



# Play Fair

## How to Prevent a Corrupt President from Tipping the Playing Field in His Own Election

July 2019



## Executive Summary

Democracy requires free, fair, and regular elections. But an election cannot be free and fair when one of the candidates meddles with the rules or tilts the playing field. That's why we have laws like the Hatch Act that limit how and when government officials can advocate for candidates for federal office. While a sitting president is free to compete in an election following the same rules as other candidates, he is not free to use the powers of his office to manipulate the election outcome.

But this is precisely what President Trump has tried to do, repeatedly signaling that he may use his official powers to manipulate the 2020 election. In doing so, he has also echoed and harnessed well-known and well-understood authoritarian tactics for interfering with elections.

For example, President Trump has repeatedly rejected the idea that he could legitimately lose an election or fail to receive support from the majority of Americans, and he even set up a White House commission in an attempt to cast votes from non-supporters as "fraudulent." He has ginned up doubt about election results that he doesn't like. He has demanded the criminal investigation of electoral opponents. He has tried to deploy federal resources to intimidate black and brown voters into staying away from the polls and to instill fear in people who might oppose him publicly. He has used rhetorical and regulatory tools to silence unfriendly media.

Given President Trump's threats and actions, and the risk that a future authoritarian-minded president could be waiting in the wings, Congress needs to move to protect our elections from improper interference by a president or his allies. While there are limits on Congress's power to control the presidential bully pulpit, legislation can prevent the president from translating words into actions. For example, statutes can constrain lower-level officials' ability to enforce a president's autocratic whims. We offer six recommendations for legislative reform:

1. **Protect political candidates from improper law enforcement activity.** Congress should create procedures for law enforcement agencies to follow before taking any major investigative step with respect to any candidate for federal office or any federal campaign committee.
2. **Prevent voter intimidation by all law enforcement officers, including those who assist in enforcing immigration laws.** Congress should update the laws to, among other things, expressly prohibit federal law enforcement officers or employees from taking immigration-related enforcement actions at polling places or conducting other non-routine, non-emergency law enforcement activity on election days.

3. **Enact a federal prohibition on practices intended to deceive voters and strengthen federal protections against voter intimidation.** Congress should amend federal criminal law to prohibit any person from knowingly communicating false information about how, when, and where to vote, if the intent of providing the false information is to prevent another person from exercising the right to vote or to prevent a person from voting for their preferred candidate. Congress should also strengthen existing federal prohibitions (both civil and criminal) on voter intimidation.
4. **Make it possible for victims of unconstitutional government interference in elections to obtain money damages.** Congress needs to enact a statutory *Bivens* remedy to clarify that individuals whose rights to vote are violated by federal officials are entitled to recover for their injuries.
5. **Strengthen disciplinary procedures in the Hatch Act for certain high-level federal employees.** Congress should update the Hatch Act to ensure that any employee “in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President” is held to a high standard for ethical and non-partisan conduct while in office, including appropriate oversight checks and strong disciplinary procedures.
6. **Require political campaigns to disclose offers of foreign assistance and prohibit government officials from aiding potential efforts to seek such assistance from foreign governments.** Congress should require campaigns and candidates — including the sitting president — to promptly disclose offers of illegal foreign campaign assistance, and make it a crime for government officials to conspire to violate the Emoluments Clause, which already prohibits the president from receiving foreign assistance or gifts.

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## Introduction

Free, fair, and regular elections are the cornerstones of a democracy. In the United States, they are protected by multiple provisions of the Constitution, at least in theory if not always in practice. Central to the promise — the aspiration — of free and fair elections is the principle that candidates cannot meddle with the rules governing their own elections. Thus, while the sitting president is free to compete in an election by following the same rules as other candidates, he is not free to use the powers of his office to manipulate the rules of that election.

President Trump rejects this basic principle. Throughout his presidency, he has openly tried to manipulate elections to his advantage, and he has embraced well-known and well-understood authoritarian tactics along the way.

He has encouraged and endorsed violence toward voters who don't support his policies;<sup>1</sup> threatened to “jail” political opponents;<sup>2</sup> habitually spread misinformation to the electorate;<sup>3</sup> equated dissent, comedy, and accurate journalism with treason, in an attempt to silence and undermine the voices of those who could hold him accountable or provide political competition;<sup>4</sup> spread unfounded allegations of voter fraud to justify disenfranchising voters of color;<sup>5</sup> tried to cast doubt on the ballot-counting process in the midterm elections after early returns favored the Republican candidates;<sup>6</sup> stoked fears of “invasion” by black and brown migrants in advance of

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<sup>1</sup> Jonathan Chait, *Trump Isn't Inciting Violence by Mistake, but on Purpose. He Just Told Us.*, N.Y. Magazine (Nov. 5, 2018), <http://nymag.com/intelligencer/2018/11/trump-isnt-inciting-violence-by-mistake-he-just-told-us.html>.

<sup>2</sup> Jeremy Diamond, *Trump Calls for Clinton to Be Jailed*, CNN (June 4, 2016), <https://www.cnn.com/2016/06/02/politics/donald-trump-hillary-clinton-imprisoned/index.html>.

<sup>3</sup> Glenn Kessler et al., *President Trump Has Made More Than 10,000 False or Misleading Claims*, Washington Post (Apr. 29, 2019), <https://www.washingtonpost.com/politics/2019/04/29/president-trump-has-made-more-than-false-or-misleading-claims/>.

<sup>4</sup> Aaron Rupar, *Trump's Reckless "Treason" Accusation Against the FBI, Explained*, Vox (May 17, 2019), <https://www.vox.com/2019/5/17/18629175/trump-treason-fbi-russia>; Peter Baker, *Trump Blames 'Treasonous' Critics for Russia Inquiry*, N.Y. Times (Mar. 25, 2019), <https://www.nytimes.com/2019/03/25/us/politics/trump-russia.html>; Dana Milbank, *Opinion, For Trump, the Name of the Season is Treason*, Washington Post (Apr. 12, 2019), [https://www.washingtonpost.com/opinions/for-trump-the-name-of-the-season-is-treason/2019/04/12/f8c5c44c-5d33-11e9-a00e-050dc7b82693\\_story.html](https://www.washingtonpost.com/opinions/for-trump-the-name-of-the-season-is-treason/2019/04/12/f8c5c44c-5d33-11e9-a00e-050dc7b82693_story.html).

<sup>5</sup> Ashley Parker, *Trump Says Pence Will Head Investigation into Voting Irregularities, Despite No Evidence of Fraud*, Washington Post (Feb. 5, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/02/05/trump-says-pence-will-head-investigation-into-voting-irregularities-despite-lack-of-evidence-of-fraud/?utm\\_term=.b55d9df5f4c3](https://www.washingtonpost.com/news/post-politics/wp/2017/02/05/trump-says-pence-will-head-investigation-into-voting-irregularities-despite-lack-of-evidence-of-fraud/?utm_term=.b55d9df5f4c3).

