House of Representatives Speaker Nancy Pelosi calling Fine's removal "part of a disturbing pattern of retaliation by the President against overseers fulfilling their statutory and patriotic duties to conduct oversight on behalf of the American people."[337] Bipartisan experts also decried the decision. For example, Paul Rosenzweig, a Department of Homeland Security political appointee in the George W. Bush administration, condemned Fine's ouster as "an affront to independence and oversight."[338]

c. Firing of the Department of State Inspector General

Trump continued his retaliatory purge of national security watchdogs when he placed DOS IG Steve Linick on administrative leave, effectively firing him.[339] Linick, who was appointed to the role in 2013 and had previously served as a senior anti-fraud official in the Justice Department, had come under fire for a number of controversial Trump-era investigations.[340] Most notably, he was investigating whether Secretary of State Mike Pompeo was improperly using a political appointee to run personal errands.[341] He was also launching an inquiry into whether Pompeo had used an emergency declaration against Iran to bypass congressional

---

[334] Nakashima, *supra* note 270.
[335] *Id*.
[336] *Id*.
[337] Press Release, Nancy Pelosi, Speaker, House of Representatives, Pelosi Statement on Sudden Removal of Head of CARES Act Oversight (Apr. 7, 2020), https://pelosi.house.gov/news/press-releases/pelosi-statement-on-sudden-removal-of-head-of-cares-act-oversight [https://perma.cc/K6TC-76NE].
[338] Nakashima, *supra* note 270.
[339] Philip Rucker et al., *Trump Ramps up Retaliatory Purge with Firing of State Department Inspector General*, WASH. POST (May 16, 2020), https://www.washingtonpost.com/politics/trump-ramps-up-retaliatory-purge-with-firing-of-state-department-inspector-general/2020/05/16/8f8b55da-979a-11ea-82b4-c8db161ff6e5_story.html [https://perma.cc/DMQ3-RQUJ].
[340] *Id*. Linick had also served as the Federal Housing Finance Agency Inspector General. *Id.*
[341] *Id*.

approval for an $8 billion arms sale to Saudi Arabia.[342] In addition, Linick's office had released reports stating that the DOS Bureau of International Organization Affairs leadership had harassed staffers over alleged disloyalty to the Trump administration; that a civil service employee working in Iranian and Persian Gulf affairs had been fired due to her Iranian descent, her work supporting the Obama Administration, and her alleged political opposition to President Trump; and that conflict between Ambassador Robert Pence and the Helsinki Embassy's second-in-command had fostered a toxic work environment.[343]

Secretary Pompeo requested Linick's removal because he claimed the IG had failed "to perform his duties over a series of months" and had displayed "strange and erratic behavior."[344] Nevertheless, Linick contended that his ouster was retaliatory. Linick told congressional investigators that a close personal friend of Pompeo's had "bull[ied]" Linick and tried to dissuade him from investigating the Secretary.[345]

As in the case of the other IG firings, congressional leaders from both parties criticized the action. Sen. Grassley said that Trump's explanation for Linick's firing was not "sufficient" under governing law and demanded more information.[346] Sen. Mitt Romney, referring to all the IG terminations collectively, tweeted that "[t]he firings of multiple Inspectors General is unprecedented; doing so without good cause chills the independence essential to their purpose. It is a threat to accountable democracy and a fissure in the constitutional balance of power."[347]

As with Atkinson, Trump's decision to place Linick on administrative leave at the same time he informed Congress of his intent to fire him may have violated the 30-day notice requirement in the statute, which is virtually identical to the notice requirement in the IC IG statute. In addition, the ouster may have interfered with

---

[342] Catie Edmondson, *Ousted Watchdog Says State Dept. Official Pressured Him to End Inquiry into Pompeo*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/us/politics/steve-linick-mike-pompeo-inspector-general.html [https://perma.cc/U72E-ZYWK].
[343] Rucker et al., *supra* note 339.
[344] Abigail Williams & Haley Talbot, *Pompeo denies wrongdoing in Trump removal of State Department watchdog*, NBC NEWS (June 12, 2020), https://www.nbcnews.com/politics/politics-news/pompeo-denies-wrongdoing-trump-removal-state-department-watchdog-n1230776 [https://perma.cc/65UP-4FKK].
[345] Edmondson, *supra* note 342; *see also* Edward Wong et al., *Pompeo Aide Who Pushed Saudi Arms Sale Said to Have Pressured Inspector General*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/10/us/politics/pompeo-inspector-general-saudi-arms.html [https://perma.cc/36Z6-4528].
[346] Press Release, Sen. Charles Grassley, Grassley Statement On Termination Of State Dept. Inspector General (May 16, 2020), https://www.grassley.senate.gov/news/news-releases/grassley-statement-termination-state-dept-inspector-general [https://perma.cc/VTE8-352F].
[347] Mitt Romney (@SenatorRomney), TWITTER (May 16, 2020). https://x.com/SenatorRomney/status/1261799211760222210 [https://perma.cc/D8XX-PNXS].

an ongoing investigation, even though the Inspector General Act specifically prohibits the Secretary of State or any other officer of the Department from "prevent[ing] or prohibit[ing] 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."[348] At a minimum, even if the termination did not amount to a direct interference in an ongoing investigation, it certainly had the appearance of doing so.[349]

B. Possible Legislative Reforms

Legislative reforms could aim to better protect national security IGs from attacks by a rogue President. In particular, Congress could bolster the eligibility requirements for the appointment of IGs, enhance protections against their removal, and strengthen reporting requirements to limit the ability of agency heads or the President to block investigations. In the past several years, Congress has enacted some important additional statutory reforms in each of these areas.[350] But there is much more that Congress could do to provide a bulwark against severe presidential overreach.

