



## Safeguarding the Rule of Law

As John Adams wrote in 1780, the rule of law at its most essential means a “government of laws and not of men.”<sup>1</sup> The rule of law is “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated.”<sup>2</sup> Among these principles of governance within the U.S. constitutional regime are separation of powers, democratic accountability, transparency, and norms that guide officials in their use of political power.<sup>3</sup>

Critics argue that the United States is currently being led by an executive who demonstrates autocratic tendencies, with a record of ignoring established legal processes, dismantling democratic conventions, and flouting norms that help preserve a stable, reliable government. In light of these circumstances, ACS encourages chapters to host events in 2018 examining the rule of law in the federal system.

### I. Separation of Powers

In our constitutional structure, each branch of government plays a role in maintaining the stability and accountability of the government by checking the other branches’ exercise of power. Within this delicate balance, efforts by one branch to subvert the authority or legitimacy of either of the other branches threatens the rule of law.

#### A. Independent Judiciary

The judiciary’s power “extend[s] to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.”<sup>4</sup> Implicit in this grant is the power to review acts of Congress and the executive to determine their constitutionality.<sup>5</sup> The independence of the judiciary—in which “judges exercis[e] judicial powers

---

<sup>1</sup> MASS. CONST., art. XXX, pt. I (1780).

<sup>2</sup> United Nations, [What is the Rule of Law?](#)

<sup>3</sup> Though the rule of law is relevant at all levels of government, this program guide examines only the federal system.

<sup>4</sup> U.S. CONST. art. III, § 2.

<sup>5</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) (noting that “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority,” and that it “belongs to [the judiciary] to ascertain [the Constitution’s] meaning, as well as the meaning of any particular act proceeding from the legislative body.”); *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (holding that “the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be

independently of the executive or legislative powers” and base their decisions solely on the facts and applicable law in the case in front of them<sup>6</sup>—is “designed to protect the system of justice and the rule of law, and thus maintain public trust and confidence in the courts.”<sup>7</sup>

According to former Supreme Court Justice Sandra Day O’Connor, “Presidents, ministers, and legislators at times rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted.”<sup>8</sup> An independent judiciary is necessary to ensure that the executive and legislative branches, either independently or in concert, do not subvert legal or constitutional rule in search of a popular or convenient solution. It is meant to stand as a bulwark to protect “discrete and insular minorities” against the tyranny of a majority that may “curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>9</sup>

Despite the need for the judiciary to be resolutely independent, it may also be the branch most susceptible to having its independence subverted through undue political pressure and public opinion campaigns by the other two branches. Because the judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever,” it is often considered the “weakest of the three departments of power.”<sup>10</sup> Its ability to effectuate its decisions, for all practical purposes, relies on the respect and cooperation of the executive and legislative branches.

In addition, the [Code of Conduct for United States Judges](#) circumscribes judges’ ability to respond to attacks from the other branches. The Code directs judges to “maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved,” and “not be swayed by partisan interests, public clamor, or fear of criticism.” Judges have a duty to serve as neutral arbiters for all cases and controversies coming before them. As a result, when members of the other branches say critical or incendiary things about members of the judiciary, judges are constrained in their responses, which may allow improper criticism to inflame public sentiment, weakening respect for, and consequently the influence of, the judiciary.

It is for these reasons that President Trump’s attacks on members of the judiciary are so problematic. The most visible of these attacks was against Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California, who presided over two cases in which Trump was a party in his personal capacity and is now presiding over one against the federal government in which a 23-year-old who had been granted protected status under the Deferred Action for

---

essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.”)

<sup>6</sup> Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT’L L. 293, 302 (2009).

<sup>7</sup> *Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109 (S.C. 2010).

<sup>8</sup> JEFFREY TOOBIN, *THE NINE – INSIDE THE WORLD OF THE SUPREME COURT* (New York: Anchor Books, 2008) at 291.

<sup>9</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>10</sup> THE FEDERALIST No. 78, *supra* note 5 (Alexander Hamilton).

Childhood Arrivals program has challenged his deportation.<sup>11</sup> President Trump has called Judge Curiel “a hater of Donald Trump,” who “happens to be, we believe, Mexican” and as such, cannot give a fair ruling in these cases.<sup>12</sup> Another judge, James Robart of the U.S. District Court for the Western District of Washington, temporarily enjoined Trump’s “travel ban” in February 2017,<sup>13</sup> leading Trump to tweet that the “so-called judge[s]” decision was “ridiculous,”<sup>14</sup> and to question “what the country was coming to.”<sup>15</sup> Neither judge has responded to these attacks.

## DISCUSSION QUESTIONS

*In what ways can the judiciary attempt to insulate itself from attacks by the executive and legislative branches? Is it ever appropriate for the judiciary to respond publicly, particularly to attacks that threaten to subvert the judiciary’s authority through distortions of its role or the neutrality of its decision making? Do the rules for recusal sufficiently protect against the type of bias President Trump alleges? What role, if any, can the Administrative Office of the U.S. Courts play in protecting individual judges from ad hominem attacks?*

## FOR MORE INFORMATION ON JUDICIAL INDEPENDENCE

Pam Karlan, [\*Two Concepts of Judicial Independence\*](#), 72 S. CAL. L. REV. 535 (1999); Aidan Quigley, [\*The 23 people, places and things Donald Trump has attacked on Twitter as president\*](#), POLITICO (Feb. 4, 2017); Michael Gerhardt & Richard Painter, [\*The New Normal: Unprecedented Judicial Obstruction and a Proposal for Change\*](#), AMERICAN CONSTITUTION SOCIETY (October 2016).

### B. Executive Branch

Under [Article II of the Constitution](#), the president’s powers include, among others, signing or vetoing legislation, granting reprieves and pardons, and commanding the armed forces.

Administrations approach this power differently, but the authoritarian tendencies that some critics have observed in the Trump administration can be understood, to some extent, as reflecting a strongly unitary conception of executive power.

#### I. The Unitary Executive Theory

The president has broad power to control national affairs and set the priorities of the government through the placement of political appointees sympathetic to the president’s agenda within federal agencies and, more directly, the issuance of executive orders. The unitary executive theory posits that “[t]he executive is headed by a single person, not a collegial body, and that single person is the ultimate policy maker, with all others subordinate to him.”<sup>16</sup> A strongly unitary executive conception of presidential power asserts the president’s near absolute power to make policy in all executive agencies and to exert *direct* control of all subordinate officers with limited input from Congress. Some have even argued that proponents of the strongly unitary executive believe that the president

---

<sup>11</sup> Madeline Conway, [\*Judge attacked by Trump to oversee Dreamer deportation lawsuit\*](#), POLITICO (Apr. 20, 2017, 9:59 AM).

<sup>12</sup> *Id.*; see also Kristen East, [\*Trump attacks ‘Mexican’ judge in Trump U lawsuit\*](#), POLITICO (May 28, 2016, 9:55 AM).

<sup>13</sup> Eugene Scott and Allie Malloy, [\*Trump Attacks Another Federal Judge\*](#), CNN (Feb. 5, 2017, 7:38 AM).

<sup>14</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 5:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976>.

<sup>15</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 12:44 PM), <https://twitter.com/realDonaldTrump/status/827981079042805761>.

<sup>16</sup> John Harrison, [\*The Unitary Executive and the Scope of Executive Power\*](#), 126 YALE L.J. F. 374 (2017).

is “allowed to depart from the law, including the law of war, in some circumstances.”<sup>17</sup> This is most commonly understood to apply in instances in which an administration asserts a threat to national security.