<sup>6</sup> See, e.g., Cheyenne Haslet, *Trump, Without Evidence, Calls Florida Ballots 'Massively Infected,' Demands End to Recounts*, ABC News (Nov. 12, 2018), <https://abcnews.go.com/Politics/trump-calls-florida-ballots-massively-infected-demands-end/story?id=59136811>; Eric Bradner, *Fact-checking Trump's False Claims About Arizona and Florida Elections*, CNN (Nov. 12, 2018), <https://www.cnn.com/2018/11/12/politics/trump-false-claims-arizona-florida-elections/index.html>.

the midterm elections;<sup>7</sup> and threatened to withhold government services from communities that do not support his policies.<sup>8</sup>

The President's comments and actions illustrate two key facts. **First**, a president who embraces authoritarian tactics and is willing to abuse his powers has many tools available for manipulating an election. **Second**, Congress must erect new guardrails to protect our elections from improper interference by the president. The House of Representatives has taken an important step toward promoting free and fair elections by passing H.R. 1,<sup>9</sup> but there's more work to be done, not only to empower voters, but also to disempower presidents who would abuse their powers and the good faith of the American people.

This white paper first explains some of the ways that our elections are vulnerable to abuse of power by a sitting president. It then proposes solutions, outlining a set of common-sense reforms that Congress could enact to curb presidents' power to compromise the integrity of U.S. elections.

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<sup>7</sup> Donald J. Trump (@realDonaldTrump), Twitter (Oct. 29, 2018, 7:41 AM), <https://twitter.com/realdonaldtrump/status/1056919064906469376>.

<sup>8</sup> Robinson Meyer, *Trump's Bizarre California Fire Threat Is Serious*, Atlantic (Jan. 10, 2019), <https://www.theatlantic.com/science/archive/2019/01/trumps-bizarre-california-fire-threat-is-serious/579931/>.

<sup>9</sup> H.R. 1, 116th Cong. (1st Sess. 2019).

## President Trump’s History of Election Interference and the Authoritarian Model

Free, fair, and regular elections form the foundation of the U.S. experiment, allowing citizens to exercise their most basic political right: the right to choose who governs them. While free and fair elections have always been more of an ideal than a reality — especially for historically disadvantaged groups — the trend lines have been generally positive over the long term. But President Trump, harnessing the tools of an authoritarian, has sought to try to undermine the promise of free and fair elections.

Today, authoritarian leaders, unlike the traditional dictators of yore, often seek to preserve a semblance of democratic legitimacy by holding elections (albeit not free and fair ones).<sup>10</sup> They “organize a system that creates the illusion of competition while squelching it in reality.”<sup>11</sup> Today’s authoritarians—such as Vladimir Putin (Russia), Recep Tayyip Erdoğan (Turkey), and Viktor Orbán (Hungary), all of whom President Trump has publicly lauded<sup>12</sup> —“seek to fix outcomes well before election day through laws and policies that embed unfairness at every level,” and they take pride in the resulting electoral victories “as demonstrations of political mastery.”<sup>13</sup> As Brian Klaas, a political scientist now at University College London, has observed, “authoritarian regimes [have] learned [that] elections [are] actually a very useful tool to control their populations, to divide the opposition and to maintain power.”<sup>14</sup> In functioning democracies, election manipulation by the person holding the nation’s highest office has often been a first step toward democratic decline. That is particularly true when populist governments come to power; populist leaders are four times more likely than non-populist leaders to cause significant

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<sup>10</sup> Arch Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, Freedom House (June 2017), at 10, [https://freedomhouse.org/sites/default/files/June2017\\_FH\\_Report\\_Breaking\\_Down\\_Democracy.pdf](https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf).

<sup>11</sup> *Id.* The author notes that of the countries considered in the report (including Russia, Turkey, and Venezuela), China is the only one to “reject[] elections as part of the leadership’s strategy for political control.” *Id.* Exposure jeopardizes the authoritarian they are meant to protect. For example, in Russia, Putin was not only enraged, but also “rattled” and “placed on the defensive,” after operatives from his party were videotaped engaging in ballot stuffing in 2011. *Id.* at 11. Reports indicate that Putin’s “fury” at then-Secretary of State Hillary Clinton for “challenging the fairness of Russian elections” led the Russians to hack (and promote the release of emails from) the Democratic National Committee’s email server when she ran for President in 2016. *See, e.g.*, Michael Crowley & Julia Ioffe, *Why Putin Hates Hillary*, Politico (July 25, 2016), <https://www.politico.com/story/2016/07/clinton-putin-226153>.

<sup>12</sup> Domenico Montanaro, *6 Strongmen Trump Has Praised — And the Conflicts It Presents*, NPR (May 2, 2017), <https://www.npr.org/2017/05/02/526520042/6-strongmen-trumps-praised-and-the-conflicts-it-presents> (praising Putin); Peter Baker, *Viktor Orban, Hungary’s Far-Right Leader, Gets Warm Welcome from Trump*, N.Y. Times (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/trump-viktor-orban-oval-office.html> (praising Orban); Nolan D. McCaskill, *Trump Says Turkish President Gets ‘Very High Marks’*, Politico (Sept. 21, 2017), <https://www.politico.com/story/2017/09/21/trump-erdogan-turkey-praise-242986> (praising Erdogan).

<sup>13</sup> Puddington, *supra* note 10 at 11.

<sup>14</sup> *See* Lauren Leatherby & Mira Rojanasakul, *Elected Leaders Are Making the World Less Democratic*, Bloomberg (July 23, 2018), <https://www.bloomberg.com/graphics/2018-democracy-decline/>.

“democratic backsliding,” and populist rule also tends to erode checks and balances and threaten individual rights.<sup>15</sup>

President Trump has, in several ways, borrowed from the modern authoritarian playbook. Because President Trump’s actions are part of a pattern we have seen before, they are easy to identify and — if we can muster the political will — possible to constrain. To that end, this section identifies a series of common authoritarian tactics, and then describes how and when President Trump has used, or has threatened to use, those tactics. Undergirding these tactics are three main themes:

First, because authoritarians see all opposition as illegitimate, **they attack the legitimacy of non-supporters, independent actors, and election outcomes that they don’t like.** For example, authoritarians may try to twist the rules to claim that opposition candidates are ineligible for office,<sup>16</sup> much as in 2011 when Donald Trump challenged President Obama’s eligibility for office while floating the idea of his own presidential run.<sup>17</sup>

Second, **authoritarians adopt a veneer of inevitability to scare off opposition and render the population too cynical to act.** Authoritarians will spread disinformation and conspiracy theories to foster support for their leadership and discredit their opponents. Outcomes that don’t favor the authoritarian must be wrong because it is not possible — not legitimate — that the authoritarian wouldn’t be favored by the vast majority of people.<sup>18</sup> This cements in the population’s mind that the authoritarian is the only person capable of governing and can lead to paralysis.

Third, **authoritarians use strongman tools.** They try to intimidate opposition leaders and activists. They may investigate them, attack them, and attack their families or their families’ means of making a living.<sup>19</sup>

We see these themes recur within five principal tactics that President Trump has used, or threatened to use, to manipulate American elections.

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<sup>15</sup> Jordan Kyle and Yascha Mounk, *The Populist Harm to Democracy: An Empirical Assessment*, Tony Blair Institute for Global Change (Dec. 26, 2018), <https://institute.global/sites/default/files/articles/The-Populist-Harm-to-Democracy-An-Empirical-Assessment.pdf>.

<sup>16</sup> In Russia, for instance, opposition leader Alexey Navalny was held to be ineligible to run for president following a widely-criticized prosecution for fraud. See Associated Press in Moscow, *Russian Opposition Leader Alexei Navalny Barred from Running for President*, The Guardian (Dec. 25, 2017), <https://www.theguardian.com/world/2017/dec/25/russian-opposition-leader-alexei-navalny-barred-from-running-for-president>.