1. Appointment

In the wake of President Trump's attacks on IGs, Congress amended the IC IG statute in 2022 to provide that, if a vacancy arises, the President may designate a replacement to serve in an acting capacity, but only from the existing pool of IG employees who meet certain criteria.[351] In addition, a designated individual may only serve in one such acting role at a time.[352] Furthermore, 30 days before making the designation, the President must provide a "substantive rationale, including … detailed and case-specific reasons" for the decision to the congressional intelligence committees.[353] The statute also specifies that Vacancy Act time limits[354] apply to the designation.[355] Congress made similar amendments to the CIA IG statute, also in 2022.[356]

---

[348] 5 U.S.C. § 415(d)(1).
[349] John Hudson & Carol Morello, *Pompeo's Moves Against Inspector General Leave a Trail of Questions and a Department Divided*, WASH. POST (May 18, 2020) (quoting Ron Neumann, President of American Academy of Diplomacy, stating that, "[i]f the President has removed the inspector general because of any investigation he is carrying out, that would be contrary to the law.") https://www.washingtonpost.com/national-security/pompeos-moves-against-inspector-general-leave-a-trail-of-questions-and-a-department-divided/2020/05/18/ec34524e-9945-11ea-b60c-3be060a4f8e1_story.html [https://perma.cc/2GWE-3HZS].
[350] FY2023 NDAA §§ 5201–5275.
[351] 50 U.S.C. § 3033(c)(6)(B).
[352] 50 U.S.C. § 3033(c)(6)(D).
[353] 50 U.S.C. § 3033(c)(6)(B)(iii)(IV).
[354] 5 U.S.C. § 3346 (specifying a time limit of 210 days beginning on the date the vacancy occurs).
[355] 50 U.S.C. § 3033(c)(6)(B)(ii).
[356] 50 U.S.C. § 3517 (b)(8).

By ensuring that acting IGs must be drawn from the ranks of existing deputy IGs or senior officers within the broader IG role, these restrictions reduce opportunities for Presidents simply to hand IG appointments to political supporters. The amendments also limit the risk that acting IGs will be mired in conflicts of interest, by stipulating that an acting IG may not serve in two IG roles at once. A number of scholars and experts argued for such reforms after the experience of the first Trump presidency.[357] Jack Goldsmith, for example, pointed out that, in addition to reducing the risk that a political "loyalist" could be slotted into an IG position in an acting capacity, such provisions could "deter Presidents from firing or removing inspectors general in the first place."[358]

Despite the value of these amendments, additional legislative restrictions on IG appointments would further enhance IG independence. For example, Congress could expand the list of qualifications for IGs. Further, Congress could mandate that the President explain how each IG nominee satisfies legislative qualification requirements. Indeed, a prominent group of former IGs has proposed requiring more robust executive branch explanation in order to increase inter-branch dialogue and enhance IG qualifications, independence, and oversight capacity.[359] Congress could also exercise its power of the purse to incentivize the executive branch to make permanent IG appointments. Specifically, as recommended by Troy Cribb of the Partnership for Public Service, Congress could "withhold appropriations if an agency lacks a qualified and either nominated, acting or confirmed IG to carry out investigations."[360] By using the appropriations power in this way, Congress could better protect IG operations and enhance IG independence.

2. Removal

To guard against abuse, Congress could also enact greater restrictions on the President's ability to remove IGs. As part of the IG reform initiative in the wake of the first Trump presidency, Congress did place some minimal additional procedural limits on the President's ability to remove IGs. For example, the IG

---

[357] Jack Goldsmith, *Here's a Better Way to Protect Our Inspectors General*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/opinions/2020/06/01/heres-better-way-protect-our-inspectors-general/ [https://perma.cc/3EDY-6HXW]; *see also* Dan G. Blair & Troy Cribb, *Five Ways Congress Can Strengthen the Independence of Inspectors General*, P'SHIP FOR PUB. SERV. (Apr. 28, 2020), https://ourpublicservice.org/blog-five-ways-congress-can-strengthen-the-independence-of-inspectors-general/ [https://perma.cc/Q2SA-XV6W] (advocating that acting IGs should be limited to deputy IG or senior officer in broader IG community).

[358] *Id*.; *see also* Jack Goldsmith, *A Constitutional Response to Trump's Firings of Inspectors General*, LAWFARE (June 10, 2020), https://www.lawfareblog.com/constitutional-response-trumps-firings-inspectors-general [https://perma.cc/MEE8-RE6Q].

[359] *Former Inspectors General Call on Congress to Pass Overdue Reforms to IG System*, PROJECT ON GOV'T OVERSIGHT (May 5, 2020), https://www.pogo.org/policy-letters/former-inspectors-general-call-on-congress-to-pass-overdue-reforms-to-ig-system [https://perma.cc/S86Z-DLEY].

[360] Blair & Cribb, *supra* note 357.

statutes now require the President to provide a more detailed explanation of the reasons for removing an IG, and they limit the situations in which the President may place an IG on non-duty status.[361]

But these reforms do not go nearly far enough to protect IGs from abuse. Additional restrictions, such as for-cause removal provisions or fixed terms, are critical to protect IG independence and enable IGs to fulfill their function of providing transparency and accountability.[362] A broad coalition of former IGs and other commentators have advocated for such reforms.[363]

Finally, a private right of action for IGs to contest removal would further enhance IG independence. Armed with a private right of action, IGs could directly enforce any removal provisions in the statutory framework. Thus, if a President or cabinet secretary were to retaliate against an IG for an unwanted investigation, and that retaliation violated statutory terms, the IG could head to court. Such a mechanism would offer another avenue for judicial involvement beyond the often-fraught pathways of litigation on behalf of Congress. Indeed, as Paul Rosenzweig

---

[361] *See* WILHELM, *supra* note 267, at 3. Specifically, the amendments modify the core IG statute to mandate that the President (or the DFE head) must provide a more detailed explanation for a decision to remove an IG than was required previously: Before removing an IG, the President must not only notify Congress 30 days in advance of the removal and provide a rationale for the removal to Congress in writing, but the rationale must include "detailed and case-specific reasons." Furthermore, if the President wishes to place an IG on non-duty status, the President must also submit a substantive rationale with "detailed and case-specific reasons" to Congress 15 days before the change in status takes effect, must determine that the IG poses a "threat" as defined by Congress, and must submit a report to Congress explaining why the IG poses the particular threat no later than the date the change in status takes effect. 5 U.S.C. § 403. These same amendments apply to the IC IG, 50 U.S.C. § 3033(c)(4), and the CIA IG, 50 U.S.C. § 3517(6)–(7).

[362] In the wake of the Trump administration's treatment of IGs, members of Congress proposed numerous other bills along similar lines. *See*, *e.g.*, Inspector General Protection Act, H.R. 1847, 116th Cong. (2019) (enhancing obligation of executive branch to notify Congress in case of IG removal); The Heroes Act, H.R. 6800, 116th Cong. (2020), § 70104 (enhancing congressional notification requirements in the case of IG removal and limiting removal to permanent incapacity, inefficiency, neglect of duty, malfeasance conviction of a felony or conduct involving moral turpitude, knowing violation of a law, rule, or regulation, gross mismanagement, gross waste of funds, and abuse of authority); Inspector General Independence Act, H.R. 6984, 116th Cong. (2020) (imposing "for-cause" removal restriction limiting removal to "[d]ocumented" instances of permanent incapacity, neglect of duty, malfeasance, conviction of a felony or conduct involving moral turpitude, knowing violation of a law or regulation, gross mismanagement, gross waste of funds, abuse of authority, or inefficiency).