Perhaps the most infamous example of a president’s claim of broad authority in response to national security concerns is President Franklin D. Roosevelt’s [Executive Order 9066](#) during World War II, which authorized the forced removal and internment of thousands of Japanese Americans. In [Korematsu v. United States](#), the Supreme Court upheld the executive order, citing the president’s authority to protect the country in times of war. Even though the Court reasoned that “[c]ompulsory exclusion of large groups of citizens from their homes... is inconsistent with our basic governmental institutions,” the risk to civil liberties must be balanced against the need to protect citizens from national security threats.

Less than a decade later, in [Youngstown Sheet & Tube Co. v. Sawyer](#), the Court rejected President Truman’s executive order nationalizing steel mills to prevent a labor strike. Truman asserted that a strike would compromise national security at a time when the United States was involved in military conflict in Korea. The Court was not persuaded by this argument and ruled that neither the president’s authority as commander in chief nor the aggregate of his powers under Article II of the Constitution provided him the lawmaking authority to seize the mills—the exclusive provenance of Congress—even in times of war. While Justice Hugo Black wrote the majority opinion, it is Justice Jackson’s concurrence that has had lasting influence. Jackson concluded that the president has maximum authority when he or she “acts pursuant to an express or implied authorization of Congress.” If the president relies upon his or her independent Article II powers, an executive order may stand even “in absence of a congressional grant or denial of authority.” However, when the president takes measures that are “incompatible with the expressed or implied will of Congress,” the president’s action are most susceptible to constitutional attack “for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

In the event of a major terrorist attack, whether on U.S. soil or against U.S. interests abroad, the question of how the Trump administration might act to curtail rights or circumvent constitutional constraints looms large. The administration’s [original Muslim entry ban](#), which the president issued absent any evidence of an imminent national security threat, was a sweeping executive order that banned immigration from seven majority Muslim nations and all refugee resettlement. Legal permanent residents of the United States and visa holders from these seven countries were refused reentry into the U.S.—either detained at U.S. airports, returned to their country of origin, or prevented from boarding flights to the U.S. The order caused chaos, panic, public protests and mass mobilization of lawyers to help those affected. Within two days, the ban had been enjoined by a

---

<sup>17</sup> *Id.*

federal court,<sup>18</sup> leading to months of appeals and ultimately dismissal by the U.S. Supreme Court.<sup>19</sup> While there was some initial doubt about whether federal officials would fully comply with the injunctions, the administration has revised the ban twice to try to effectuate its goals in a manner acceptable to the courts, and litigation is still pending. Some are concerned that the administration might take even more extreme measures in the wake of a major terrorist attack and that the judiciary would defer, citing national security concerns.

## 2. Executive Clemency Power

The Constitution gives the president the power to “grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”<sup>20</sup> In July 2017, multiple media outlets reported that President Trump had consulted his lawyers about pardons related to Special Counsel Robert Mueller’s Russia investigation (discussed in more detail in Part II), including pardons for associates, family members, and even himself, as well as preemptive pardons that might shield individuals from indictment.<sup>21</sup>

Though there is some disagreement on the margins, constitutional scholars and legal experts largely agree that there are few limits to a president’s power to grant clemency to any person for any federal crime. While it may not be a “complete power to pardon,” as President Trump has [suggested](#), it is nonetheless a broad power that the president is free to exercise as he sees fit.<sup>22</sup> The Supreme Court has acknowledged the breadth of executive clemency power and Congress’s inability to constrain it,<sup>23</sup> but also warned that it may not be used in a manner that would “otherwise offend the Constitution.”<sup>24</sup>

As [Ex Parte Garland](#) seems to make clear, there is no constraint on the “class of offenders” to whom the president may grant clemency, which would include family members and political allies. The question remains, however, whether such exercise, in an effort to hamper a criminal investigation, could constitute obstruction of justice that itself would be a prosecutable offense

---

<sup>18</sup> *Washington v. Trump*, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. 2017) (finding that the ban “adversely affects the States’ residents in areas of employment, education, business, family relations, and freedom to travel” and issuing a nationwide temporary restraining order). Later versions of the ban were enjoined by courts in Hawaii and Maryland. *See Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017), *aff’d in part*, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017), *aff’d in part*, *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

<sup>19</sup> *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017); *Trump v. Int’l Refugee Assistance Project*, No. 16-1436, 2017 WL 4518553 (Oct. 10, 2017).

<sup>20</sup> U.S. CONST. art. II, § 2.

<sup>21</sup> Carol D. Leonnig, et al., [Trump team seeks to control, block Mueller’s Russia investigation](#), WASH. POST (July 21, 2017).

<sup>22</sup> Andrew Rudalevige, [Here’s What You Need to Know About the Presidential Power to Pardon](#), WASH. POST (July 24, 2017).

<sup>23</sup> *See Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (holding “Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.”); *United States v. Klein*, 80 U.S. (13 Wall) 128, 147 (1871) (“To the executive alone is intrusted the power of pardon; and it is granted without limit.”); *Ex Parte Grossman*, 267 U.S. 87, 120 (1925) (“The executive can reprieve or pardon all offenses...without modification or regulation by Congress”); *Schick v. Reed*, 419 U.S. 256, 266 (1977) (holding, “pardon power “flows from the Constitution alone, not any legislative enactments,” and “cannot be modified, abridged, or diminished by the Congress.”).

<sup>24</sup> *Schick*, 419 U.S. at 266.

against the president and if so, whether he could be indicted.<sup>25</sup> Nor is it clear whether the president may pardon himself, though an [Office of Legal Counsel memo](#) drafted while Richard Nixon was president—which has persuasive value but is not legally-binding—concluded, “Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.”

There is also precedent for presidents prospectively or preemptively pardoning individuals for crimes for which they have not yet been indicted or even investigated.<sup>26</sup> President Ford [pardoned](#) Nixon for all federal offenses that he “committed or may have taken part in,” precluding Nixon’s prosecution for his role in the Watergate scandal. President George H.W. Bush pardoned six individuals connected with the Iran-Contra affair, including some who had yet to face trial.<sup>27</sup>

Trump’s first pardon, for former Maricopa County Sheriff Joe Arpaio,<sup>28</sup> may provide insight into how he will use his clemency power to protect political allies, and the legal and constitutional questions those pardons may raise. In pardoning Arpaio, President Trump wholly circumvented the normal pardon procedure, which—though not constitutionally mandated—requires an individual to submit a pardon request to the Office of the Pardon Attorney, which then evaluates the request and makes a recommendation to the president.<sup>29</sup> Commentators fear that the circumstances surrounding Arpaio’s pardon send the message that the president’s allies may “disregard the Constitution, so long as they do so in a manner” that the administration finds favorable.<sup>30</sup> Though some critics have alleged that Arpaio’s pardon is constitutionally suspect because it infringes on the judiciary’s power to enforce constitutional rights,<sup>31</sup> by and large critics acknowledge that the consequence for any improper use of the pardon power would likely have to be political, the most severe being impeachment.

## DISCUSSION QUESTIONS

*What are arguments for and against the unitary executive theory as a matter of law? As a matter of policy? What limits can Congress and the judiciary place on the president’s response to national security threats? What limits, if any, can Congress and the judiciary place on the president’s pardon power? How does Trump’s use of the pardon comport with the practice of past presidents? How might using the pardon power prospectively affect the recipient’s ability to invoke the 5<sup>th</sup> Amendment right against self-incrimination in a subsequent proceeding? Can a pardon rise to the level of obstruction of justice?*

---

<sup>25</sup> Daniel Hemel and Eric Posner, [If Trump Pardons, It Could Be a Crime](#), N.Y. TIMES (July 21, 2017); Adam Liptak, [A Constitutional Puzzle: Can the President Be Indicted?](#), N.Y. TIMES (May 29, 2017).

<sup>26</sup> Andrew Wright, [Possible Presidential Pardon Scenarios](#), JUST SECURITY (July 19, 2017, 8:39 AM).