<sup>17</sup> Kendra Marr, *Donald Trump, Birther?*, Politico (Mar. 17, 2011), <https://www.politico.com/story/2011/03/donald-trump-birther-051473>.

<sup>18</sup> See, e.g., Steven Levitsky & Daniel Ziblatt, *HOW DEMOCRACIES DIE* 141 (2018) (describing Richard Nixon’s reliance on conspiracy theories to justify authoritarian tactics relating to elections).

<sup>19</sup> See *id.* at 12-13 (describing jailing of opposition leaders in Russia and Malaysia, among others).

## 1. Using Government Power to Discredit Political Opponents

The President has supplemented his efforts to delegitimize unfavorable election results by using state power against his political opponents. Through these tactics, President Trump sends a clear message to anyone he perceives as competition: if you stand in my way, I will threaten your reputation, your livelihood, and even your family. This is a key means by which authoritarians chill opposition and maintain power.

Famously, one of candidate Trump's chief tactics during the 2016 presidential election involved riling up his supporters with threats to prosecute his general-election opponent, Hillary Clinton. Trump and his surrogates routinely led chants of "Lock her up! Lock her up!"<sup>20</sup> They linked these threats to their quest for roughly 30,000 emails that had been deleted from Secretary Clinton's private server.<sup>21</sup> During the second presidential debate, Trump told Clinton directly: "If I win, I am going to instruct my attorney general to get a special prosecutor to look into your situation."<sup>22</sup>

The threat was not an empty one. In mid-2017, President Trump pressured Attorney General Jeff Sessions to open an investigation into Clinton and to prosecute her.<sup>23</sup> In November 2017, Assistant Attorney General Robert Boyd informed the chairman of the House Judiciary Committee that "the Attorney General has directed senior federal prosecutors to evaluate" "alleged unlawful dealings related to the Clinton Foundation."<sup>24</sup> In March 2018, Attorney General Sessions informed Congressional leaders that he had asked John Huber, the U.S. Attorney for Utah, to review whether further investigation into Clinton had been warranted.<sup>25</sup> Later that Spring, President Trump again explored ordering DOJ to investigate Hillary Clinton

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<sup>20</sup> Peter W. Stevenson, A Brief History of the 'Lock Her up!' Chant by Trump Supporters Against Clinton, Washington Post (Nov. 22, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/?utm\\_term=.9cc118504d7f](https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/?utm_term=.9cc118504d7f).

<sup>21</sup> Ashley Parker & David E. Sanger, *Donald Trump Calls on Russia to Find Hillary Clinton's Missing Emails*, N.Y. Times (July 27, 2016), <https://www.nytimes.com/2016/07/28/us/politics/donald-trump-russia-clinton-emails.html>.

<sup>22</sup> Gregory Krieg, *Trump Threatens to Jail Clinton If He Wins Election*, CNN (Oct. 10, 2016), <https://www.cnn.com/2016/10/09/politics/eric-holder-nixon-trump-presidential-debate/index.html>. After the election, President-elect Trump initially changed course, dropping the calls to investigate Clinton or "lock her up" because he didn't "want to hurt the Clintons." Julie Hirschfeld Davis & Micheal D. Shear, *Donald Trump Drops Threat of New Hillary Clinton Investigation*, N.Y. Times (Nov. 22, 2016),

<https://www.nytimes.com/2016/11/22/us/politics/donald-trump-hillary-clinton-investigation.html?module=inline>.

<sup>23</sup> Michael S. Schmidt, *Mueller Report Reveals Trump's Fixation on Targeting Hillary Clinton*, N.Y. Times (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/us/politics/jeff-sessions-hillary-clinton-donald-trump.html>.

<sup>24</sup> Letter from Assistant Attorney General Stephen E. Boyd to Representative Robert W. Goodlatte, Chairman of the Committee on the Judiciary (Nov. 13, 2017), *available at*

<https://assets.documentcloud.org/documents/4204968/Special-Counsel-Department-of-Justice.pdf>.

<sup>25</sup> Laura Jarrett, *Sessions Does Not Appoint Second Special Counsel to Review FBI Misconduct Claims*, CNN (Mar. 29, 2018), <https://www.cnn.com/2018/03/29/politics/sessions-prosecutor-fbi-misconduct-clinton-uranium-one-special-counsel/index.html>; Letter from Attorney General Jefferson Sessions to Senator Charles E. Grassley, Chairman of the Committee on the Judiciary, Representative Robert W. Goodlatte, Chairman of the Committee on the Judiciary, and Representative Trey Gowdy, Chairman of the Committee on Oversight and Government Reform (Mar. 29, 2018),: <http://cdn.cnn.com/cnn/2018/images/03/29/ag.letter.re.ig.and.huber.reviews.pdf>.

and former FBI Director (and Trump critic) James Comey.<sup>26</sup> To date, former Secretary Clinton has not been charged in any crimes,<sup>27</sup> but these investigations continue. Meanwhile, throughout his first 2.5 years in office, President Trump has tweeted dozens of times accusing Clinton and her associates of illegal activity or corruption, calling for her to be investigated or jailed, and bemoaning the FBI's perceived failure to investigate her.<sup>28</sup>

As his 2020 reelection campaign gears up, President Trump is deploying the same tactics against his new rivals. Reporting indicates that President Trump views former Vice President Joe Biden as his biggest electoral threat.<sup>29</sup> Within a week of Biden formally entering the presidential race, President Trump's allies were fueling rumors about alleged illegal activity by Biden and his son, Hunter, related to Hunter's work in Ukraine.<sup>30</sup> President Trump's lawyer, Rudy Giuliani, took a leading role in promoting this conspiracy theory, working with Ukrainian prosecutors and planning a trip (later cancelled) to Ukraine to push for further investigations.<sup>31</sup> President Trump himself repeated the allegations in an interview with Fox News and on Twitter<sup>32</sup> — even after they were refuted by Ukraine's current prosecutor general.<sup>33</sup> And President Trump has publicly said it would be “appropriate” for him to discuss a potential U.S. investigation into Joe or Hunter Biden with Attorney General William Barr.<sup>34</sup>

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<sup>26</sup> Michael S. Schmidt & Maggie Haberman, *Trump Wanted to Order Justice Dept. to Prosecute Comey and Clinton*, N.Y. Times (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html>.

<sup>27</sup> Betsy Woodruff, *It Exists: DOJ Finds Letter Ordering Scrutiny of Uranium One, Hillary Clinton*, Daily Beast (Mar. 10, 2019), <https://www.thedailybeast.com/doj-finds-letter-it-said-didnt-exist-ordering-scrutiny-of-uranium-one-hillary-clinton>.

<sup>28</sup> See, e.g., Donald J. Trump (@realDonaldTrump), Twitter (Jul. 22, 2017, 4:44 AM), <https://twitter.com/realdonaldtrump/status/888726438265966592>; Donald J. Trump (@realDonaldTrump), Twitter (May 27, 2018, 7:13 AM), <https://twitter.com/realdonaldtrump/status/1000741764565753856>; Donald J. Trump (@realDonaldTrump), Twitter (Aug. 25, 2018, 6:05 AM), <https://twitter.com/realdonaldtrump/status/103339636343549952>; Donald J. Trump (@realDonaldTrump), Twitter (Apr. 15, 2019, 4:15 AM), <https://twitter.com/realdonaldtrump/status/1117748268820201472>.

