



How a Future President Can Hold the Trump Administration Accountable

By Sam Berger August 6, 2020

The Trump administration has engaged in a wide-ranging pattern of actions that violate laws, agency regulations, and ethical requirements, repeatedly putting its own interests before the public interest. Administration officials and their allies have lied to federal investigators,¹ lied to Congress,² and sought to obstruct federal investigations,³ among other illegal actions. These efforts constitute a direct and sustained attack on the rule of law that effectively creates two justice systems—one for the Trump administration and its allies and one for everyone else.

As part of its attack on the rule of law, the administration has worked to subvert the very institutions that might hold it accountable—including the U.S. Department of Justice (DOJ),⁴ inspectors general,⁵ and Congress⁶—to eliminate even the possibility of oversight.

Whenever the Trump administration ends, there may be good-faith concerns that addressing the administration's misconduct will be too divisive, set a bad precedent, or lead to political pushback from the administration's supporters. But the lesson from the past four years is clear: The absence of accountability is treated as license to escalate abuses of power.

It is critical for leaders to make clear now that those who break the law will face accountability in the future. Ignoring the Trump administration's attacks on the rule of law will only invite further attacks—and likely even more brazen and threatening ones. The Trump administration's efforts to undermine U.S. democracy have greatly escalated—with the administration politicizing the deployment of federal law enforcement and casting doubt on the legitimacy of electoral processes—and are likely to grow in intensity unless it is clear that there will be accountability for wrongdoing.

While Congress will have a role in seeking to prevent future abuses, there are immediate steps a future administration can take.

First, the attorney general must conduct a top-to-bottom review of the DOJ to identify where politicization has influenced investigations, charging decisions, sentencing recommendations, and the like. There should be a particular focus on instances in which Trump administration allies received special treatment or opponents of his administration were targeted. This type of special treatment violates the DOJ's Justice Manual, which states that "legal judgments of the Department of Justice must be impartial and insulated from political influence."⁷ Where possible, decisions that have been improperly influenced must be revisited.

Second, nonpartisan career prosecutors must be allowed to pursue evidence of wrongdoing without political interference. If officials in the Trump administration—career or political—have broken the law, they must be treated like everyone else and held to account.

Third, there must be a recognition of the breadth of corruption across the executive branch. This problem is bigger than the White House and its current occupant. Throughout government, a culture of corruption has set in, where officials put their own interests before the public interest. A number of agency heads in the Trump administration have been forced to resign due to corruption scandals.⁸

There are a number of anti-corruption laws and regulations that govern agency officials, including those that prohibit government employees from using their public office for personal gain,⁹ lying to Congress or a court,¹⁰ or providing special treatment to people with whom they have a personal or business relationship,¹¹ among others. But these requirements are only effective if enforced, which has not been the case in the Trump administration. Every agency must be directed to conduct an immediate internal review to identify corruption during the Trump administration and publicly report on the steps it will take to address it. Where appropriate, information obtained during these reviews must be shared with law enforcement, inspectors general, and congressional committees.

The Trump administration is not simply trying to skirt the law—it is acting as if the law does not apply to it at all. If the rule of law is to have any meaning, it is incumbent on a future administration to make clear that it applies to everyone. The moral hazard of allowing the Trump administration to escape accountability would put our democracy permanently at risk.

Trump administration corruption is continual, unapologetic, and escalating

Corruption in the Trump administration is notable both for its breadth and depth. In some cases, these actions violate laws. In other situations, they may be contrary to ethical requirements, agency rules and regulations, or long-standing norms.