<sup>27</sup> David Johnston, [Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails ‘Cover-Up’](#), N.Y. TIMES (Dec. 25, 1992).

<sup>28</sup> For a discussion of the Arpaio pardon controversy, see Matt Ford, [President Trump Pardons Former Sheriff Joe Arpaio](#), THE ATLANTIC (Aug. 25, 2017, 10:55 PM).

<sup>29</sup> Associated Press, [A Look at the President’s Pardon Power and How It Works](#), PBS NEWSHOUR (Aug. 26, 2017, 5:12 P.M.).

<sup>30</sup> Daniel T. Kobil, [A Presidential Pardon for Joe Arpaio?](#), ACSBLOG (Aug. 25, 2017); see also Renato Mariotti, [Pardoning Joe Arpaio Undermines Respect for the Law](#), THE HILL (Aug. 25, 2017, 7:00 AM).

<sup>31</sup> [Brief for Free Speech for People and Coalition to Preserve, Protect, and Defend as Amici Curiae Supporting Plaintiffs](#), U.S. v. Arpaio (Sept. 11, 2017), No. CR-16-01012-001-PHX-SRB.

## FOR MORE INFORMATION ON EXECUTIVE POWER

Peter M. Shane, [The Originalist Myth of the Unitary Executive](#), 19 U. PA. J. CONST. L. 323 (2016); Erwin Chemerinsky, [Controlling Inherent Presidential Power: Providing a Framework for Judicial Review](#), 56 S. CAL. L. REV. 864 (1983); Robert J. Reinstein, [The Limits of Executive Power](#), 59 AMER. U. L. REV. 259 (2009); Si Lazarus, [Trump's Anti-ACA Sabotage Campaign Tramples On The Constitution—Why Are ACA Supporters Not Shouting This Out From The Rooftops?](#), ACSBLOG (Nov. 5, 2017); John Harrison, [The Unitary Executive and the Scope of Executive Power](#), 126 YALE L.J. F. 374 (2017); [Trump's Executive Order on Immigration](#), ACS Information and Resources; [Pardon the Disruption: The Reach, Limits, and Effect of Executive Clemency](#), American Constitution Society Briefing (Oct. 25, 2017); Martin H. Redish, [A Pardon for Arpaio Would Put Trump in Uncharted Territory](#), THE NEW YORK TIMES (Aug. 24, 2017); Andrew Wright, [A Self-Pardon?](#), ACSBLOG (July 25, 2017); Glenn Harlan Reynolds, [Congressional Control of Presidential Pardons](#), UNIVERSITY OF TENNESSEE LEGAL STUDIES, Research Paper No. 332 (Aug. 25, 2017); Renato Mariotti, [Should the President Pardon Himself and His Family?](#), THE HILL (July 23, 2017).

### C. Congress

In [Article I](#), the Constitution grants Congress the power to make laws and impeach and remove the president, other executive offices, and members of the judiciary. While these and other congressional powers provide a check on the other branches, when the same party controls Congress and the White House, lawmakers have often failed to use these powers as aggressively as when the opposition party controls the White House.

#### I. Oversight and Legislative Powers

As part of its oversight and legislative function, a congressional committee or subcommittee may compel testimony and the production of documents through the issuance of subpoenas.<sup>32</sup> For the subpoena to be valid, the chamber in which the committee sits (either the House or Senate) must authorize the investigation, the investigation must be related to a “valid legislative purpose,” and the testimony or documents sought must be relevant to the authorized investigation.<sup>33</sup> Courts seldom quash congressional subpoenas once they determine that a committee is acting within its “legitimate legislative sphere.”<sup>34</sup> Even in disputes in which the executive branch refuses to comply, courts tend to rule that such matters are “political questions” unsuitable for judicial remedy.<sup>35</sup>

Congress’s power to compel members of the executive branch and others to testify and produce documents serves as an important check on the executive’s activities. Investigations into Watergate, the Iran-Contra Affair, and the firing of U.S. attorneys during the George W. Bush administration, for example, were critical to bringing administrations’ misdeeds to light. As chairman of the

---

<sup>32</sup> *Wilkinson v. United States*, 365 U.S. 399 (1961); 2 U.S.C. § 190d *et. seq.*

<sup>33</sup> *Wilkinson*, 365 U.S. at 408-409.

<sup>34</sup> *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 501 (1975).

<sup>35</sup> See generally Todd Garvey, [Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments](#), Congressional Research Service (2014) (discussing the assertion of executive privilege in response to congressional inquiries).

Watergate Committee Senator Sam Ervin observed, investigations “can be the catalyst that spurs Congress and the public to support vital reforms in our nation’s laws.”<sup>36</sup>

Too frequently, however, robust congressional investigations occur only when one or both chambers are controlled by the party that does not control the White House (as was the case for Watergate, Iran-Contra, and the U.S. attorney firings). The opposition party, of course, has a political interest in uncovering executive branch wrongdoing, but the oversight function is too important to be used solely as a partisan tool. Currently, both the House and Senate Select Intelligence Committees are pursuing investigations into Russian interference in the 2016 U.S. presidential election and related issues.<sup>37</sup> Critics, however, fear the Republican majority is more interested in insulating the president and his administration from further scrutiny and diverting attention to ancillary matters, rather than conducting a probing investigation.<sup>38</sup> Failure to pursue this investigation in good faith and provide robust oversight would be an abdication of one of Congress’s key powers in checking the executive.

## 2. Impeachment

Congress’s arguably most powerful check on the executive and judiciary branches is also one of its most seldom used—the power to impeach and remove from office.<sup>39</sup> The House of Representatives has “the sole power to impeach,” while the Senate has “the sole power to try all impeachments,” including impeachment of the president.<sup>40</sup> The Constitution prescribes impeachment for the president in cases of “treason, bribery, or other high crimes and misdemeanors.”<sup>41</sup>

Alexander Hamilton described impeachable offenses as “the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”<sup>42</sup> High crimes and misdemeanors, being the most vague and open-ended impeachable offenses, are largely agreed to be conduct that causes “a great injury directly to the constitutional system of government.”<sup>43</sup> During the Clinton impeachment, several law professors argued that the proceedings were improper because “impeachment [for high crimes and misdemeanors] demands convincing evidence of grossly derelict exercise of official authority.”<sup>44</sup> By voting to impeach President Clinton, who was accused of perjury in the course of a private suit not involving his official conduct, some argue the House implicitly adopted an interpretation of “high crimes and misdemeanors” that is not limited to official

---

<sup>36</sup> United States Senate, [A History of Notable Senate Investigations](#).

<sup>37</sup> Press Release, House Permanent Select Committee on Intelligence, [Intelligence Committee Chairman, Ranking Member Establish Parameters for Russia Investigation](#) (Mar. 1, 2017); Press Release, Senate Select Committee on Intelligence, [Joint Statement on Committee Inquiry into Russian Intelligence Activities](#) (Jan. 13, 2017).

<sup>38</sup> Nicholas Fandos, [Hopes Dim for Congressional Russia Investigation as Parties Clash](#), N.Y. TIMES (Oct. 22, 2017).

<sup>39</sup> Only two presidents have ever been impeached—Andrew Jackson and Bill Clinton, both by Houses controlled by their political opponents. In neither case did the Senate vote to convict the president and remove him from office.

<sup>40</sup> U.S. CONST., art. I, §§ 2 & 3.

<sup>41</sup> *Id.* at art. II, § 4.

<sup>42</sup> THE FEDERALIST NO. 65 (Alexander Hamilton).

<sup>43</sup> Neal K. Katyal, [Impeachment as Congressional Constitutional Interpretation](#), 63 LAW & CONTEMP. PROBS. 169, 170 (Winter/Spring 2000).