[363] Blair & Cribb, *supra* note 357; Danielle Brian, *It's Past Time for Congress to Give Inspectors General and Whistleblowers Additional Protection*, WASH. POST (May 20, 2020), https://www.washingtonpost.com/opinions/2020/05/20/congress-is-overdue-ensuring-oversight/ [https://perma.cc/LEA6-2HWN]; William Roberts, *Amid the Coronavirus Pandemic, the Trump Administration Targets Government Watchdogs*, CTR. FOR AM. PROGRESS (June 1, 2020), https://www.americanprogress.org/article/amid-coronavirus-pandemic-trump-administration-targets-government-watchdogs/ [https://perma.cc/KF9K-J2PS]; *Former Inspectors General Call on Congress to Pass Overdue Reforms to IG System, supra* note 359; *Organizations Call on Congress to Urgently Pass Inspector General Removal Protections*, PROJECT ON GOV'T OVERSIGHT (April 10, 2020), https://www.pogo.org/policy-letters/organizations-call-on-congress-to-urgently-pass-inspector-general-removal-protections [https://perma.cc/AW2R-WBL7].

and Vishnu Kannan have pointed out, a private right of action is particularly important in the national security domain, where enhanced protections for the executive branch make enforcement of statutory rules especially challenging.[364]

3. Reporting Requirements

Finally, Congress could augment current IG reporting rules to close gaps in the existing framework. Most importantly, Congress should clarify that the IC IG can report directly to Congress after receiving whistleblower complaints, without first receiving approval from the DNI. More broadly, Congress should expand the authority of national security IGs to report directly to Congress.

As noted above, under the existing framework IG reports to Congress and the public are a cornerstone of the IG role. The IGs generally provide semi-annual reports to Congress detailing their investigations and audits, while also noting whistleblower complaints.[365] In fulfilling this mandate, the IGs first report to the establishment, agency, or DFE head who has the opportunity to provide comments on these reports before he or she in turn is obligated to transmit the reports to the "appropriate committees or subcommittees of the Congress" within 30 days.[366] Furthermore, in the case of "serious or flagrant problems, abuses, or deficiencies," the IG must report to the head of the relevant establishment "immediately," and the head of the establishment, in turn, has seven days to transmit the report in question to Congress.[367]

For some national security IGs, however, the authority to report to Congress is limited. To protect national security, the reports prepared by the IC IG and the CIA IG are transmitted only to the congressional intelligence committees, do not need to be made public, and do not need to be transmitted in full. However, they must contain certain minimum elements.[368] In addition, the heads of agencies or

---

[364] Paul Rosenzweig & Vishnu Kannan, *Repairing the Rule of Law: An Agenda for Post-Trump Reform*, LAWFARE (Sept. 7, 2020), https://www.lawfareblog.com/repairing-rule-law-agenda-post-trump-reform [https://perma.cc/VCN9-45H6].

[365] 5 U.S.C. § 405.

[366] 5 U.S.C. § 405(c).

[367] 5 U.S.C. § 405(e).

[368] 50 U.S.C. § 3033(k)(1)(B) (requiring bi-annual reports to list ongoing investigations, inspections, audits, or reviews; describe problems, abuses, and deficiencies related to the administration of programs and activities of the intelligence community; set forth IG recommendations of corrective action; state whether corrective action has been taken; certify whether or not IG has had access to relevant information; identify any exercise of IG subpoena authority; and include any IG recommendations for relevant legislation); 50 U.S.C. § 3517(d)(1)(A) (requiring bi-annual reports to describe significant problems, abuses, and deficiencies related to the administrations of programs and operations of the CIA; set forth IG recommendations for corrective action related to any reported problems, abuses, or deficiencies; state whether any corrective action has been completed for each IG recommendation; certify that the IG has had full and direct access to relevant information; describe exercise of IG subpoena authority; and include any IG recommendations for relevant legislation).

DFEs, as the case may be, can impede investigations of some national security IGs under certain circumstances. For example, the DOD IG faces potential curbs by the Secretary of Defense, who may block access to information, investigations, and the issuance of subpoenas if the Secretary determines "that such prohibition is necessary to preserve the national security interests of the United States."[369] In such a circumstance, the DOD IG must submit a statement[370] and the Secretary must provide a rationale[371] to specific congressional committees if he or she chooses to exercise this authority. The IC IG,[372] CIA IG,[373] and NSA IG[374] face similar restrictions.

The IC IG is subject to further limitations applicable to IC whistleblower complaints. Specifically, the IC IG must give notice of a whistleblower complaint to the DNI, who must in turn transmit the complaint to the congressional

---

[369] 5 U.S.C. § 408(b)(2).

[370] 5 U.S.C. § 408(b)(3). Specifically, if the Secretary of Defense exercises this power, "the Inspector General shall submit a statement concerning that exercise of power within 30 days the Committee on Armed Services and the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Armed Services and the Committee on Oversight and Reform of the House of Representatives and to other appropriate committees or subcommittees of the Congress." *Id*.

[371] 5 U.S.C. § 408(b)(4).

[372] The DNI may prohibit any audit, investigation, inspection, or issuance of a subpoena "if the Director determines that such prohibition is necessary to protect vital national security interests of the United States." 50 U.S.C. § 3033(f)(1). But, if the Director exercises such power, the Director is to "submit to the congressional intelligence committees an appropriately classified statement of the reasons for the exercise of such authority" within seven days, while also advising the Inspector General of the statement to the extent permissible per the classification of the information. 50 U.S.C. § 3033(f)(2)-(3). The Inspector General then has the option to issue a statement to the congressional intelligence committees in response to the notice from the DNI. 50 U.S.C. § 3033(f)(4). The Secretary is also required to simultaneously notify the Inspector General about the submission of such a statement, who may then submit to the Committees any comments on the notice or statement.