Efforts to undermine the rule of law began almost from the start of the administration, as President Trump and his allies worked hard to cover up their engagement with Russia during the 2016 campaign. Trump's national security adviser Michael Flynn lied to the FBI about his discussions with Russia.¹² Trump's longtime lawyer Michael Cohen lied to congressional investigators about Trump's ties to Russia.¹³ His campaign manager, Paul Manafort, lied to the FBI about interactions with Konstantin Kilimnik, a man suspected of having ties to Russian intelligence.¹⁴ Trump campaign adviser George Papadopoulos lied to the FBI about his contacts with a Russia-linked operative named Joseph Mifsud.¹⁵ And longtime Trump adviser Roger Stone lied to Congress about the Trump campaign's efforts to coordinate with WikiLeaks.¹⁶

Trump himself took a range of actions to obstruct the investigation into Russian interference, including pressuring then-FBI Director James Comey to stop his investigation into Flynn; firing Comey; seeking to have then-Attorney General Jeff Sessions end his recusal and take over supervision of the investigation; attempting to fire special counsel Robert Mueller; and directing the White House Counsel to create a false record about Trump's prior efforts to obstruct the Mueller investigation.¹⁷

The Trump administration has also shown no remorse for its actions. Instead, it has simply escalated them time and time again. The day after Mueller testified about Trump and his close associates' myriad abuses and illegal actions, the president held a call with Ukraine's president to try to extort him into interfering in U.S. electoral processes.

This isn't the only instance of the Trump administration doubling down on illegal behavior. Trump violated appropriations law during the government shutdown in 2018–2019 to reduce political blowback for his refusal to sign spending bills.¹⁸ Then, he illegally utilized emergency authority to shift money from the military to build his border wall.¹⁹ After that, he illegally withheld funding from Ukraine to extort them to interfere in the U.S. electoral process.

Since then, the pattern has continued. After Trump was impeached for his efforts to extort Ukraine and the Senate declined to remove him from office, his administration's attacks on the rule of law have grown more brazen. The DOJ overruled career prosecutors to recommend a lower sentence for Stone, and then Trump commuted that sentence before Stone ever served a day in jail.²⁰ Over the objection of career prosecutors working the Flynn case, the DOJ withdrew its prosecution of Flynn, even though he pleaded guilty twice.²¹ And the Trump administration attacked peaceful protestors outside the White House so that Trump could have a staged photo op²² and is now seeking to utilize federal law enforcement as a paramilitary force to dominate cities "run by liberal Democrats."²³

Instances of corruption and potential illegality stretch far beyond the White House to other parts of the executive branch. Consider the administration's efforts to put a citizenship question into the census in order to skew the process to build its political power. Secretary of Commerce Wilbur Ross lied to Congress²⁴ in claiming that the

DOJ wanted the question added to enforce the Voting Rights Act. The administration continued to put forward that lie when challenged in court. In ruling against the Trump administration's effort to add the question, Chief Justice John Roberts was clear that the department had lied: "Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision [...] We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process."²⁵ After the court struck it down, Trump recently began an attempted end run around the Constitution to implement his preferred policy anyway—the very one his administration claimed was not the impetus for its prior action.²⁶

Other examples of brazen corruption include the tenures of Environmental Protection Agency Administrator Scott Pruitt and Secretary of the Interior Ryan Zinke, both of whom resigned in the face of numerous ethics investigations and scandals.²⁷ These are not isolated examples: The Trump administration, which has put more former lobbyists in the Cabinet in three years than the two prior presidential administrations did in eight,²⁸ is rife with potential conflicts of interest.

Trump is attacking oversight at every turn

As part of its efforts to undermine the rule of law, the Trump administration has targeted institutions that might seek to provide accountability: law enforcement, inspectors general, and Congress. All of these bodies have traditionally acted as checks on executive overreach and abuse of power. But the Trump administration has attacked each of them, seeking to delegitimize them or corrupt them to its own ends. The weakening of these institutions has further emboldened the administration.

Politicizing law enforcement

The Department of Justice states that part of its mission is "to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans."²⁹ As the Justice Manual makes clear:

*The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration. It is a fundamental duty of every employee of the Department to ensure that these principles are upheld in all of the Department's legal endeavors.*³⁰

But Trump has been intent from his first day in office to turn the department into a political weapon to protect his friends and attack his enemies. He views the role of the attorney general as someone who protects the president from accountability.³¹ In Attorney General William Barr, Trump has found someone who fits that mold perfectly.