<sup>44</sup> 144 CONG. REC. H9650 (daily ed. Oct. 6, 1998) (Dec. 18, 1998).



conduct.<sup>45</sup> The Senate, in declining to convict President Clinton, did not endorse or explicitly reject this interpretation, leaving the matter unresolved. Still, many see the “official/unofficial conduct” distinction as inapposite, since a “president with a significantly diminished ability to discharge the powers of his office could be extremely dangerous, whether the diminution stems from official or unofficial misconduct.”<sup>46</sup>

## DISCUSSION QUESTIONS

*Are there ways to insulate congressional investigations from politicization? Under what circumstances is setting up a special or select committee warranted? When should Congress establish an investigative commission and how effective have they been in the past? How does the assertion of executive privilege, which is not explicitly mentioned in the Constitution, affect Congress’s oversight and investigation authority? To what extent can and should the courts referee disputes between the executive and the legislative branches? Does the judiciary have any role in defining the limits of Congress’s impeachment and removal power?*

## FOR MORE INFORMATION ON CONGRESSIONAL POWERS

Susan Hennessey and Helen Klein Murillo, [The Rules of Congressional Investigations and Trump’s Growing Russia Problem](#), LAWFARE (Mar. 2, 2017); Richard K. Neumann Jr., [The Revival of Impeachment as a Partisan Political Tool](#), HOFSTRA U. LEGAL STUDIES RESEARCH PAPER NO. 06-22 (2006); Neil Kinkopf, [The Scope Of ‘High Crimes And Misdemeanors’ After the Impeachment of President Clinton](#), 63 LAW & CONTEMP. PROBS. 200, (Winter/Spring 2000); Neal K. Katyal, [Impeachment as Congressional Constitutional Interpretation](#), 63 LAW & CONTEMP. PROBS. 169 (Winter/Spring 2000); Ron Fein, [‘If Discovered, He May Be Impeached’: President Trump and the Foreign Emoluments Clause](#), ACSBLOG (Feb. 2, 2017).

## II. Democratic Accountability and Transparency

A government premised on democratic participation can only remain accountable if it is operated in a transparent manner. This allows the governed to make informed decisions about elected officials and the policies they seek to pursue. While every administration falls short of complete transparency, critics believe the Trump administration has demonstrated particular contempt for transparency and accountability. Trump and his administration have refused to release his tax returns,<sup>47</sup> failed to disclose and divest his corporate holdings,<sup>48</sup> sought to unwind Obama-era regulations without engaging in necessary public consultation,<sup>49</sup> taken the unprecedented step of firing FBI Director James Comey to stymie the FBI’s Russia investigation, subsequently signaled the possibility of

---

<sup>45</sup> Katyal, *supra* note 43.

<sup>46</sup> Neil Kinkopf, [The Scope of ‘High Crimes and Misdemeanors’ after the Impeachment of President Clinton](#), 63 LAW & CONTEMP. PROBS. 201, 220 (Winter/Spring 2000).

<sup>47</sup> Julie Hirschfeld Davis, [Trump Won’t Release His Tax Returns, a Top Aide Says](#), N.Y. TIMES (Jan. 22, 2017).

<sup>48</sup> Andy Sullivan, et al., [Trump says won’t divest from his business while president](#), REUTERS (Jan. 11, 2017, 11:33 A.M.).

<sup>49</sup> See e.g., *Clean Air Council v. Pruitt*, 862 F. 3d 1 (D.C. Cir. 2017).

removing Special Counsel Robert Mueller,<sup>50</sup> and repeatedly attacked the credibility of the FBI and intelligence community.<sup>51</sup>

### A. Emoluments Clauses and Conflicts of Interest

The Foreign Emoluments Clause requires that “no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”<sup>52</sup> This means that federal officials, including the president, cannot receive a payment or other benefit from a foreign government. The Domestic Emoluments Clause, in contrast, specifically restricts the president from receiving any emolument beyond the fixed compensation paid by the United States, from the United States or any state.<sup>53</sup>

Foreign Emoluments Clause violations are of unique concern now because President Trump has refused to divest his interest in the Trump Organization and place his assets in a blind trust,<sup>54</sup> which has been a common approach in recent administrations.<sup>55</sup> As a result, he currently faces multiple lawsuits by plaintiffs including private businesses, members of Congress, and the State of Maryland and District of Columbia, alleging he has violated the Foreign Emoluments Clause by accepting foreign funds and payments through his business enterprises, including his hotels, golf courses, and residential properties.<sup>56</sup> Commentators also [express](#) concern that President Trump is violating the Domestic Emoluments Clause by receiving government subsidies and tax breaks, as well as income from leases of, and expenditures at, his various properties—claims that Maryland and the District of Columbia are pursuing in their litigation against the president.<sup>57</sup>

Lawyers for President Trump [assert](#) that “commentators are wrong to suggest that business in the ordinary course at any of the Trump International Hotels, or at any of the [President’s] businesses, risks violating” the Foreign Emoluments Clause, because its prohibitions do not apply to payments

---

<sup>50</sup> John Wagner, [Trump friend floats possibility of firing special counsel in Russian probe](#), WASH. POST (June 13, 2017).

<sup>51</sup> See e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 3, 2017, 8:00 AM), <https://twitter.com/realDonaldTrump/status/937305615218696193>; Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2017, 9:06 PM), <https://twitter.com/realDonaldTrump/status/937141061343956992>.

<sup>52</sup> U.S. CONST. art. I, § 9, cl. 8

<sup>53</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>54</sup> See Joshua Matz & Laurence Tribe, [President Trump Has No Defense Under the Foreign Emoluments Clause](#), AMERICAN CONSTITUTION SOCIETY (Jan. 24, 2017); Jackie Northam, [Trump Files Documents to Shift Management of Businesses to His Sons](#), NPR (Jan. 23, 2017, 5:34 PM).

<sup>55</sup> Jennifer Wang, [Why Trump Won't Use A Blind Trust And What His Predecessors Did With Their Assets](#), FORBES (Nov. 15, 2016, 9:00 AM).

<sup>56</sup> The cases currently pending are Citizens for Responsibility and Ethics in Washington (CREW) v. Trump, No. 1:17-cv-00458-RA (pending S.D.N.Y.); Blumenthal, et al. v. Trump, No. 1:17-cv-01154 (pending D.D.C.); and D.C. and Maryland v. Trump, No. 8:17-cv-01596 (pending D. Md.). See also, Cork v. Trump Old Post Office, LLC and Trump, No. 1:17-cv-00731-RJL (pending D.D.C.), which raises different, but related claims. In *Cork*, the plaintiff, a restaurant located in the District of Columbia, alleges that the owners and operators of Trump International Hotel, including Donald J. Trump, have engaged in unfair competition under D.C. common law by continuing to operate the hotel while Trump is president, in violation of the lease with the federal government. *Id.*

<sup>57</sup> D.C. and Maryland v. Trump, No. 8:17-cv-01596.

of “fair market value” or those not made “as a consequence of discharging the duties of an *office*.”<sup>58</sup> Critics of this reading point to the purpose of the clause—to prevent undue influence from foreign governments—and contend there is no reason to limit the clause to fair market value or payments for official duties if the intent is to prevent a conflict of interest from impeding a federal official’s objectivity.<sup>59</sup>

## B. Rulemaking

The Administrative Procedures Act (APA) sets forth the requirements by which federal agencies may adopt or rescind regulations.<sup>60</sup> In general, these rules require that a federal agency publish a notice of proposed rulemaking to the public, through publication in the Federal Register, and provide an opportunity for the public to comment on the proposed regulatory change.<sup>61</sup> This fosters transparency and public engagement in the rulemaking process.