[373] The CIA Director may prohibit any audit, investigation, inspection, or issuance of a subpoena "if the Director determines that such prohibition is necessary to protect vital national security interests of the United States." 50 U.S.C. § 3517(b)(3). But if the Director exercises such power, the Director must "submit an appropriately classified statement of the reasons for the exercise of such power" to the congressional intelligence committees within seven days, while also advising the IG of such a statement. 50 U.S.C. § 3517(b)(4). The Inspector General may then issue a statement to the congressional intelligence committees in response to the notice from the Director if desired. *Id.*

[374] Because the National Security Agency is an element of the intelligence community, "[t]he Secretary of Defense, in consultation with the Director of National Intelligence, may prohibit the inspector general … from initiating, carrying out, or completing any audit or investigation, or from accessing information available to an element of the intelligence community … if the Secretary determines that the prohibition is necessary to protect vital national security interests of the United States." 5 U.S.C. § 415(d)(2)(A). If the Secretary of Defense exercises this authority, however, the Secretary must issue a statement to the House and Senate Intelligence and Armed Services Committees within seven days explaining the reasons for exercising this authority. 5 U.S.C. § 415(d)(2)(B). The Secretary must also simultaneously notify the Inspector General about the submission of such a statement, who may then submit any comments to the congressional intelligence committees. 5 U.S.C. § 415(d)(2)(C).

intelligence committees if the complaint entails a matter of "urgent concern."[375] The statute, however, is silent as to what happens if the DNI decides *not* to transmit the complaint to Congress, over the objection of the IC IG. This issue arose in the Atkinson investigation that led to President Trump's first impeachment. Atkinson deemed the complaint about Trump's conversation with Zelensky to be a matter of "urgent concern"[376] within the terms of the IC IG statute. Yet, the DNI withheld the complaint from Congress after the OLC decided that the complaint was *not* a matter of "urgent concern."[377] Atkinson subsequently notified the intelligence committees of the existence of the complaint without transmitting the complaint itself, and Rep. Adam Schiff, the chair of the House Intelligence Committee, subpoenaed the document.[378]

This incident exposed flaws and ambiguities in the IC IG statute's reporting framework. The statute does not address what happens when the DNI and the IG *disagree* about whether the matter is in fact of urgent concern. By lodging the reporting requirement with the DNI, the statute as currently written provides that the DNI is the one who decides to report, thereby both undermining the independence of the IG and reducing transparency by subjecting the reporting process to political control by the DNI.

To address this problem, Congress should provide that the IC IG can report directly to Congress when there are disputes between the IC IG and the DNI or other executive branch officials over the meaning of "urgent concern."[379] Although some commentators have suggested that the current statute could be interpreted to mandate this result,[380] the Atkinson case shows that the ambiguity in the text allows for exploitation. Thus, Congress should revise the applicable statute to provide that the IG may directly transmit the report to the congressional intelligence committees, rather than first sending it to the DNI for approval. The DNI could be given the opportunity to comment, but the actual decision to transmit the report must lie with the IG.[381] Indeed, national security IGs should have clearer authority to report to Congress in general, even beyond the whistleblower context. The statutes could clarify that the relevant agency heads merely have the opportunity to

---

[375] 50 U.S.C. § 3033(k)(5)(A).
[376] Bertrand & Desiderio, *supra* note 313.
[377] Press Release, U.S. H.R. Perm. Sel. Comm. on Intel., Chairman Schiff Issues Subpoena for Whistleblower Complaint Being Unlawfully Withheld by Acting DNI from Intelligence Committees (Sept. 13, 2019) [https://perma.cc/5QAU-4CL4].
[378] For an account of this chain of events, *see* Kel McClanahan, *Q&A on Whistleblower Complaint Being Withheld from Congressional Intelligence Committees*, JUST SECURITY (Sept. 17, 2019), https://www.justsecurity.org/66211/qa-on-whistleblower-complaint-being-withheld-from-congressional-intelligence-committees/ [https://perma.cc/M7AB-784S].
[379] Rosenzweig & Kannan, *supra* note 364.
[380] *See* McClanahan, *supra* note 378.
[381] Some IGs, such as the IC IG and the CIA IG, can report to Congress if there is a dispute with the establishment or agency head. 50 U.S.C. § 3033(f)(4); 50 U.S.C. § 3517(b)(4).

review the reports in advance and make potential national security determinations. But the decision to report should be more clearly lodged in the IG.

C. Potential Constitutional Concerns

Any enhanced legislative protections for IGs would certainly face constitutional challenges. Indeed, the U.S. Supreme Court has in recent years moved towards a broader view of the President's Article II authority in general, calling into question attempts by Congress to narrow executive branch discretion in relation to the appointment and removal of officials within the executive branch. With regard to for-cause removals in particular, the Court in *Seila Law v. Consumer Financial Protection Bureau* struck down a removal restriction that applied to the director of the newly formed Consumer Finance Protection Bureau (CFPB).[382] The Court concluded that the restriction, which permitted removal of the director only for "inefficiency, neglect, or malfeasance," violated separation of powers, in particular the Vesting and Take Care clauses of Article II.[383] The Court reasoned that the executive power necessarily includes the removal power, in order to ensure that lesser executive officers can "remain accountable to the President, whose authority they wield."[384]

Nevertheless, the logic of *Seila Law* need not apply to IGs in the national security arena for two reasons. First, the principle articulated in *Seila Law* is that the President needs unitary control over the individuals who are formulating and executing executive branch policies.[385] But unlike the head of the CFPB, IGs do not have any role at all in developing policies or carrying them out. To the contrary, the IG statute explicitly states that "an Inspector General shall *not* be considered to be an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws."[386] Instead, an IG functions solely as a watchdog or ombudsperson to investigate allegations of wrongdoing. Thus, IGs are inferior officers who are more like independent counsels than policymakers.

Second, *Seila Law* did not address the appointment or removal of officials in the national security arena and therefore did not consider the importance of independent checks on presidential authority in the context of the national security agencies specifically. And while the President obviously receives deference as Commander in Chief and over national security decision-making more broadly, that deference does not necessarily extend to any and all activities within the national security agencies. To the contrary, as Justice Jackson made clear in his concurrence in *Youngstown*, "[p]residential powers are not fixed but fluctuate, depending upon

---

[382] *See generally* Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197 (2020).
[383] *Id.* at 2197, 2204–07.
[384] *Id.* at 2197.
[385] *Id.* at 2206–07.
[386] 5 U.S.C. § 403(c) (emphasis added).

their disjunction or conjunction with those of Congress."[387] Indeed, in the national security arena especially, oversight is necessary to balance executive power with the will of Congress, in order to protect against authoritarianism. Thus, at least in the national security arena, the analysis regarding the constitutionality of for-cause removals should include a consideration of *Youngstown*. Both of these arguments for distinguishing *Seila Law* are discussed in more detail below.