<sup>29</sup> Eliana Johnson & John Bresnahan, *Trump's Biden Insults Fueled by Belief He Can Win*, Politico (Apr. 25, 2019), <https://www.politico.com/story/2019/04/25/donald-trump-joe-biden-2020-1290338>.

<sup>30</sup> Kenneth P. Vogel & Iuliia Mendel, *Biden Faces Conflict of Interest Questions That Are Being Promoted by Trump and Allies*, N.Y. Times (May 1, 2019), <https://www.nytimes.com/2019/05/01/us/politics/biden-son-ukraine.html>.

<sup>31</sup> Kenneth P. Vogel, *Rudy Giuliani Cancels His Trip to Ukraine, Blaming Democrats' 'Spin'*, N.Y. Times (May 11, 2019), <https://www.nytimes.com/2019/05/11/us/politics/rudy-giuliani-ukraine.html>.

<sup>32</sup> Salvador Rizzo, *Fact-Checking President Trump's Wild Jabs at Joe Biden*, Washington Post (May 23, 2019), [https://www.washingtonpost.com/politics/2019/05/23/fact-checking-president-trumps-wild-jabs-joe-biden/?utm\\_term=.e216d9eb78ec](https://www.washingtonpost.com/politics/2019/05/23/fact-checking-president-trumps-wild-jabs-joe-biden/?utm_term=.e216d9eb78ec); Donald J. Trump (@realDonaldTrump), Twitter (May 1, 2019, 5:47 PM), <https://twitter.com/realdonaldtrump/status/1123910471151755265> (retweeting New York Times reporter Kenneth Vogel).

<sup>33</sup> Daryna Krasnolutska, et al., *Ukraine Prosecutor Says No Evidence of Wrongdoing by Bidens*, Bloomberg (May 16, 2019), <https://www.bloomberg.com/news/articles/2019-05-16/ukraine-prosecutor-says-no-evidence-of-wrongdoing-by-bidens>.

<sup>34</sup> Eliana Johnson, et al., *Trump: Discussing a Biden Probe with Barr Would Be 'Appropriate'*, Politico (May 10, 2019), <https://www.politico.com/story/2019/05/10/trump-biden-ukraine-barr-1317601>.

This sets a dangerous precedent: If the president can successfully weaponize his leadership of the Department of Justice to quell opposing candidates, we will have taken a major step away from democracy and the rule of law.

## **2. Delegitimizing Election Wins by Opposition Candidates**

Authoritarians reject the notion that anyone else could legitimately challenge their power. No legitimate election would result in their loss; therefore, any election loss must be rigged. By spreading myths of illegitimate opposition and inevitable victory in the media, authoritarians seek to foreclose challenges to their power.

President Trump has repeatedly rejected the idea that he could legitimately lose an election by failing to receive support from a majority of Americans.<sup>35</sup> This rhetoric threatens the building blocks of our democracy: competitive elections and the peaceful transfer of power. Yet, since before the 2016 election, Donald Trump and his allies have promoted myths that undermine these building blocks, and we can expect to hear similar language as the 2020 election draws nearer.

### ***A. The 2016 Election and the Pence-Kobach Commission***

During the final presidential debate of 2016, then-candidate Trump threatened that, if he lost, he might not accept the election results.<sup>36</sup> And after he won the Electoral College but lost the popular vote, then-President-elect Trump tweeted a racialized lie designed to undermine the legitimacy of his losing the popular vote: “In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally[.]”<sup>37</sup>

President Trump has used the machinery of government to bolster his claims of a fraudulent vote count, in particular by trying to delegitimize votes cast by Latinx and immigrant Americans. In May 2017, he formed the Presidential Advisory Commission on Election

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<sup>35</sup> See, e.g., Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. Times (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html>; David A. Graham, *Democracy, Interrupted*, Atlantic (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trump-continues-to-attack-rigged-elections/580030/>.

<sup>36</sup> *Trump Won't Accept Election Results If He Loses as Clinton Expands Campaign into Red States*, PBS (Oct. 21, 2016), <https://www.pbs.org/weta/washingtonweek/episode/trump-wont-accept-election-results-if-he-loses-clinton-expands-campaign-red-states>. Avery Anapol, *Ex-Obama Aides Reveal He Had Plan for If Clinton Won and Trump Rejected Results*, The Hill (Oct. 10, 2018), <https://thehill.com/policy/national-security/410842-ex-obama-aides-reveal-former-president-had-plan-in-place-if-clinton> (reporting that the Obama Administration was so distressed by this threat that it developed a bipartisan plan to validate the election results).

<sup>37</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realDonaldTrump/status/802972944532209664>.

Integrity.<sup>38</sup> Kansas Secretary of State Kris Kobach, a longtime proponent of voter fraud theories, served as the Commission’s vice chairman and de facto leader.<sup>39</sup> The commission’s mission was to study voter fraud and illegal voter registrations, with the goal of making policy recommendations to prevent this purported problem.<sup>40</sup> In July 2017, President Trump himself referred to it as a “VOTER FRAUD PANEL”<sup>41</sup> and when he announced that Pence would lead the commission, President Trump explained that it was targeted at fraudulent voter registration and “irregularities” in the 2016 election.<sup>42</sup>

About eight months after the commission began its work, it was summarily disbanded, without issuing a final report. One of the commissioners, Maine Secretary of State Matthew Dunlap, filed a lawsuit to gain access to the commission’s documents, which revealed no evidence of voter fraud but instead demonstrated “a troubling bias.”<sup>43</sup> According to Dunlap, the Commission’s only purpose “seem[ed] to have been to validate” the President’s claims that “3 to 5 million people voted illegally,”<sup>44</sup> a claim rooted in anti-Latinx and anti-immigrant sentiment.

Although the Commission itself was short-lived, President Trump’s broader effort to delegitimize Hillary Clinton’s popular vote win was effective. While Clinton won about 2.9 million more votes than did Trump,<sup>45</sup> one poll in early 2017 found that *one in four* voters believed the President’s claims that he was the “legitimate” winner of the popular vote.<sup>46</sup>

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<sup>38</sup> Exec. Ord. No. 13799, 82 Fed. Reg. 22389 (May 11, 2017), <https://www.federalregister.gov/documents/2017/05/16/2017-10003/establishment-of-presidential-advisory-commission-on-election-integrity>.

<sup>39</sup> Eli Rosenberg, *Kris Kobach Used Flawed Research to Defend Trump’s Voter Fraud Panel, Experts Say*, Washington Post (Aug. 7, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/08/07/experts-say-kris-kobach-used-flawed-research-to-defend-trumps-voter-fraud-panel/?utm\\_term=.615247434b76](https://www.washingtonpost.com/news/politics/wp/2018/08/07/experts-say-kris-kobach-used-flawed-research-to-defend-trumps-voter-fraud-panel/?utm_term=.615247434b76).

<sup>40</sup> Exec. Ord. No. 13799, *supra* note 38.

<sup>41</sup> Donald J. Trump (@realDonaldTrump), Twitter (July 1, 2017, 6:07 AM), <https://twitter.com/realDonaldTrump/status/881137079958241280>.