Barr protected Trump from the fallout from the Mueller report, releasing his own misleading summary first.³² Barr's DOJ has also undermined the rule of law to protect those who have protected Trump, as it did in the Stone and Flynn cases.

During the Trump administration, law enforcement has not only been used to protect Trump's cronies but also to attack those he perceives as enemies. The Trump administration orchestrated the removal of the U.S. attorney who prosecuted Stone³³ and forced out another U.S. attorney involved in a number of cases involving Trump and his allies.³⁴ Michael Cohen had his bail revoked because he refused to sign an agreement that would have prohibited him from publishing a book with unfavorable facts about Trump; a judge reversed that action because it was "retaliation."³⁵ And a DOJ whistleblower testified that political officials overruled concerns from career staff to pursue an unfounded antitrust investigation of California after Trump complained about its efforts to improve air quality emissions standards; the investigation was closed after turning up no evidence of any wrongdoing.³⁶

Weakening internal agency oversight

In addition to turning law enforcement into a political tool, Trump has sought to hollow out government watchdogs, particularly the inspectors general (IGs) responsible for investigating potential instances of fraud, waste of taxpayer dollars, or abuse of power.

IGs act as independent auditors to ensure executive branch accountability. They are required by law to be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability." And agency heads may not "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation."³⁷

But the Trump administration has targeted IGs who have sought to provide accountability. Trump started by removing Michael Atkinson, the U.S. Intelligence Community IG who had reviewed the Ukraine whistleblower complaint and determined it was an urgent concern.³⁸ The administration then took aim at IGs at the departments of Defense, Health and Human Services, State, and Transportation.³⁹ And Attorney General Barr publicly disputed the results of an IG investigation that found the FBI had justification to investigate ties between Russia and the Trump campaign.⁴⁰

Trump has also sought to punish whistleblowers. Trump fired EU Ambassador Gordon Sondland after he testified during Trump's impeachment. He removed Lt. Col. Alexander Vindman, another impeachment witness, from his White House position⁴¹ and even went so far as to punish Vindman's twin brother, removing him from a White House position as well. After the White House sought to undermine Vindman's promotion, he decided to leave the military.⁴² And when Marie Yovanovitch, the U.S. ambassador to Ukraine, stood against Rudy Giuliani's corrupt efforts in Ukraine, she was ousted from her position.⁴³

Stonewalling Congress

The Trump administration has made no secret of its disdain for congressional oversight. As Chief Justice Roberts wrote in a recent decision in which Trump challenged a congressional oversight request, “congressional demands for the President’s information have been resolved by the political branches without involving this Court,” and there has long been a “tradition of negotiation and compromise [between the two branches].”⁴⁴ This has not been the case with the Trump administration.

Trump vowed to fight any type of congressional oversight⁴⁵ and has made good on that claim. The administration has fought to prevent Congress from accessing Trump’s financial records,⁴⁶ to prevent Congress from seeing the entirety of the Mueller report,⁴⁷ and to prevent his former White House counsel from testifying about Trump’s obstruction of justice.⁴⁸ The administration also took the unprecedented step of refusing to provide documents or witnesses to the U.S. House of Representatives during its impeachment inquiry, leading Trump to be impeached on a charge of obstruction of Congress.⁴⁹

These efforts have the same purpose: to insulate the administration from accountability for its corruption.

Recommendations for a future administration to hold the Trump administration accountable

It is critical that steps be taken to restore the rule of law after the Trump administration’s sustained attack on it. To do so, there must be accountability for the many corrupt and, at times, illegal, actions taken that strike at the heart of American democracy and the legal system. Where laws have been broken, this will require investigation and, potentially, prosecution. In other cases in which agency rules are violated, administrative sanctions or other corrective actions may be the appropriate response. To look the other way with respect to the actions of the Trump administration would mean that the rule of law is not a constant, but rather that it only exists for certain administrations and for certain people—which is to say that it does not exist at all.