It is also important to recognize that *Seila Law* did not overrule *Morrison v. Olson*,[388] the Supreme Court's earlier decision affirming the constitutionality of the Independent Counsel statute. As with the statute at issue in *Seila Law*, the Independent Counsel statute contained for-cause limitations on removal.[389] However, unlike *Seila Law*, the *Morrison* Court concluded that the restriction did *not* intrude too far into the President's Article II powers.[390] The *Morrison* Court reasoned that the validity of a "for-cause" removal restriction turns not on whether the function of the official is purely executive or not, but rather on whether the restriction impedes the President's ability to perform his or her constitutional duty.[391] The Court determined that there was no such interference in the case of the Independent Counsel because the Independent Counsel was an inferior officer "with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."[392] More broadly, the Court emphasized the functional necessity of the "good cause" removal requirement to ensure some measure of independence for the IC, concluding that it was "essential…. to establish the necessary independence of the office."[393]

In *Seila Law*, the Court did not reverse *Morrison* or repudiate the functionalist rationale on which the *Morrison* decision rested.[394] Rather, the Court explicitly preserved *Morrison*, noting that a limited exception still exists regarding "for-cause removal restrictions" on inferior officers within executive agencies, provided those officers have "limited duties and no policymaking or administrative authority."[395] This exception should apply to IGs. It is true that many national security IGs are appointed by the President with the advice and consent of the Senate, perhaps suggesting that they are not "inferior." But the fact that these appointments require Senate confirmation does not necessarily mean that these IGs

---

[387] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).
[388] *See generally* Morrison v. Olson, 487 U.S. 654 (1988).
[389] *See id.* at 663 (describing the statute's for-cause termination provisions).
[390] *Compare* Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197, 217 (2020), *with Morrison*, 487 U.S. at 659–60.
[391] *Morrison*, 487 U.S. at 691–92.
[392] *Id*. at 691.
[393] *Id.* at 693. In addition, the Court concluded that the power of the specialized court to select an IC did not run afoul of the Appointments Clause because the IC was an inferior officer, and the text of the clause permits some interbranch appointments for such officers, provided that such appointment does not impair the function of the other branches. *See id.* at 695-96.
[394] *Seila Law*, 591 U.S. at 2199.
[395] *Id.* at 2199–2200.

cannot be classified as inferior officers. The Court has not offered particularly clear guidance on this question, but it has indicated that the status of a particular official turns more on the official's role, and whether the individual is supervised by a principal officer,[396] than on the formality of the appointment mechanism.[397] Indeed, because IGs typically report to the head of the agency for which they are serving as IG, they could certainly be deemed inferior on that basis alone.

Even more importantly, IGs do not exercise policy-making authority of any kind. Rather, they conduct internal agency investigations and produce reports for the agency and Congress. Indeed, given that IGs have no authority to indict or prosecute, they wield even less administrative authority than the Independent Counsel at issue in *Morrison*. Therefore, they seem to fit quite squarely within the *Morrison* exception.

More broadly, when considering IGs in the national security context, both *Seila Law* and *Morrison* should be applied in light of the fundamental constitutional concerns outlined in Justice Jackson's concurring opinion in *Youngstown*. In that case the Supreme Court limited the President's power even though it was exercised to aid the prosecution of military activity abroad.[398] Instead, the Court emphasized the important role Congress plays in limiting presidential power.[399] In his concurrence, Jackson notably rejected vague reliance on the President's "'[i]nherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers."[400] Instead, Jackson worried about presidential power that might "submit to no legal restraint" at all.[401]

Youngstown therefore provides an important lens for viewing the functionalist approach in *Morrison* and preserved in *Seila Law*. The *Morrison* Court explicitly emphasized that the for-cause removal restrictions at issue in that case were "essential …. to establish the necessary independence of the office."[402] With regard to IGs within national security agencies, removal restrictions are arguably even more significant. As discussed above, the limited scope of judicial

---

[396] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 663 (1997) (reasoning that "inferior Officers" in the U.S. Constitution's Appointments Clause of Art. II are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"). The *Edmond* Court concluded that the Coast Guard Court of Criminal Appeals are such "inferior Officers" because they are supervised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces. *Id*. at 666.

[397] Indeed, the *Edmond* Court noted that the "default" is for inferior officers to be appointed in the same manner as principal officers: nomination by the President with the advice and consent of the Senate. *Id.* at 660.

[398] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 587 (1952).

[399] *See id.* at 588–89.

[400] *Id.* at 647 (Jackson, J., concurring).

[401] *Id.* at 653 (Jackson, J., concurring).

[402] Morrison v. Olson, 487 U.S. 654, 693 (1988).

review over national security decision-making and the need for secrecy within the national security state reduces oversight of national security actors. IGs within national security agencies therefore provide an essential—and sometimes perhaps the only—check on overreach, fraud, and abuse within those agencies. The risks posed by a rogue President interfering with the legitimate work of the IGs, by firing them without cause, are all too real. Therefore, tenure protections for national security IGs offer much-needed independence of the kind described in *Morrison* and preserved in *Seila Law*.[403]

One final point deserves emphasis. Regardless of how these various constitutional issues play out, there is an independent value in Congress at least *trying* to assert its fundamental constitutional role as a crucial check on the power of a rogue President. Thus, members of Congress should not let fear of a potential constitutional challenge deter them from asserting the legislature's oversight role. After all, history suggests that authoritarian leaders are more likely to accrete power to themselves if the other branches of government are silent or accommodating. Accordingly, these reforms should be adopted even in the face of constitutional challenges.