The Trump administration, particularly the Environmental Protection Agency under Administrator Scott Pruitt, has already run afoul of these rules. The EPA has attempted to bypass the APA’s and the Clean Air Act’s rulemaking procedures by simply suspending indefinitely an already finalized rule.<sup>62</sup> In *Clean Water Action*, plaintiffs claim that “without notice and without providing the public with an opportunity to comment, EPA promulgated the Indefinite Stay, which purports to postpone indefinitely Clean Water Act compliance deadlines for power plants established” by the Effluent Limitation Guidelines finalized in November 2015. In *Clean Air Council*, the D.C. Circuit rejected the EPA’s attempt to stay a methane rule, noting that the agency failed to “point to something in either the Clean Air Act or the APA that gives it authority to stay the methane rule.”<sup>63</sup>

Critics are concerned that, given the size and scope of the federal regulatory landscape, many other regulatory changes may be afoot without proper public notice and comment. As explained in a recent ACS webinar, understanding and staying abreast of regulatory changes and participating in notice and comment proceedings are critical to holding the administration accountable.<sup>64</sup>

## C. Russia Investigation

On May 9, 2017, President Trump dismissed FBI Director James Comey, citing his handling of the Hillary Clinton email investigation and the recommendations of Attorney General Sessions and Deputy Attorney General Rosenstein. Two days later, after many conflicting reasons were given for

---

<sup>58</sup> The DOJ makes similar arguments in its response to CREW’s suit, though it first asserts the case should be dismissed on standing grounds. Memorandum of Law in Support of Defendant’s Motion to Dismiss, *CREW v. Trump* (June 9, 2017), No. 1:17-cv-00458-RA. Some scholars argue that the president does not fall within the category of “Persons holding any Office of Profit or Trust under them,”—as evidenced by early presidential behavior—and is therefore not subject to the Foreign Emoluments Clause. See e.g., Seth Barrett Tillman, [Originalism & the Scope of the Constitution’s Disqualification Clause](#), 33 QUINNIPIAC L. REV. 59, 71, 85 (2014).

<sup>59</sup> See Matz & Tribe, *supra* note 54.

<sup>60</sup> 5 U.S.C. § 500 et seq., Pub. L. 79–404, 60 Stat. 237.

<sup>61</sup> *Id.* at § 553.

<sup>62</sup> See *Clean Water Action v. Pruitt*, No. 17-817 (D.D.C.); *Clean Air Council v. Pruitt*, 862 F. 3d 1 (D.C. Cir. 2017).

<sup>63</sup> *Clean Air Council*, 862 F. 3d at 9. For further explanation of the case, see Dan Farber, [A Case of Administrative Bad Faith](#), LEGAL PLANET (July 5, 2017).

<sup>64</sup> [Notice and Comment Procedure: A Critical Oversight Tool](#), American Constitution Society (Sept. 19, 2017).

Comey's dismissal, President Trump said, "When I decided to just do it, I said to myself, I said, you know, this Russia thing with Trump and Russia is a made-up story,"<sup>65</sup> referring to alleged connections between Trump's campaign and the Russian government's election tampering. In response, on May 17, Deputy Attorney General Rosenstein appointed former FBI Director Robert Mueller as special counsel to lead the Russia investigation, pursuant to Department of Justice (DOJ) [regulations](#) that allow for a special counsel when an "investigation or prosecution... would present a conflict of interest" for the Justice Department and that it would be "in the public interest to appoint an outside Special Counsel to assume responsibility."<sup>66</sup> The [DOJ regulations](#) provide that the special counsel be selected from "outside the United States government" and must be a lawyer with "a reputation for integrity and impartial decisionmaking and... appropriate experience." A special counsel has "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney," which includes the power to prosecute, and may be removed only by the Attorney General (or in this case, the Deputy Attorney General) "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."<sup>67</sup> Mueller's authority also stems from [Deputy Attorney General Rosenstein's Order](#) appointing him as special counsel. Since Mueller's appointment, President Trump has complained that the investigation is rife with conflicts of interest,<sup>68</sup> and has called the investigation a "terrible (and bad for our country) Witch Hunt (sic) for evil politics."<sup>69</sup>

The current rules replace the procedures for appointing an independent counsel required under the Ethics in Government Act and its reauthorizing acts, which expired in 1999.<sup>70</sup> Because the congressionally created statutory protections no longer exist, and given what we already know of the administration's view of executive power, President Trump, despite lacking unilateral authority to remove a special counsel, might attempt to compel Rosenstein to fire Mueller or instruct the attorney general to revoke DOJ's special counsel regulations.<sup>71</sup> There could, however, be significant procedural hurdles to doing so, since "as a practical matter, repealing the special counsel regulations

---

<sup>65</sup> Michelle Ye Hee Lee, [All of the White House's conflicting explanations for Comey's firing: A timeline](#), WASH. POST (May 12, 2017).

<sup>66</sup> Rosenstein made the appointment of Mueller because Attorney General Sessions had recused himself from all matters involving the Russia investigation in March 2017, after it was discovered that he had conversations with Russia's ambassador to the U.S., Sergey Kislyak during his time as a surrogate for Trump's campaign and failed to disclose them during his confirmation hearing. Press Release: [Attorney General Sessions Statement on Recusal](#), U.S. DEPT. OF JUSTICE, Mar. 2, 2017; Madeleine Sheehan Perkins and Harrison Jacobs, [The Justice Department Has Appointed a Special Counsel to Investigate Trump-Russia Ties – Here's How It Works](#), BUSINESS INSIDER (May 17, 2017, 6:19 PM).

<sup>67</sup> 28 C.F.R. § 600.7(d).

<sup>68</sup> Peter Baker, et al., [Excerpts from the Time's Interview with Trump](#), N.Y. TIMES (July 19, 2017).

<sup>69</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2017, 10:09 AM), <https://twitter.com/realDonaldTrump/status/924639422066384896>.

<sup>70</sup> Final Rule, *Office of Special Counsel*, 64 F.R. 37038-01 (July 9, 1999); Ethics in Government Act, Pub. L. 95-521, 92 Stat. 1867, Title VI. The Ethics in Government Act was passed in 1978, in response to what is known as the "Saturday Night Massacre," in which President Nixon ordered the firing of special prosecutor Archibald Cox, who was investigating the Watergate scandal, prompting then-Attorney General Elliot Richardson and Deputy Attorney General William French Smith to resign.

<sup>71</sup> Noah Bookbinder, Norman Eisen, and Caroline Fredrickson, [Why Trump Can't \(Easily\) Remove Mueller—and What Happens If He Tries](#), AMERICAN CONSTITUTION SOCIETY AND CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Dec. 6, 2017).

may be subject to the APA's drawn-out notice-and-comment requirements."<sup>72</sup> Moreover, Rosenstein has committed to honoring the rule of law and adhering to the regulation's requirement, saying he will not dismiss Mueller absent "good cause."<sup>73</sup> If Rosenstein were to refuse, Trump could fire him and could "keep firing DOJ officials who refused to fire Mueller until he finds one" who will.<sup>74</sup> Beyond the political cost the president would face for interfering with a federal investigation, some opine that the president's taking active measures to end an investigation that might implicate his political allies, his family, and himself in criminal activities could very well rise to the level of obstruction of justice.<sup>75</sup> At the very least, such interference would signal a turn away from democratic accountability and transparency. According to Rep. Adam Schiff (D-CA), in such a case, it would be up to Congress to "take up a bill that would establish an independent counsel for the purposes of this investigation, and give the appointment power to legislative leader."<sup>76</sup>

## DISCUSSION QUESTIONS

*Who has standing to sue the president for Emoluments Clause violations? What remedies can a court impose on a president for such violations and how are separation of powers principles implicated? What are the most effective ways to monitor and respond to proposed federal rulemaking? Can Trump be subject to obstruction of justice charges for firing Director Comey? Can a sitting president face criminal charges or is impeachment the only response to evidence of law breaking? What steps can be taken, either by the Department of Justice, Congress, or the judiciary to insulate a special counsel from undue influence by the president?*