<sup>42</sup> Parker, *supra* note 5. Early on, the Commission drew controversy for its overreaching tactics. In June 2017, the Commission sent a letter to the various states requesting detailed voter information, including the names, addresses, birthdates, party affiliations, felony convictions, and last four digits of social security numbers of all registered voters. *See, e.g.*, Presidential Advisory Commission on Election Integrity, Letter to the Secretary of State of North Carolina (June 28, 2017), <https://www.documentcloud.org/documents/3881856-Correspondence-PEIC-Letter-to-North-Carolina.html>. At least 44 states refused to comply at all or in part with the Commission’s request, some decrying it as “federal intrusion and overreach” and a violation of federalism principles and others contending that it was an attempt at “voter suppression.” Liz Starck & Grace Huack, *Forty-Four States and DC Have Refused to Give Certain Voter Information to Trump Commission*, CNN (July 5, 2017), <https://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html>.

<sup>43</sup> Eli Rosenberg, *The Most Bizarre Thing I’ve Ever Been a Part of’: Trump Panel Found No Widespread Voter Fraud, Ex-Member Says*, Washington Post (Aug. 3, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/08/03/the-most-bizarre-thing-ive-ever-been-a-part-of-trump-panel-found-no-voter-fraud-ex-member-says/?utm\\_term=.9bcebbc1fade](https://www.washingtonpost.com/news/politics/wp/2018/08/03/the-most-bizarre-thing-ive-ever-been-a-part-of-trump-panel-found-no-voter-fraud-ex-member-says/?utm_term=.9bcebbc1fade).

<sup>44</sup> *Id.*

<sup>45</sup> Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives, Federal Election Commission (Dec. 2017), <https://transition.fec.gov/pubrec/fe2016/federalelections2016.pdf>.

<sup>46</sup> Jake Sherman, *Poll: 1-in-4 Voters Believe Trump’s Vote-Fraud Claims*, Politico (Feb. 1, 2017), <https://www.politico.com/story/2017/02/poll-donald-trump-voter-fraud-234458>.

Furthermore, after years of hearing unsubstantiated claims of election fraud, nearly half of Americans believe that fraudulent voting occurs regularly, even though studies have repeatedly disproved this.<sup>47</sup> This is laying the groundwork for challenging the legitimacy of an unfavorable outcome in the 2020 election. A *Washington Post* survey from August 2017 found that 52 percent of surveyed Republicans would support postponing the 2020 elections, were President Trump to say it needed to be postponed to “make sure that only eligible American citizens can vote.”<sup>48</sup> (Of course, these threats and the lies about fraudulent voting are not *only* aimed at suppressing voter turnout in upcoming elections. They are also part of a broader campaign to create support for new voter suppression laws modeled after those that have historically targeted communities of color.)

### ***B. Claims of Illegality in the 2018 Midterms***

Even though President Trump wasn’t on the ballot in 2018, he continued his pattern of casting doubt on election results that he didn’t like and seeking to incite popular rejection of vote counts. One focus of President Trump’s attention was Florida, where the races for governor and senator were close enough that Florida law called for an automatic recount.<sup>49</sup> President Trump immediately began attacking the recount efforts.<sup>50</sup> On November 9, as the recount was underway, President Trump suggested that election officials were fraudulently creating ballots, tweeting: “Rick Scott was up by 50,000+ votes on Election Day, now they ‘found’ many votes and he is only up 15,000 votes. ‘The Broward Effect.’ How come they never find Republican votes?”<sup>51</sup> Trump kept up his attacks over the next few days.<sup>52</sup> He even suggested that Florida should stop counting ballots on Election Day — notwithstanding laws requiring the state to count mail-in ballots that arrived after the election.<sup>53</sup> Fox News hosts amplified these claims. For

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<sup>47</sup> Emily Guskin & Scott Clement, *Poll: Nearly Half of Americans Say Voter Fraud Occurs Often*, *Washington Post* (Sept. 15, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/15/poll-nearly-half-of-americans-say-voter-fraud-occurs-often/>.

<sup>48</sup> Ariel Malka & Yphtach Lelkes, *In a New Poll, Half of Republicans Say They Would Support Postponing the Election if Trump Proposed It*, *Washington Post* (Aug. 10, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/10/in-a-new-poll-half-of-republicans-say-they-would-support-postponing-the-2020-election-if-trump-proposed-it/>.

<sup>49</sup> Gregory Krieg, et al., *Florida Recounts Begin as Tensions Escalate Across State*, *CNN* (Nov. 10, 2018), <https://www.cnn.com/2018/11/10/politics/florida-recount-rick-scott-bill-nelson-ron-desantis-andrew-gillum/index.html>.

<sup>50</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 8, 2018, 6:38 PM), <https://twitter.com/realDonaldTrump/status/1060723241193484288>.

<sup>51</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 9, 2018, 9:36 AM), <https://twitter.com/realDonaldTrump/status/1060949297900834816>.

<sup>52</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 9, 2018, 10:14 AM), <https://twitter.com/realDonaldTrump/status/1060958713047961600>; Donald J. Trump (@realDonaldTrump), Twitter (Nov. 9, 2018, 10:20 AM), <https://twitter.com/realDonaldTrump/status/1060960329876697088>; Donald J. Trump (@realDonaldTrump), Twitter (Nov. 10, 2018, 11:09 AM), <https://twitter.com/realDonaldTrump/status/1061335051294728194>.

<sup>53</sup> Cheyenne Haslett, *Trump, Without Evidence, Calls Florida Ballots ‘Massively Infested,’ Demands End to Recounts*, *ABC News* (Nov. 12, 2018), <https://abcnews.go.com/Politics/trump-calls-florida-ballots-massively-infected-demands-end/story?id=59136811>.

example, on November 15, while the recount was ongoing, one suggested that Florida election officials should “go to jail” for voter fraud.<sup>54</sup>

And it wasn’t just in Florida. After the Democratic candidate in an Arizona House race captured the lead from the Republican candidate, President Trump suggested that the vote count was fraudulent, tweeting “Call for a new election?” and telling reporters that, “all of a sudden, out of the wilderness, they find a lot of votes” for the Democrat.<sup>55</sup> This effort to manipulate the results of an election by leaving votes uncounted is inconsistent with our Constitution’s guarantee of the right to vote, with the President’s Article II obligations, and with the fundamental values of our democracy.

President Trump’s attacks have communicated that the current President of the United States will — at the very least — cast doubt on any election results that he doesn’t like. Based on his conduct in 2016 and 2018, there is every reason to believe that he will refuse to accept as legitimate a loss in the 2020 presidential elections.

### **3. Intimidating Voters for Other Candidates**

Elections are only free and fair — they are only accurate measures of the will of the people — if everyone who is lawfully able to vote can do so without burden and without fear of retaliation. Modern authoritarians have found that they can continue to hold elections without jeopardizing their hold on power as long as they can intimidate voters or otherwise undercut support for the opposition. And that doesn’t necessarily require acts of violence: incumbents have learned they “can intimidate voters with innuendo and vague threats,”<sup>56</sup> or by deploying other dirty tricks,<sup>57</sup> and can thereby steal elections.