Ensuring accountability has historical precedent. Take the Watergate scandal: While many people focus on President Gerald Ford’s pardon of Richard Nixon, that pardon did not mean that others in the administration were not held to account. Nixon’s former chief of staff, former chief domestic policy adviser, and former attorney general, among others, were tried and convicted after Nixon’s pardon.⁵⁰ All told, nearly 50 people were convicted or pleaded guilty as a result of Watergate.⁵¹

Restoring the rule of law requires addressing the politicization of law enforcement. Where “the Department’s investigatory and prosecutorial powers” have not been “exercised free from partisan consideration,” as required by the department’s own manual, there must be corrective action taken.⁵² In so doing, a future administration must make

sure that it is not unintentionally exacerbating the problem by allowing political considerations to seep into specific law enforcement decisions. That concern cuts both ways: An individual should not be treated more harshly because they worked for the Trump administration, nor should they receive more lenient treatment not afforded to others suspected of breaking the law.

The first step is to determine the extent of the problem. While there are numerous documented examples of the DOJ's politicization, there is no reason to think that the extent of the problem is fully known. Rather, the broad scope of issues in which the personal interests of members of the Trump administration have affected determinations provides good reason to think that these instances are only the tip of the iceberg.

To this end, there must be a top-to-bottom review of the DOJ to identify instances in which the administration's allies received special treatment or its perceived political enemies were targeted. A senior DOJ official should lead the effort to ensure proper prioritization and speedy resolution and to ensure career officials know they will have the backing of the highest levels of the department in identifying instances of politicization. As appropriate, the DOJ should refer matters to the IG and Office of Professional Responsibility for them to take action as well.

Once the DOJ has determined the scope of the problem, it must seek to address it. That may well require revisiting investigatory and charging decisions. It is important that the DOJ not treat these cases differently because of their political nature. Determinations about whether to initiate, or reinstate, investigations, bring charges, or take other steps should follow the normal course of business, primarily resting with career officials. The White House should not be involved in these determinations in any way. Where the department identifies politicization but declines to take further action, it should produce a report identifying the politicization and explaining why it has declined to take any further action. To the greatest extent possible, this report should be made available to the public.

Finally, there must be recognition that the problems with self-dealing and illegality extend beyond the White House to virtually every corner of the executive branch. To this end, each major agency should conduct its own internal review to identify instances where officials put their own interests before the public interest. The process can be facilitated by providing clear channels for career staff to identify potential instances of corruption and, as with the DOJ review, having a senior department official oversee the effort to ensure proper prioritization. The results of these reviews should be shared with IGs and Congress and be referred to the DOJ as appropriate. Appropriate disciplinary actions should be taken where career officials are found to have engaged in misconduct. The results of the review should also be made public to the greatest extent possible, along with steps the agency will take in response.

Congress can play an important role in the process now by holding hearings, conducting oversight, and taking other steps to draw attention to and document the Trump administration's actions. There are also legislative steps that can be taken to limit further abuses, including strengthening the independence of agency watchdogs and limiting presidential authorities that have been misused. But full accountability will require action by a future administration.

Addressing concerns to holding the Trump administration accountable

Restoring the rule of law will force a future administration to make tough choices. There is always a desire to turn the page on past corruption, and there are good-faith arguments that can be made to this effect. Specifically, there may be concerns raised that any investigation would set a dangerous precedent; that there will be a need to move the country forward; and that holding the administration accountable will invariably look political and distract from other priorities. These arguments deserve consideration, but they ultimately fail to fully reckon with the nature of the Trump administration's attack on the rule of law and the dangers posed by ignoring it.