## FOR MORE INFORMATION ON DEMOCRATIC ACCOUNTABILITY AND TRANSPARENCY

Zephyr Teachout, [\*The Anti-Corruption Principle\*](#), 94 CORNELL L. REV. 341 (2009); Norman L. Eisen, Richard Painter, and Laurence H. Tribe, [\*The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump\*](#), GOVERNANCE STUDIES AT BROOKINGS (Dec. 16, 2016); American Constitution Society National Event: [\*All the President's Business Interests: The Emoluments Clauses and the Trump Administration\*](#) (July 19, 2017); Joshua Matz & Laurence Tribe, [\*President Trump Has No Defense Under the Foreign Emoluments Clause\*](#), American Constitution Society (Jan. 24, 2017); [\*Collected Posts on the Emoluments Clause\*](#), ACSBLOG; [\*Notice and Comment Procedure: A Critical Oversight Tool\*](#) (Audio), American Constitution Society (Sept. 19, 2017); Noah Bookbinder, Norman Eisen, and Caroline Fredrickson, [\*Why Trump Can't \(Easily\) Remove Mueller—and What Happens If He Tries\*](#), AMERICAN CONSTITUTION SOCIETY AND CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (Dec. 6, 2017); Barry H. Berke, Noah Bookbinder, and Norman L. Eisen, [\*Presidential obstruction of justice: The case of Donald J. Trump\*](#), GOVERNANCE STUDIES AT BROOKINGS (Oct. 10,

---

<sup>72</sup> *Id.* at 10.

<sup>73</sup> Matt Zapotosky, [\*Rosenstein Says He'd Need 'Good Cause' to Fire Mueller\*](#), WASH. POST (June 13, 2017, 10:55 AM).

<sup>74</sup> Steve Vladeck, [\*If the Rumors Are True: President Trump and the Firing of Bob Mueller\*](#), ACSBLOG (July 21, 2017).

<sup>75</sup> See Barry H. Berke, Noah Bookbinder, and Norman L. Eisen, [\*Presidential obstruction of justice: The case of Donald J. Trump\*](#), GOVERNANCE STUDIES AT BROOKINGS (Oct. 10, 2017).

<sup>76</sup> Greg Sargent, [\*If Trump tips into full-blown authoritarianism, will Republicans step up? Don't count on it\*](#), WASH. POST (June 13, 2017).

2017); [ACS-Crew Presidential Investigation Education Project](#), American Constitution Society; [Collected Posts on the Russia Investigation](#), ACSBLOG.

### III. The Role of Norms in Constitutional Governance

Norms are unwritten rules and conventions that shape political behavior in both the political and constitutional sphere.<sup>77</sup> Political norms guide an official's exercise of discretion to promote comity, respect, and cooperation between branches or political parties. Constitutional norms vindicate some fundamental purpose of the Constitution that may not appear plainly in its text (e.g., a right to vote for president even though a state legislature could arguably appoint presidential electors to the electoral college).<sup>78</sup> Put simply, norms provide a way of speaking about certain rules of behavior that Americans expect from government actors but may struggle to articulate.

Historically, elected officials have mostly acted within the constraints of political and constitutional norms when exercising discretion. More recently, experts opine that the influence of tribalism, where “members of the opposite party are” viewed as “dangerous enemies,” has reduced respect for norms altogether.<sup>79</sup> For example, President Trump's decision to fire FBI Director Comey and his subsequent admission that his firing was a response to the Russia investigation was considered a seismic break with longstanding norms at the time.<sup>80</sup> Comey's dismissal may have been legal, but it was largely understood that a president should refrain from wielding political influence against Justice Department officials. So, too, were the president's continued visits to and promotion of his own businesses considered a violation of the understanding that the president should not use the bully pulpit to enrich himself.<sup>81</sup> While it might be technically legal for the president to use his official position to promote his business interests, the fact that his Cabinet members and other executive officials may not, reveals the impropriety of such profiteering.<sup>82</sup> An additional risk is that once norms are broken, they can, by definition, be difficult to repair.

Despite this danger, President Trump has called into question the democratic process itself by threatening to reject the results of the election as illegitimate if he did not win,<sup>83</sup> encouraging acts of

---

<sup>77</sup> Curtis A. Bradley and Neil S. Siegel, [Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers](#), 105 GEO L.J. 255 (2014).

<sup>78</sup> Neil Siegel, [The U.S. Constitution, Constitutional Conventions, and President Trump](#), OXFORD HUMAN RIGHTS HUB (Mar. 1, 2017).

<sup>79</sup> E.J. Dionne Jr., Norm Ornstein, and Thomas E. Mann, [How the GOP Prompted the Decay of Political Norms](#), THE ATLANTIC (Sept. 19, 2017).

<sup>80</sup> Graham Lanktree, [Trump Firing James Comey Could Permanently Alter American Democracy, Experts Say](#), NEWSWEEK (May 14, 2017, 2:44 PM).

<sup>81</sup> Brad Heath, Fredreka Schouten, Steve Reilly, Nick Penzenstadler and Aamer Madhani, [Trump Gets Millions from Golf Members. CEOs and Lobbyists Get Access to President](#), USA TODAY (Sept. 8, 2017, 12:25 PM).

<sup>82</sup> 5 C.F.R. § 2635.702 prohibits any federal employees from using their “public office for [their] own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated,” but 5 C.F.R. § 2635.102 explicitly omits the president and vice president from the definition of federal employee.

<sup>83</sup> Max Fisher, [Donald Trump's Threat to Reject Election Results Alarms Scholars](#), N.Y. TIMES (Oct. 23, 2016).

violence among his supporters;<sup>84</sup> and calling for his political opponents to be investigated and jailed, even after defeating them.<sup>85</sup> President Trump has seemingly rejected the consultative and deliberative policymaking process of most prior administrations, instead releasing major policy decisions via social media.<sup>86</sup> He frequently attacks the press when unflattering stories about him or his administration are reported, going so far as to threaten the broadcast license of one network and possibly interfering with AT&T's acquisition of Time Warner as a way to punish CNN.<sup>87</sup>

The president's violation of norms extends beyond his own statements. It is the executive branch's responsibility to select and nominate individuals for the judiciary and executive agencies. The Senate then provides its advice and consent, evaluating the nominees and voting whether to confirm. Though not required by the Constitution, it is expected that a president will select qualified nominees to sit on the bench or help lead the federal agencies under his care. Instead, President Trump has nominated individuals that lack the background and training to properly execute their duties.<sup>88</sup> Many have conflicts of interest,<sup>89</sup> serious ethical lapses,<sup>90</sup> have made racist statements<sup>91</sup> or have previously worked to dismantle the very agencies they are appointed to lead.<sup>92</sup> Among his judicial nominees, the American Bar Association has determined four to be "not qualified,"<sup>93</sup> one of whom also failed to disclose to senators that his wife works in the White House Counsel's Office.<sup>94</sup>

These and a litany of other statements, threats, and actions put at risk the delicate and largely unwritten political compact that has allowed our government to remain functional and stable (excepting the Civil War) despite sometimes vehement disagreement between the political parties. Without norms to guide them, preserving the rule of law in our governmental institutions has been, and will continue to become, more challenging.

---

<sup>84</sup> Trump has made numerous statements about acts of violence with his supporters and stated that he "could stand in the middle of 5<sup>th</sup> Avenue and shoot somebody and I wouldn't lose voters." Jeremy Diamond, [Trump: I Could 'Shoot Somebody and I Wouldn't Lose Voters.'](#) CNN (Jan. 24, 2016).