#### ***A. False Claims of “Voter Fraud” and Illegal Voting***

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<sup>54</sup> Ian Schwartz, *Laura Ingraham on Florida Recounts: ‘People Are Going to Have to Go to Jail’*, Real Clear Politics (Nov. 15, 2018),

[https://www.realclearpolitics.com/video/2018/11/15/laura\\_ingraham\\_on\\_florida\\_recounts\\_people\\_are\\_going\\_to\\_have\\_to\\_go\\_to\\_jail.html](https://www.realclearpolitics.com/video/2018/11/15/laura_ingraham_on_florida_recounts_people_are_going_to_have_to_go_to_jail.html).

<sup>55</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 9, 2018, 3:33 PM),

<https://twitter.com/realdonaldtrump/status/1060993836984324096>.

<sup>56</sup> Nic Cheeseman & Brian Klaas, *How to Steal an Election in Broad Daylight*, Foreign Policy (May 21, 2018), <https://foreignpolicy.com/2018/05/21/how-to-steal-an-election-in-broad-daylight/>.

<sup>57</sup> For example, in a local assembly election in St. Petersburg in 1998, the city’s governor recruited two men named Oleg Sergeyev to run against an incumbent member of the opposition, also named Oleg Sergeyev. The plan worked — Sergeyev’s supporters were confused and the vote was divided, allowing the governor’s favored candidate to win. *Id.* In another example, Prime Minister Viktor Orbán’s Fidesz party helped to create fake opposition parties to run in Hungary’s April 2018 elections, dividing the anti-Fidesz vote and helping to ensure a Fidesz victory. Zack Beauchamp, *It Happened There: How Democracy Died in Hungary*, Vox (Sept. 13, 2018), <https://www.vox.com/policy-and-politics/2018/9/13/17823488/hungary-democracy-authoritarianism-trump>.

President Trump’s lies about voter fraud don’t just undermine faith in elections, as discussed above. They also intimidate voters, both directly and by incentivizing others to intimidate voters.

In socializing the idea that it’s easy to break the law by voting, President Trump is deploying a well-known tactic for depressing voter turnout.<sup>58</sup> When people believe that voting is hard, or might lead to criminal punishment, they are less likely to come out to the polls.<sup>59</sup> Consistent with this aim, President Trump regularly sends the message to voters that their activities at the polls will be closely scrutinized by law enforcement. For example, in 2018, the day before the midterm election, the President tweeted: “Law Enforcement has been strongly notified to watch closely for any ILLEGAL VOTING which may take place in Tuesday’s Election (or Early Voting). Anyone caught will be subject to the Maximum Criminal Penalties allowed by law. Thank you!”<sup>60</sup>

Messages like this — suggesting that voters will be watched closely and prosecuted — have a chilling effect, scaring lawful voters, specifically voters of color, away from the polls. Indeed, these messages and threats cannot be separated out from the well-documented racism in certain segments of the law enforcement community,<sup>61</sup> and the long history and well-established pattern of pretextual police harassment and violence toward persons of color.<sup>62</sup> For Latinx communities, the threats can take on additional dimensions. For example, in 2018, the Trump Administration scheduled Customs and Border Patrol crowd control exercises for Election Day, only to scrap those exercises once the exercises, and their potential to affect voters, surfaced publicly.<sup>63</sup>

President Trump has also worked to encourage vigilante Trump supporters to target non-white populations, especially majority black communities. For example, at a rally in rural Pennsylvania before the 2016 election, he urged a nearly all-white crowd to go to Philadelphia, where many neighborhoods are predominantly black, and monitor the polls to prevent the

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<sup>58</sup> See Josie Duffy Rice, *How to Punish Voters*, N.Y. Times (Oct. 31, 2018), <https://www.nytimes.com/2018/10/31/opinion/election-voting-rights-fraud-prosecutions.html>.

<sup>59</sup> See *id.*

<sup>60</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 5, 2018, 7:41 AM), <https://twitter.com/realDonaldTrump/status/1059470847751131138>.

<sup>61</sup> See, e.g., Matthew McKnight, *The Stop-and-Frisk Challenge*, New Yorker (Mar. 27, 2013), <https://www.newyorker.com/news/news-desk/the-stop-and-frisk-challenge>.

<sup>62</sup> Josh Hafner, *Police Killings of Black Men in the U.S. and What Happened to the Officers*, USA Today (Mar. 29, 2018), <https://www.usatoday.com/story/news/nation-now/2018/03/29/police-killings-black-men-us- and-what-happened-officers/469467002/>.

<sup>63</sup> Robert Moore, *Border Patrol Cancels El Paso Crowd-Control Exercise amid Concerns About Voter Suppression*, Washington Post (Nov. 6, 2018), [https://www.washingtonpost.com/politics/border-patrol-to-conduct-a-crowd-control-exercise-in-el-paso-on-election-day/2018/11/06/147dd678-e18f-11e8-8f5f-a55347f48762\\_story.html?utm\\_term=.db89bad7d779](https://www.washingtonpost.com/politics/border-patrol-to-conduct-a-crowd-control-exercise-in-el-paso-on-election-day/2018/11/06/147dd678-e18f-11e8-8f5f-a55347f48762_story.html?utm_term=.db89bad7d779).

election from being “stolen” from them<sup>64</sup> — notwithstanding Philadelphia officials’ insistence that fears of widespread voter fraud were groundless.<sup>65</sup>

Under President Trump, the Department of Justice is also conducting more investigations and pursuing more prosecutions for illegal voting, which can further deter lawful voters from casting a ballot. For instance, in 2018, DOJ and ICE subpoenaed eight years of voting records from North Carolina, including absentee ballots that could reveal how some voters cast their votes.<sup>66</sup> If people are concerned that their voting records might be leaked or hacked, they are likely to feel constrained in their ability to vote against the sitting president.<sup>67</sup>

### ***B. Inciting Threats Against Individual Voters and Activists***

The President’s use of Twitter to attack those who criticize him is another source of voter intimidation: not directly by the President, but by followers who take his criticisms as an invitation to further threats. When the President turns to Twitter to attack those who criticize him — including ordinary citizens — death threats often follow.<sup>68</sup> And the President, given opportunities to distance himself from these threats, has at times seemed to endorse them. For example, in 2019, when President Trump’s tweets about Representative Ilhan Omar incited death threats aimed at her, he was asked whether he regretted his tweet. He responded, “No, not at all. Look, she’s been very disrespectful to this country. She’s been very disrespectful, frankly, to Israel. She is somebody that doesn’t really understand life, real life.”<sup>69</sup> Other targets of foreseeable death threats that have followed from the President’s tweets have included the Red Hen restaurant where then-Press Secretary Sarah Huckabee Sanders was refused service (as well as other restaurants with the same name);<sup>70</sup> the head of a local steelworkers union who criticized

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<sup>64</sup> Trip Gabriel, *Donald Trump’s Call to Monitor Polls Raises Fears of Intimidation*, N.Y. Times (Oct. 18, 2016), <https://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html>.

<sup>65</sup> *Id.*

<sup>66</sup> Tal Kopan, *ICE, Justice Subpoena Voter Records from North Carolina*, CNN (Sept. 5, 2018), <https://www.cnn.com/2018/09/05/politics/ice-subpoena-voter-records/index.html>.