D. Potential Executive Branch Actions

Apart from the legislative reforms discussed above, the outgoing administration (or any subsequent administration) could take actions directly to strengthen IGs, and in particular national security IGs. First, the President or agency head should nominate candidates to fill all IG vacancies and seek their

[403] Beyond these substantive restrictions on removal, Congress in 2022 increased notification requirements with regard to any decision to remove IGs. Securing Inspector General Independence Act of 2022, 5 U.S.C. § 5202 (2022). Such notification requirements obviously pose less of an incursion on the President's authority than the for-cause removal restrictions because they only mandate that the President provide a written justification to Congress for the removal. However, the executive branch has at times argued that even such lesser notification requirements raise "serious constitutional concerns." Cipollone Letter, *supra* note 331, at 3. In a letter to Senator Charles Grassley regarding President Trump's removal of the Intelligence Community IG and the State Department IG, White House Counsel Pat Cipollone cited an earlier statement from the executive branch during the administration of President Carter that such congressional reporting requirements "constitute[] an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers." *Id.* (quoting MEMORANDUM OPINION FOR THE ATTORNEY GENERAL, INSPECTOR GENERAL LEGISLATION, 1 Op. O.L.C. 16, 18 (1977) (internal citations omitted). Cipollone's reliance on this statement is problematic, however, because the statement pre-dates *Morrison,* which, as discussed above, explicitly balanced executive power against the need for oversight. *Morrison*, 487 U.S. at 693. Under *Morrison*, the President first would need to show that the reporting requirements truly interfere with a core executive power and then also show that Congress was not justified in imposing the requirements as a means of imposing needed oversight. *Id.* at 691–92. In the case of mere reporting requirements concerning the reasons for removing an IG, it is difficult to see how such requirements unduly interfere with presidential power. And of course, if a for-cause removal requirement is upheld under *Morrison* and *Seila Law*, that would necessarily also mean that the less onerous reporting requirements should also be permissible.

confirmation. At the time this Article goes to press, no national security IG positions remain vacant and without a nominee.[404] However, the administration should actively seek confirmation of IGs who have been nominated but not yet confirmed, such as the Treasury Department IG, the DOC IG, and the NSA IG.[405] Due to the relative lack of accountability and oversight by the courts and Congress over the national security agencies, putting IGs in place in these agencies is crucial for protecting the rule of law.

Second, executive branch lawyers could issue legal opinions acknowledging the constitutionality of various statutory measures—enacted or contemplated—that are aimed at ensuring IG independence. Certainly, the executive branch must protect the presidency, and historically such legal opinions have often sought to articulate a relatively broad view of the President's power. However, the executive branch has in the past pulled back from extreme, overbroad interpretations. For example, a series of OLC opinions expansively interpreting presidential power after 9-11[406] were subsequently repudiated by the executive branch.[407] And even apart from that extraordinary example, the executive branch has never endorsed a truly unlimited view of presidential power.

Thus, the executive branch could do more both to acknowledge the permissible constitutional role of Congress in regulating IGs and to interpret ambiguities in governing statutes. For example, the executive branch could consider embracing the view that Congress may play a role in imposing at least some requirements on the President with respect to appointment, removal, and reporting of IGs. Executive branch lawyers could also endorse the view that Congress may require the President to provide substantive explanations prior to removing IGs, thereby repudiating arguments such as the one that White House Counsel Cipollone made with regard to IG firings during the Trump Administration.[408] Such an opinion, especially if publicly released, could help to

---

[404] Council of the Inspectors General on Integrity and Efficiency, *Inspector General Vacancies*, https://www.oversight.gov/ig-vacancies [https://perma.cc/PS8W-W8WM].
[405] *Id*.
[406] *See, e.g.*, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, RE: AUTHORITY FOR USE OF MILITARY FORCE TO COMBAT TERRORIST ACTIVITIES WITHIN THE UNITED STATES (Oct. 23, 2001).
[407] Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, RE: OCTOBER 23, 2001 OLC OPINION ADDRESSING THE DOMESTIC USE OF MILITARY FORCE TO COMBAT TERRORIST ACTIVITIES (Oct. 6, 2008); Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, RE: STATUS OF CERTAIN OLC OPINIONS ISSUED IN THE AFTERMATH OF THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001 (Jan. 15, 2009).
[408] *See* Cipollone Letter, *supra* note 331. President George H.W. Bush made a similar statement when signing an IG bill that contained a similar reporting requirement. Statement by President George Bush Upon Signing H.R. 2748, 25 Weekly Comp. Pres. Doc. 1851, reprinted in 1989 U.S.C.C.A.N. 1222, 1224 (Nov. 30, 1989). A 1977 OLC opinion concludes that a similar

shore up IG independence, even if the executive branch is not prepared to go further and endorse the constitutionality of congressionally mandated removal restrictions (which Congress has not yet imposed in any event). The executive branch could also clarify ambiguities in the statute to support readings that favor IG independence, for example by repudiating the Trump Administration OLC memo that rejects the IG's authority to determine which circumstances presented to the IG give rise to an "urgent concern" that requires congressional notification.[409]

Third, the President could issue an Executive Order or policy guidance, voluntarily implementing some of the reforms proposed above, such as for-cause removal restrictions on IGs. The Department of Justice guidelines for special prosecutors offer a potential model. When the Independent Counsel statute at issue in *Morrison* expired, DOJ promulgated regulations for the appointment of "Special Counsel" within DOJ and voluntarily imposed for-cause removal protections stating that only the Attorney General may remove a special counsel and only for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."[410] This framework offers an example of the way in which the executive branch can act, even in the absence of congressional statute, to set standards to protect the independence and impartiality of officials that operate in ways that are similar to IGs.

None of these executive branch actions is likely to pose constitutional concerns. The Constitution does not limit executive branch lawyers from issuing legal opinions. And any concerns about the permissibility of statutory limitations on removal and other legislative requirements related to IGs would not apply to executive branch self-regulation. Thus, these are steps the outgoing executive branch could take immediately, regardless of whether Congress imposes statutory reforms and regardless of whether courts uphold such reforms.

Of course, as discussed previously, a future rogue President could repudiate or ignore OLC opinions and change any regulations regarding IGs. But that does not render these reforms ineffectual. Experience suggests that such institutional reforms can be sticky.[411] They spawn institutional practices and habits of operation that become the norm regarding the way things are done. Such habits can be changed, but the changes take time and effort and might generate negative publicity. As a result, the changes often do not occur at all because other needs are deemed more pressing. Thus, even if these actions could in theory be challenged in

---

reporting requirement "constitute[d] an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers," MEMORANDUM OPINION FOR THE ATTORNEY GENERAL, INSPECTOR GENERAL LEGISLATION, 1 Op. O.L.C. 16, 18 (1977) (internal citations omitted), but this opinion predates the 1978 Act.

[409] *See* U.S. Dep't of Justice, Office of Legal Counsel, *"Urgent Concern" Determination by the Inspector General of the Intelligence Community*, 2 (2019).

[410] 28 C.F.R. § 600.7(d).

[411] *See* Dickinson, *supra* note 91.

court, it is still worthwhile to try to institutionalize them now to create roadblocks to a rogue President in the future.