<sup>85</sup> Yoni Appelbaum, [Trump's Promise to Jail Clinton is a Threat to American Democracy](#), THE ATLANTIC (Oct. 10, 2016); Matt Zapotosky, [Sessions considering second special counsel to investigate Republican concerns, letter shows](#), WASH. POST (Nov. 13, 2017).

<sup>86</sup> Trump announced his transgender troop ban on Twitter. See Julie Hirschfeld Davis and Helene Cooper, [Trump Says Transgender People Will Not Be Allowed in the Military](#), N.Y. TIMES (July 26, 2017).

<sup>87</sup> Jim Rutenberg, [In AT&T Deal, Government Action Catches Up With Trump Rhetoric](#), N.Y. TIMES (Nov. 8, 2017).

<sup>88</sup> Juliet Eilperin, [Trump agriculture nominee Sam Clovis confirms he has no hard-science credentials, withdraws over ties to Russia probe](#), WASH. POST (Nov. 2, 2017); Paul Waldman, [Donald Trump has assembled the worst Cabinet in American history](#), WASH. POST (Jan. 19, 2017).

<sup>89</sup> Eric Lipton, et al., [With Trump Appointees, a Raft of Potential Conflicts and 'No Transparency'](#), N.Y. TIMES (April 15, 2017).

<sup>90</sup> Juliet Eilperin, et al., [HHS Secretary Tom Price resigns amid criticism for taking charter flights at taxpayer expense](#), WASH. POST (Sept. 29, 2017); Abigail Tracey, [Jeff Sessions' Perjury Nightmare Deepens](#), VANITY FAIR (Nov. 3, 2017, 5:41 PM); Fred Barbash, [Commerce Secretary Wilbur Ross 'lied' about his wealth to make richest Americans list, says Forbes Magazine](#), WASH. POST (Nov. 8, 2017).

<sup>91</sup> Erin McCann, [Coretta Scott King's 1986 Statement to the Senate About Jeff Sessions](#), N.Y. TIMES (Feb. 8, 2017).

<sup>92</sup> Dominique Mosbergen, [Scott Pruitt Has Sued the Environmental Protection Agency 13 Times. Now He Wants to Lead It.](#), THE HUFFINGTON POST (Jan. 17, 2017).

<sup>93</sup> Philip Bump, [How unusual are Trump's 'not qualified' judicial nominations?](#), WASH. POST (Nov. 10, 2017).

<sup>94</sup> Matt Apuzzo and Michael S. Schmidt, [Trump Judicial Pick Did Not Disclose He Was Married to a White House Lawyer](#), N.Y. TIMES (Nov. 13, 2017).

## DISCUSSION QUESTIONS

*What role do norms and conventions play in constitutional governance and how do they relate to duties and rights found in the Constitution? How do we know what constitutes a norm and, once identified, how do we determine its scope? Can and should lawmakers seek to codify norms in order to ensure future elected officials comply with their constraints? What are the consequences of ignoring political and constitutional norms both in the short and long term? Is the ballot box the only remedy for violations of norms or can the judiciary play a role?*

## FOR MORE INFORMATION ON NORMS

ACS 2017 National Convention Plenary: [Norms, Conventions, and Constitutional Governance](#) (June 9, 2017); ACS National Event: [Democratic Deterioration at Home and Abroad](#) (Nov. 6, 2017); Curtis A. Bradley & Neil S. Siegel, [Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers](#), 105 GEO. L.J. 255 (2017); Geoffrey R. Stone, [An Unprecedented Breach of Norms by Senate Republicans](#), HUFFINGTON POST: THE BLOG (Mar. 1, 2016); Aziz Huq & Tom Ginsburg, [How To Lose a Constitutional Democracy](#), VOX (Feb. 21, 2017); Kate Sell, [Conventions as Constraints on Executive Discretion](#), REG. REV. (Feb. 1, 2016).



## Speakers List

The following list includes a variety of scholars, advocates, and litigators you may contact when planning your chapter's rule of law events this year. The speakers are listed in alphabetical order, according to their location. We have provided their title, organization, and the broad legal issues related to the rule of law into which their research, litigation, or advocacy falls. Please note that these categories are necessarily simplistic. When considering any of the experts listed below for your programming, we encourage you to research the speaker to ensure their specific specialties would be appropriate for your event.

Please note that the potential speakers included in this guide are not an exhaustive list of all possible experts you might consider as you plan your 2018 programming. Instead, this list is intended to provide you with a sampling of the scholars, advocates, institutions, and organizations that work on these issues. When developing your events, we also encourage you to consider local experts and practitioners and to consult law school faculty members, including ACS student chapter faculty advisors, for further suggestions.

Name	Title	Organization	State	Specialty
<b>Toni M. Massaro</b>	Regents' Professor, Milton O. Riepe Chair in Constitutional Law; Dean Emerita	University of Arizona James E. Rogers College of Law	AZ	Constitutional Law
<b>Bijal Shah</b>	Associate Professor	Arizona State University Sandra Day O'Connor College of Law	AZ	Administrative Law; Immigration Law; Constitutional Law
<b>Jennifer Chacón</b>	Professor of Law	University of California, Irvine School of Law	CA	Constitutional Law; Immigration Law
<b>Erwin Chemerinsky</b>	Dean; Jesse H. Choper Distinguished Professor of Law	University of California Berkeley Law	CA	Constitutional Law
<b>James Dempsey</b>	Executive Director, Berkeley Center for Law & Technology	University of California Berkeley Law	CA	National Security Law

The American Constitution Society for Law and Policy

<b>Name</b>	<b>Title</b>	<b>Organization</b>	<b>State</b>	<b>Specialty</b>
<b>Daniel Farber</b>	Sho Sato Professor of Law; Co-Faculty Director, Center for Law, Energy & the Environment	University of California Berkeley Law	CA	Constitutional Law; Administrative Law
<b>Pamela Karlan</b>	Kenneth and Harle Montgomery Professor of Public Interest Law; Co-Director of the Supreme Court Litigation Clinic	Stanford Law School	CA	Constitutional Law
<b>Leah Litman</b>	Assistant Professor of Law	University of California, Irvine School of Law	CA	Constitutional Law; Federal Courts
<b>Jon Michaels</b>	Professor of Law	UCLA School of Law	CA	Constitutional Law; Administrative Law; National Security Law
<b>Zachary Price</b>	Associate Professor	University of California, Hastings College of Law	CA	Constitutional Law; Administrative Law
<b>Frederic Bloom</b>	Associate Dean for Research; Professor of Law	University of Colorado Law School	CO	Federal Courts
<b>Harold Hongju Koh</b>	Sterling Professor of International Law	Yale Law School	CT	National Security Law
<b>Noah Bookbinder</b>	Executive Director	Citizens for Responsibility and Ethics in Washington (CREW)	DC	Government Ethics
<b>David Cole</b>	National Legal Director	American Civil Liberties Union	NY/DC	Constitutional Law
<b>Jennifer Daskal</b>	Associate Professor of Law	American University Washington College of Law	DC	Constitutional Law; National Security Law