<sup>67</sup> In a somewhat analogous case, CBP has been retaliating against immigration advocates. Although this concerns policies — as opposed to elections — it is yet another example of the Trump Administration targeting those who disagree with them. And it will likely have a similar chilling effect. See Tom Jones, et al., *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC San Diego (Mar. 8, 2019), <https://www.nbcsandiego.com/news/local/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html>.

<sup>68</sup> As of May 2019, *New York Times* had documented nearly 600 people, places, and things that Trump had targeted, just via Twitter, since declaring his candidacy. Jasmine C. Lee & Kevin Quealy, *The 598 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. Times (May 24, 2019), <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html>.

<sup>69</sup> Aaron Rugar, *Trump on If He’s Had Second Thoughts About Incendiary Ilhan Omar Tweet: “No, Not at All,”* Vox (Apr. 16, 2019), <https://www.vox.com/2019/4/16/18395065/trump-ilhan-omar-death-threats>.

<sup>70</sup> Adam Gabbatt, *A Visit to the Red Hen Restaurant, Where Death Threats Mix with Letters of Support*, Guardian (June 29, 2018), <https://www.theguardian.com/us-news/2018/jun/29/red-hen-sarah-sanders-local-reactions-death-threats-support>; Derrick Ward, *Wrong Red Hen DC Restaurant Getting Death Threats*, NBC Washington (June 25, 2018), <https://www.nbcwashington.com/news/local/Wrong-Red-Hen-DC-Restaurant-Getting-Death-Threats-After-Spot-With-Same-Name-Booted-Sarah-Huckabee-Sanders-486500061.html>.

the President for lying to the public about a deal;<sup>71</sup> and an 18-year old woman who questioned his treatment of women and his views on abortion.<sup>72</sup> This pattern of public name-calling aimed at regular Americans and their representatives — name-calling that has the foreseeable consequence of undermining their safety and the safety of their families — is highly likely (indeed, seems designed to) deter political speech and action by potential party activists and voters.

These forms of intimidation chill core political expression, imposing heavy costs on people who participate in the political process. And they seek to undermine the promise of free and fair elections.

#### 4. Creating an “Emergency” to Spark Voters’ Fears

President Trump can also use his presidential powers to create a false sense of “emergency.” A supposed emergency gains credibility when it is backed by the resources of the federal government, and it can spark fear among voters and prompt them either to support the President politically or not turn out to vote at all.

For well over a century, this nation has debated how to draw lines over immigration. The security of the Southern border has always been part of that conversation.<sup>73</sup> But in the run-up to the 2018 midterm elections, the President began to proclaim that an “invasion” by Latinx migrants was imminent, in the form of a caravan of asylum-seekers coming from Central America to the U.S. southern border.<sup>74</sup> As administration officials acknowledged at the time, President Trump’s claims about the danger posed by the caravan were false.<sup>75</sup> But to make the threat seem more real, the administration ordered that 5,200 troops be sent to the border as the 3,500-person caravan began its journey from Central America to the U.S. border.<sup>76</sup>

This tactic seems to have been extremely successful among Republican voters, whom the President and his allies have primed to see immigrants as an existential threat to the country. In 2018 exit polls, Republican voters identified immigration as their top-priority issue on Election

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<sup>71</sup> Maya Kosoff, *Could Inciting Death Threats Get Trump Kicked Off Twitter?*, Vanity Fair (Dec. 9, 2016), <https://www.vanityfair.com/news/2016/12/trump-twitter-death-threats?verso=true>.

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

<sup>73</sup> See, e.g., ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943*, at 147-220 (2003).

<sup>74</sup> Jordan Fabian, *Trump: Migrant Caravan “Is an Invasion,”* The Hill (Oct. 29, 2018), <https://thehill.com/homenews/administration/413624-trump-calls-migrant-caravan-an-invasion>.

<sup>75</sup> Will Sommer, et al., *Trump’s Own Team Knows His Caravan Claims are Bullshit*, Daily Beast (Oct. 24, 2018), <https://www.thedailybeast.com/trumps-own-teams-know-his-caravan-claims-arent-true-dont-particularly-care>.

<sup>76</sup> Michael D. Shear and Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants*, N.Y. Times (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html>.

Day.<sup>77</sup> Moreover, the deployment of large numbers of troops and border patrol officers to the border likely had the added effect of intimidating Latinx voters in border areas and deterring them from going to the polls on Election Day.

But once the midterm elections were over, the Trump Administration suddenly started treating the “emergency” at the border as far less urgent. Just two weeks after the midterm election, the military announced it would begin drawing down troops from the border.<sup>78</sup> At the same time, media coverage of the caravan all but disappeared.<sup>79</sup> The Trump-induced panic leading up the midterm elections should serve as a warning of what to expect when Trump’s reelection is on the line in 2020.

## 5. Colluding with a Foreign Government to Interfere with the Election

Finally, the President’s role as commander-in-chief gives him dangerous new opportunities to invite or accept interference from foreign countries — including authoritarian states, with whom he has built close ties — to help his reelection campaign. Concern about foreign influence over American elections dates back to the Founding, when leaders like Alexander Hamilton expressed grave concern that foreign adversaries would seek to gain influence by interfering with an election and by cultivating close relationships with presidential candidates.<sup>80</sup>

Now, that threat seems especially acute. As Special Counsel Robert Mueller laid out in his report, the 2016 election was marred by interference by the Russian government. The Russians weaponized social media to drive support for then-candidate Trump and to dampen turnout among African Americans and other likely supporters of Hillary Clinton.<sup>81</sup> Russia also hacked into email accounts belonging to Democratic National Committee staffers and Clinton campaign chair John Podesta, and then strategically leaked emails from those accounts to damage the Clinton campaign.<sup>82</sup> At the time, candidate Trump openly welcomed Russia’s help

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<sup>77</sup> CNN, *Exit Polls 2018*, <https://www.cnn.com/election/2018/exit-polls>. Other studies taken near the time of the 2018 election showed that Trump’s base was angry about and motivated by concerns about illegal immigration. *See, e.g.*, Tara Golshan, *2 Weeks from Election Day, the Republican Base is Really Angry About Immigration*, Vox (Oct. 24, 2018), <https://www.vox.com/2018/10/24/18018490/caravan-midterms-2018-republican-immigration>; Ted Hesson, *Trump’s Immigration Push May Have Stemmed GOP Losses*, Politico (Nov. 7, 2018), <https://www.politico.com/story/2018/11/07/trumps-immigration-push-may-have-stemmed-losses-933276>.

<sup>78</sup> Wesley Morgan, *Troops at U.S.-Mexican Border to Start Coming Home*, Politico (Nov. 19, 2018), <https://www.politico.com/story/2018/11/19/troops-us-mexico-border-come-home-1005510>.

<sup>79</sup> Jonathan Lemire and Catherine Lucey, *Remember the Caravan? After Vote, Focus on Migrants Fades*, Associated Press (Nov. 13, 2018), <https://www.apnews.com/38870e6a25d5469292253b4b716ecc17>.

<sup>80</sup> *See* Brief of Amici Curiae by Certain Legal Historians, *Blumenthal v. Trump*, No. 1:17-cv-1154-EGS (D.D.C. Nov. 2, 2017); *see also* The Federalist No. 68 (Alexander Hamilton) (describing how the Constitution was engineered to prevent foreign powers from “gain[ing] an improper ascendant in our councils”).

<sup>81</sup> Special Counsel Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Vol. I, 19-36 (March 2019).