V. THE STATE SECRETS DOCTRINE

The four specific areas described above do not exhaust the ways in which a rogue President can upset the rule of law in the national security space. Thus, courts must shed some of their traditional unwillingness to review unilateral assertions of executive power regarding matters of national security. One legal doctrine that is ripe for refinement in this regard is the so-called state secrets doctrine, a judge-made doctrine that over the past twenty years has become increasingly restrictive, blocking national security litigants from presenting issues to the courts, and often preventing cases from moving forward at all.

A recent U.S. Supreme Court case, however, *Zubaydah v. United States*,[412] suggests a pathway for somewhat more robust judicial review in this area. Although the Court used the state secrets doctrine to block the particular litigation at issue[413] and the case overall takes an expansive view of the executive's ability to assert the need for secrecy, theories from both the majority and dissenting opinions suggest a path by which courts might look behind the executive's overbroad claims to secrecy in the future.

A. Overview of the State Secrets Doctrine

A judge-made, common-law evidentiary privilege, the state secrets doctrine seeks to balance the need of the executive branch to prevent disclosure of sensitive national security information in judicial proceedings with the judicial search for truth.[414] In part, the privilege derives from the common law of evidence, and, in fact, a rule of evidence related to the privilege was proposed but never accepted.[415] But it also has a constitutional element because assertion of the privilege implicates the President's Article II authority over military and foreign affairs and thus over information related to such affairs, a point the U.S. Supreme Court noted in *U.S. v. Nixon*.[416] However, application of the doctrine can also limit individuals' ability to

---

[412] *See generally* United States v. Zubaydah, 595 U.S. 195 (2022).
[413] *Id.* at 199. In a companion case, the Court concluded that 50 U.S.C. § 1806 (f), part of the Foreign Intelligence Surveillance Act (FISA), did not displace the state secrets doctrine, thereby imposing the state secrets framework in the FISA context and narrowing the prospects for plaintiffs to challenge governmental surveillance under the FISA regime. FBI v. Fazaga, 595 U.S. 344, 357–58 (2022).
[414] *See*, *e.g.*, El-Masri v. United States, 479 F.3d 296, 303–04 (4th Cir. 2007).
[415] See, e.g., 26 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 415–16 (1992) (setting forth draft rule of evidence 509, which was never enacted).
[416] United States v. Nixon, 418 U.S. 683, 710–11 (1974) (noting that the state secrets privilege concerns "areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities" and that, to the extent a claim of privilege "relates to the effective discharge of a President's powers, it is constitutionally based").

vindicate constitutional rights directly.[417] Invocation of the privilege thus presents a risk of executive branch overreach: overbroad application of the doctrine not only limits access to courts but also the free flow of ideas that is crucial for democracy to function.

An early U.S. Supreme Court decision setting forth the doctrine, *Totten v. United States*, barred any form of judicial review for espionage contracts, including even *in camera* review of governmental materials by the judiciary.[418] Outside the narrow domain of espionage contracts, however, the Court found a bit more scope for judicial review in instances where the government invoked state secrets. In *United States v. Reynolds*, a 1953 case brought by widows of civilian observers of a U.S. Air Force crash,[419] the Court delineated a three-part framework. First, the head of the relevant government agency must assert the privilege.[420] Second, the court must determine whether there is "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[421] Third, if the court determines that the material is privileged, it must assess whether the litigation can proceed without the privileged material.[422] Unlike the *Totten* framework applicable to espionage contracts, under *Reynolds* a court can choose to examine materials *in camera*, and even if it deems some evidence properly privileged, it can still allow the litigation to proceed without the privileged material. Indeed, in *Reynolds* itself*,* the Court both sustained the privilege and concluded that the litigation could proceed.[423] Nevertheless, even the *Reynolds* approach demonstrates the risk of overbroad assertions of the privilege. Years later, it turned out that the material for which the government had asserted the privilege did not, in fact, relate to national security at all.[424]

Since 9-11, courts began to interpret the privilege in an increasingly sweeping way, so that in practice the more permissive *Reynolds* analysis moved closer to the highly restrictive *Totten* approach.[425] Many courts tend to defer to the executive branch whenever it asserts the privilege, rarely examining privileged material even *in camera*. And after deeming evidence to be privileged, courts rarely allow litigation to proceed.[426] Nonetheless, *Reynolds* actually preserves a

---

[417] *See* Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982).
[418] Totten v. United States, 92 U.S. 105, 106–07 (1875).
[419] *See generally* United States v. Reynolds, 345 U.S. 1 (1953).
[420] *Id.* at 7–8.
[421] *Id.* at 10.
[422] *See id.* at 11.
[423] *Id*.
[424] *See* United States v. Zubaydah, 595 U.S. 195, 251 (Gorsuch, J., dissenting) (noting that, "decades later, when the government released the report [on the material sought in *Reynolds*], it turned out to contain no state secrets—only convincing proof of governmental negligence").
[425] *See* Laura K. Donohue, *Surveillance, State Secrets, and the Future of Constitutional Rights*, 2022 S. CT. REV. 351, 391-98 (discussing cases).
[426] See *id.* at 391–98 (discussing dismissals at the pleading stage).

significant role for the judiciary and does *not* dictate that courts always defer to executive branch assertions.

B. The Zubaydah *Case*

In 2022, the U.S. Supreme Court arguably breathed new life into the *Reynolds* framework, even while ruling narrowly that the state secrets doctrine barred the evidence at issue in the particular case at hand. The case arose out of litigation initiated by Abu Zubaydah, a detainee at the U.S. naval base at Guantánamo Bay.[427] Captured in Pakistan shortly after the September 11, 2001, terrorist attacks on the United States,[428] he was detained by the CIA at several sites before his transfer to Guantánamo in 2006.[429] The U.S. government has since acknowledged that he endured enhanced interrogation techniques that amounted to torture[430] but has never publicly acknowledged the location of his detention by the CIA, which he asserts was in Poland.[431] Lawyers representing Zubaydah filed a criminal complaint in Poland in 2010 seeking to hold Polish nationals accountable for their involvement in his mistreatment,[432] and Zubaydah sought information from the U.S. government to help confirm that his detention had in fact been in Poland.[433] The CIA director then asserted the state secrets doctrine to prevent disclosing that information.