Failing to hold the Trump administration accountable will lead to further attacks on the rule of law

One common concern is that an attempt to hold the Trump administration to account sets a dangerous precedent. One of the hallmarks of illiberal states is targeting political actors, particularly those from previous administrations. An investigation of individuals in the Trump administration could be used in the future to justify doing the same, perhaps even for illegitimate reasons. But the concern that law enforcement could be used to target political opponents is not a future hypothetical—it's the current reality. The problem is how to respond to the way the Trump administration has used law enforcement to protect its friends and target its enemies. The precedent has been set; what is still to be determined is the nature of the response.

Any investigations should be driven by career officials following the facts where they lead. The only way to address the politicization of law enforcement is by eliminating it, which means that people in the Trump administration, or those with connections to the administration, do not receive special treatment.

In addition, failing to act sets a far more dangerous precedent. A constant of the Trump administration has been escalation in the absence of accountability. If a free pass is provided to those who broke the law and subverted democracy, it will embolden them and any illiberal politicians or administrations in the future to show even greater disregard for the rule of law. And it will make it less likely that career officials in the future will stand up to lawlessness, knowing they will be punished by the illiberal administration and be unlikely to face sanction for aiding them from a future one.

It is far more divisive to ignore Trump administration abuses

Another concern is that holding the Trump administration accountable for its actions would be too divisive. Trump has continually sought to divide America to try to build his political support, which will likely lead to a strong desire by a future administration to rectify this problem by uniting the country around shared ideals. But one of those shared ideals is the primacy of the rule of law: that people in the United States should be treated equally, and that there should not be one justice system for the politically well-connected and one for everyone else. Having a rule of law means that it applies at all times and in all places—not only when an administration chooses to enforce it. The law applies right now to the Trump administration; that the administration refuses to acknowledge that fact is all the more reason that a future administration must reassert it. That means holding people accountable for their wrongdoing.

Those concerned about divisiveness often point to Gerald Ford's pardon of Richard Nixon as a model. But that analogy is inapposite. Nixon resigned from office in disgrace, providing some measure of accountability for his actions—although, notably, he did not admit wrongdoing. And when Ford pardoned him, he first made sure that Nixon understood Ford's view that acceptance of the pardon was an acceptance of guilt for his part in Watergate.⁵³ Moreover, as discussed earlier, many people in Nixon's administration as well as a number of his associates were investigated and held to account for their illegal actions.

The process must be driven by career officials at the DOJ

There is also the concern that any investigation will look political and distract from other pressing priorities. This concern is mitigated to a large extent by structuring the process as this brief proposes: It will be led by career law enforcement officials without any White House involvement in specific cases. A future White House should focus its time and energy on addressing pressing policy concerns and leave the investigation to the DOJ.

While it is certainly true that Trump's allies will complain and make wild accusations, they will do so regardless of the legitimacy of any investigatory processes. The bottomless bad faith shown by some of the Trump administration's most ardent supporters, whether it be smearing government officials for doing their job or amplifying Russian disinformation, should not be rewarded—and certainly not at the cost of the rule of law.

Conclusion

The White House has sought to instill a culture of corruption, in which those who are honest and ethical are punished while those who participate in the corruption or look the other way are rewarded.

Over time, this problem builds on itself, as more and more honest, ethical people are pushed out of government or choose to leave given limited prospects for advancement, leaving fewer and fewer people to stand in the way of corrupt acts. This, coupled with a lack of accountability, causes an escalation in lawlessness as those in power see there are fewer external or internal checks. It also seeps into the entirety of government, resulting in corrupt behavior running rampant regardless of whether Trump and his closest advisers are involved.

The damage the Trump administration has done is significant, but it is reversible. However, restoring the rule of law requires making clear that people will be held accountable for violating it. It starts with determining the extent of the damage at the Department of Justice. Then, career law enforcement officials must have the ability to follow the facts where they lead, without fear or favor. The rest of the executive branch must follow suit, with each agency determining the extent of any corruption and taking action where appropriate.

To repair the rule of law and protect it in the future, there must be accountability for the wrongdoings of the Trump administration.

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