<b>Name</b>	<b>Title</b>	<b>Organization</b>	<b>State</b>	<b>Specialty</b>
<b>Mary B. DeRosa</b>	Distinguished Visitor from Practice; Co-Director, Global Law Scholars Program	Georgetown University Law Center	DC	National Security Law
<b>Christopher Fonzone</b>	Partner; Former Deputy White House Counsel and National Security Council Legal Adviser	Sidley Austin, LLP	DC	National Security Law
<b>Elizabeth (Liza) Goitein</b>	Co-Director, Liberty & National Security Program	Brennan Center for Justice	DC	National Security Law; Government Transparency
<b>Deepak Gupta</b>	Founding Principal	Gupta Wessler PLLC	DC	Constitutional Law; Government Ethics
<b>Lisa Heinzerling</b>	Justice William J. Brennan, Jr., Professor of Law	Georgetown University Law Center	DC	Administrative Law
<b>Neal Katyal</b>	Partner; Paul and Patricia Saunders Professor of National Security Law; Former Acting Solicitor General	Hogan Lovells; Georgetown University Law Center	DC	Constitutional Law; National Security Law
<b>Margaret Love</b>	Principle; Former U.S. Pardon Attorney	Law Offices of Margaret Love	DC	Pardon Power; Executive Clemency
<b>Martin S. Lederman</b>	Associate Professor of Law	Georgetown University Law Center	DC	Constitutional Law
<b>Alan Morrison</b>	Lerner Family Associate Dean for Public Interest and Public Service Law; Professorial Lecturer in Law	George Washington University Law School	DC	Constitutional Law; Government Transparency; Government Ethics
<b>Todd Peterson</b>	Professor of Law	George Washington University Law School	DC	Separation of Powers; Federal Courts

The American Constitution Society for Law and Policy

<b>Name</b>	<b>Title</b>	<b>Organization</b>	<b>State</b>	<b>Specialty</b>
<b>Raha Wala</b>	Director, National Security Advocacy	Human Rights First	DC	National Security Law
<b>Bill Yeomans</b>	Lecturer in Law	Columbia Law School	DC	Separation of Powers; Legislative Process; Federal Government Ethics
<b>Neil J. Kinkopf</b>	Professor of Law	Georgia State University College of Law	GA	Separation of Powers; Presidential Powers; Constitutional Law
<b>Eric J. Segall</b>	Kathy and Lawrence Ashe Professor of Law	Georgia State University College of Law	GA	Constitutional Law
<b>Andrew Wright</b>	Associate Professor of Law	Savannah Law School	GA	Constitutional Law
<b>Paul Gowder</b>	Professor of Law	University of Iowa College of Law	IA	Constitutional Law; Rule of Law
<b>Mark Kende</b>	James Madison Chair in Constitutional Law; Director of the Constitutional Law Center	Drake Law School	IA	Constitutional Law
<b>Aziz Huq</b>	Frank and Bernice J. Greenberg Professor of Law	University of Chicago	IL	Constitutional Law
<b>Renato Mariotti</b>	Partner	Thompson Coburn	IL	Pardon Power; Federal Investigations
<b>Geoffrey Stone</b>	Edward H. Levi Distinguished Service Professor of Law	University of Chicago	IL	Constitutional Law

<b>Name</b>	<b>Title</b>	<b>Organization</b>	<b>State</b>	<b>Specialty</b>
<b>David Strauss</b>	Gerald Ratner Distinguished Service Professor of Law; Faculty Director of the Jenner and Block Supreme Court and Appellate Clinic	University of Chicago	IL	Constitutional Law
<b>Charles Gardner Geyh</b>	John F. Kimberling Professor of Law	Indiana University Maurer School of Law	IN	Judicial Independence
<b>Dawn Johnsen</b>	Walter W. Foskett Professor of Law	Indiana University Maurer School of Law	IN	Constitutional Law
<b>Judge Nancy Gertner (ret.)</b>	Senior Lecturer on Law	Harvard Law School	MA	Judicial Independence
<b>Nicholas Bagley</b>	Professor	University of Michigan Law School	MI	Administrative Law
<b>Barbara McQuade</b>	Professor from Practice; Former United States Attorney for the Eastern District of Michigan	University of Michigan Law School	MI	Federal Investigations; National Security Law
<b>Richard Primus</b>	Theodore J. St. Antoine Collegiate Professor of Law	University of Michigan Law School	MI	Constitutional Law
<b>Heidi Kitrosser</b>	Professor of Law	University of Minnesota Law School	MN	Constitutional Law
<b>Richard W. Painter</b>	S. Walter Richey Professor of Corporate Law	University of Minnesota Law School	MN	Government Ethics
<b>Michael Gerhardt</b>	Samuel Ashe Distinguished Professor in Constitutional Law	University of North Carolina School of Law	NC	Constitutional Law
<b>Bill Marshall</b>	William Rand Kenan, Jr. Distinguished Professor of Law	University of North Carolina School of Law	NC	Constitutional Law

<b>Name</b>	<b>Title</b>	<b>Organization</b>	<b>State</b>	<b>Specialty</b>
<b>Neil Siegel</b>	David W. Ichel Professor of Law and Professor of Political Science; Co-Director of the Program in Public Law; Director of the DC Summer Institute on Law and Policy	Duke University School of Law	NC	Constitutional Law
<b>Ian Bartrum</b>	Professor of Law	University of Nevada, Las Vegas William S. Boyd School of Law	NV	Constitutional Law
<b>Jamal Greene</b>	Dwight Professor of Law	Columbia Law School	NY	Constitutional Law; Federal Courts
<b>Rachel Meeropol</b>	Senior Staff Attorney; Associate Director of Legal Training and Education	Center for Constitutional Rights	NY	National Security Law
<b>Gillian Metzger</b>	Stanley H. Fuld Professor of Law	Columbia Law School	NY	Constitutional Law; Administrative Law
<b>Burt Neuborne</b>	Norman Dorsen Professor of Civil Liberties	New York University School of Law	NY	Constitutional Law
<b>Jed Shugerman</b>	Professor of Law	Fordham University School of Law	NY/MA	Administrative Law; Constitutional Law; Judicial Independence
<b>Daniel Kobil</b>	Professor of Law	Capital University Law School	OH	Constitutional Law
<b>Carole S. Rendon</b>	Partner; Former U.S. Attorney for the Northern District of Ohio	Baker Hostetler	OH	Federal Investigations
<b>Dakota Rudesill</b>	Assistant Professor of Law	The Ohio State University Moritz College of Law	OH	National Security Law

<b>Name</b>	<b>Title</b>	<b>Organization</b>	<b>State</b>	<b>Specialty</b>
<b>Peter M. Shane</b>	Jacob E. Davis and Jacob E. Davis II Chair in Law	The Ohio State University Moritz College of Law	OH	Constitutional Law; Administrative Law
<b>Hon. Timothy K. Lewis</b>	Counsel; Former U.S. Court of Appeals for the Third Circuit Judge	Schnader Harrison Segal & Lewis LLP	PA	Judicial Independence
<b>Kermit Roosevelt</b>	Professor of Law	University of Pennsylvania Law School	PA	Constitutional Law
<b>Lisa Schultz Bressman</b>	David Daniels Allen Distinguished Chair of Law	Vanderbilt University Law School	TN	Administrative Law
<b>Ganesh Sitaraman</b>	Professor of Law	Vanderbilt University Law School	TN	Constitutional Law; Administrative Law
<b>Bobby Chesney</b>	Charles I. Francis Professor in Law; Associate Dean for Academic Affairs; Director of Robert S. Strauss Center for International Security and Law	The University of Texas at Austin School of Law	TX	National Security Law
<b>Sanford V. Levinson</b>	W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair	The University of Texas at Austin School of Law	TX/MA	Constitutional Law
<b>Stephen I. Vladeck</b>	A. Dalton Cross Professor in Law	The University of Texas at Austin School of Law	TX	Constitutional Law; National Security Law
<b>Ashley S. Deeks</b>	Professor of Law; Senior Fellow, Center for National Security Law	University of Virginia School of Law	VA	National Security Law
<b>Miriam Seifter</b>	Assistant Professor	University of Wisconsin Law School	WI	Administrative Law

<b>Name</b>	<b>Title</b>	<b>Organization</b>	<b>State</b>	<b>Specialty</b>
<b>Robert Yablon</b>	Assistant Professor	University of Wisconsin Law School	WI	Constitutional Law; Federal Courts