The U.S. Supreme Court upheld the CIA director's invocation of the state secrets doctrine by a vote of 7-2 in a fractured opinion, with Justice Breyer writing for the majority as to some parts of the opinion and the plurality for other parts.[434] Significantly, Breyer's opinion reiterated *Reynolds*' emphasis that courts must make independent judgments scrutinizing executive branch justifications for invoking the state secrets privilege.[435] His opinion therefore revivified *Reynolds* and adopted its more robust standard for the executive branch to meet in order to assert the privilege successfully.[436] Central to the opinion is the distinct role of judges, both in assessing whether the privilege should apply and whether the litigation should proceed. Breyer's opinion stressed that it is courts—not the executive branch—that must independently determine whether circumstances justify invocation of the privilege.[437] Quoting *Reynolds*, he asserted that "judicial

---

[427] *Zubaydah*, 595 U.S. at 198.
[428] *Id.* at 199.
[429] *Id.* at 200.
[430] *Id.*; *see also id.* at 239 (Gorsuch, J., dissenting).
[431] *Id.* at 200–01.
[432] *Id.* at 201. The United States denied multiple requests by Polish prosecutors, pursuant to a Mutual Legal Assistance Treaty, for information related to the Polish proceedings.
[433] *Id.* at 200–01. Zubaydah filed for permission to serve two former CIA contractors with subpoenas requesting information regarding the CIA detention facilities in Poland, as well as Zubaydah's treatment there.
[434] *Id.*
[435] *See id.* at 204.
[436] *See id.* at 204–05.
[437] *See id.* at 205–06.

control over the evidence in a case cannot be abdicated to the caprice of executive officers."[438]

Significantly, a majority of the justices rejected the more deferential approaches espoused by four of the other justices. For example, Justice Thomas (joined by Justice Alito) argued that courts should defer far more to the executive branch whenever it asserts the state secrets privilege[439] and should not even independently evaluate the strength of the government's justification for asserting the privilege unless the litigant can first demonstrate a legitimate need for the information, which Justice Thomas found lacking in this case.[440] Justice Thomas reasoned that judicial evaluation would "undermine[] the 'utmost deference' [the Court owes] to the executive's national-security judgments."[441] Meanwhile Justice Kavanaugh, joined by Justice Barrett, though less deferential than Justice Thomas, nevertheless emphasized that the threshold the executive branch must meet to assert the privilege is "not demanding" and that, in most cases, the result is "typically self-evident."[442]

In contrast, the stinging dissent by Justice Gorsuch, joined by Justice Sotomayor, agreed with Justice Breyer that courts must play an important role in scrutinizing executive branch assertions of state secrets, but excoriated the majority for deferring too much to the executive in Zubaydah's case itself. Justice Gorsuch argued that the Court, consistent with *Reynolds*, should engage in a far more searching review of the executive branch rationale for asserting the privilege, including *in camera* review of the predicate for the claims of harm to national security.[443] According to Justice Gorsuch, judicial checking of the executive branch is essential to ensure that the President does not become akin to a "king."[444]

To be sure, many commentators have criticized Justice Breyer's approach in *Zubaydah* as overly deferential to the executive branch. For example, Bobby Chesney faulted the Court for muddying the doctrine by introducing "doctrinal confusions" that were "unnecessary" even as it preserved the *Reynolds* approach.[445] Likewise, Shirin Sinnar criticized the decision for "perpetuat[ing] the Supreme Court's practice of insulating national security abuses from meaningful judicial review," for example by failing to carve out an exception for disclosure of U.S. governmental promises to foreign governments "when the purpose is to enable

---

[438] *Id.* at 205.
[439] *Id.* at 216, 219–22 (Thomas, J., concurring in part and concurring in the judgment).
[440] *Id.* at 217 (Thomas, J., concurring in part and concurring in the judgment).
[441] *Id.* at 223 (Thomas, J., concurring in part and concurring in the judgment) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).
[442] *Id.* at 232-233 (Kavanaugh, J., concurring in part).
[443] *See id.* at 254-55 (Gorsuch, J., dissenting).
[444] *Id.* at 248-49.
[445] Bobby Chesney, Comment, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice,* 136 HARV. L. REV. 136, 172 (2022).

egregious human rights violations or other clear violations of international law."[446] And Laura Donohue argued that the government's rationale for keeping secret all information related to the location of Zubaydah's detention in Poland, when the fact of that detention was already public, "stretches credulity."[447]

Nonetheless, I see in the Breyer opinion an important preservation of the *Reynolds* framework against attack from the more deferential approaches put forward by Justices Thomas, Alito, Kavanaugh, and Barrett. Crucially, the Breyer opinion not only maintains the *Reynolds* approach, but also reemphasizes that courts have an important obligation to independently check the executive branch when it asserts the need for secrecy based on claims of national security. Furthermore, although the opinion by Justice Gorsuch (joined by Justice Sotomayor) is a dissent, it nonetheless lends heft to Justice Breyer's assertions about the independence of the judiciary in adjudicating state secrets. Justice Gorsuch explains that such independence is crucial to the rule of law and largely re-asserts the framework set forth in the Breyer opinion even though he disagreed with Breyer regarding the outcome in this particular case.[448] Of course, the need for independent review by the courts does not necessarily mean that the courts should always reject the government's invocation of the privilege. To the contrary, it will sometimes—perhaps even often—be the case that secrecy is in fact justified on national security grounds. But in the face of a potential rogue President, it is crucial that judges provide a meaningful independent check on the executive branch and interrogate assertions of secrecy to make sure that they are truly justified.

CONCLUSION

Although the President surely wields important powers to operate in the national security arena, the enduring principles set forth in the seminal *Youngstown* case offer a frame for preserving and erecting better guardrails against the specter of a rogue President. If a President is unwilling to defer to military expertise, historical norms, or legal regimes that might provide oversight or restraint, we need a "balanced institutional"[449] approach that recognizes the outer bounds on executive power and the importance of historical practice in order to help safeguard those limits in the national security arena. And crucially, all three branches of government can take important steps now to strengthen the institutional guardrails for the future.

This is a critical moment, when rule-of-law norms are more fragile than they once seemed. And while it is true that a rogue President committed to a truly authoritarian approach will seek to defy all legal constraints, the more constraints

---

[446] Sinnar, *supra* note 13.
[447] Laura Donohoe, *Surveillance, State Secrets, and the Future of Constitutional Rights*, 2022 SUPREME CT. REV. 386.
[448] *Zubaydah*, 595 U.S. at 991, 994-96 (Gorsuch, J., joined by Sotomayor, J., dissenting).
[449] KOH, *supra* note 7, at 263.

that are erected, the more difficult it will be for authoritarianism to take hold, and the more likely that actors within the government will be empowered to safeguard the rule of law. Therefore, although the multiple reforms described in this Article are certainly not a panacea, they are important and achievable steps that will at least help to preserve rule-of-law values in the national security domain.