<sup>82</sup> *Id.* at 36-49.

— for instance, saying at a rally: “Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing. I think you will probably be rewarded mightily by our press.”<sup>83</sup>

While Mueller did not establish evidence that the Trump campaign conspired directly with the Russian government in 2016, the President’s opportunities to do so are much greater now that he occupies the presidency. The President has met repeatedly with Russian President Vladimir Putin since taking office, including meetings that took place without any policy aides or note-takers.<sup>84</sup> He has also repeatedly refused to condemn Russia’s 2016 election interference.<sup>85</sup> And it’s not just Russia: Saudi Arabia and the United Arab Emirates also met with Trump campaign associates during in 2016, and they have benefited from policy shifts under (and close ties with) the Trump administration.<sup>86</sup>

These contacts raise the dangerous possibility that the President has invited, or at least indicated that he will tolerate, further foreign interference in the 2020 election. He recently told George Stephanopoulos that he would freely accept information about a political opponent from a foreign country.<sup>87</sup> Such interference would compromise our ability to have a truly free and fair election in 2020 and threaten the long-term survival of American democracy.

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Trump’s past actions demonstrate his willingness to abuse his position — both his presidential powers and his bully pulpit — to achieve electoral victories. He has shown no regard for the laws and norms that generally govern such behavior. As we approach the 2020 election, President Trump’s embrace of authoritarian tactics to interfere with elections will only grow more dangerous. Unlike in 2016, Trump now holds the presidency, vastly increasing the amount of power available to him. And in contrast to 2018, his own office is now at risk.

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<sup>83</sup> *Id.* at 49 (March 2019).

<sup>84</sup> Alex Ward, *Trump Met Putin Without Staff or Note Takers Present — Again*, Vox (Jan. 29, 2019), <https://www.vox.com/2019/1/29/18202515/trump-putin-russia-g20-ft-note>.

<sup>85</sup> Krishnadev Calamur, *Trump Still Hasn’t Condemned Russia for Meddling in the 2016 Election*, Atlantic (Apr. 18, 2019), <https://www.theatlantic.com/international/archive/2019/04/trump-russia-meddling-2016-election/587518/>.

<sup>86</sup> Mark Mazzetti, et al., *Trump Jr. and Other Aides Met with Gulf Emissary Offering Help to Win Elections*, N.Y. Times (May 19, 2018), <https://www.nytimes.com/2018/05/19/us/politics/trump-jr-saudi-uae-nader-prince-zamel.html>.

<sup>87</sup> Lucien Bruggeman, *‘I Think I’d Take It’: In Exclusive Interview Trump Says He Would Listen If Foreigners Offered Dirt on Opponents*, ABC News (June 13, 2019), <https://abcnews.go.com/Politics/id-exclusive-interview-trump-listen-foreigners-offered-dirt/story?id=63669304>.

## Proposed Reforms

Given these signals from President Trump, and the risk that a future authoritarian-minded leader is waiting in the wings, Congress needs to act to protect our elections. While, short of impeachment, Congress may not be able to diminish a president's access to the bully pulpit, it can limit his power to turn words into actions, including by constraining lower-level officials' abilities to lawfully enforce his autocratic whims. This key observation — that it is often more effective to regulate agencies and government officials rather than Presidents — guides the legislative reforms we propose below.

### **Proposal #1: Protect Political Candidates from Improper Law Enforcement Activity**

One of the ways President Trump has undermined the impartial administration of justice is by directing the Department of Justice (DOJ) to investigate his challengers. Congress needs to act to protect candidates, their campaigns, and their supporters from these politicized and targeted law enforcement investigations. As past attorneys general have emphasized, politicized criminal investigations can jeopardize the fairness of elections.<sup>88</sup>

Existing guardrails for protecting our elections from manipulation by law enforcement are informal, ambiguous, and limited in scope. For example, current DOJ guidance requires prosecutors to consult with the Public Integrity Section before taking major investigative steps in election-related investigations. This guidance does not impose the same requirement on investigations of candidates that involve non-election-related crimes, however.<sup>89</sup> This loophole opens the door to politically-motivated investigations of non-electoral conduct — the types of investigations that this President has repeatedly threatened.<sup>90</sup> DOJ also has an informal norm against taking public investigative steps close in time to an election, although a recent report by DOJ's Inspector General reveals that DOJ leadership has not always agreed on the scope of that norm.<sup>91</sup>

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<sup>88</sup> See, e.g., Eric Holder, Att'y Gen., U.S. Dep't of Justice, Memorandum for all Department Employees, Election Year Sensitivities, March 9, 2012 (“Simply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges. Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department’s mission and with the Principles of Federal Prosecution.”), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf>.

<sup>89</sup> U.S. Dep't of Justice, Justice Manual § 9-85.210 (2018).

<sup>90</sup> See, e.g., Michael S. Schmidt & Maggie Haberman, *Trump Wanted to Order Justice Dept. to Prosecute Comey and Clinton*, N.Y. Times (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html> (“President Trump told the White House counsel in the spring that he wanted to order the Justice Department to prosecute two of his political adversaries: his 2016 challenger, Hillary Clinton, and the former F.B.I. director James B. Comey, according to two people familiar with the conversation.”).

<sup>91</sup> See Office of the Inspector General, U.S. Dep't of Justice, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election, 16-18 (June 2018).

Congress should expand and strengthen these existing guardrails by requiring law enforcement agencies to consult with, and seek approval from at least two career (non-political) attorneys from DOJ's Public Integrity Section before taking any major investigative step with respect to any candidate for federal office, members of a candidate's immediate family, or any federal campaign committee. Then, once the agencies take investigative steps, they should provide notice of those steps, as well as the views of the consulted career attorneys (who may well have been overruled by political officers), to (1) the relevant Office of Inspector General; (2) the Office of Professional Responsibility (for DOJ only); and, where possible without compromising the investigation or the rights of the accused, (3) the chairs and ranking members of the House and Senate Judiciary Committees. When it is not possible to share information about specific investigations with Congress, aggregated statistics about the number of investigative steps taken, and the number of times that career staff have been overruled, should be shared with Members of Congress.

This consultation requirement should define "candidate for federal office" as any candidate with an active federal campaign committee or exploratory committee. It should apply to any "federal law enforcement agency," defined to include DOJ and its sub-agencies (including the Federal Bureau of Investigation), the Department of Homeland Security, and all other agencies performing law enforcement functions.

With these mechanisms in place, a better balance could be struck between, on the one hand, supporting important law enforcement activities even during election seasons, and, on the other hand, protecting the federal prosecutorial power from political abuse.

### **Proposal #2: Prevent Voter Intimidation by All Law Enforcement Officers, Including Those Who Assist in Enforcing Immigration Laws**

President Trump has tried to suppress voter turnout by scaring voters with the possibility that law enforcement officers will harass them at the polls.

Federal law enforcement activities that are not necessary to confront an imminent threat to public safety or the safety of voters should not take place in or near polling places on Election Day. Immigration enforcement actions in or near polls are particularly likely to have the effect of intimidating eligible voters, specifically non-white citizens, and preventing them from freely exercising their right to vote. Reducing immigration enforcement actions on election days will help ensure that all lawfully-registered voters are able to exercise the franchise.

A federal statute already makes it unlawful for any federal officer or employee (military or civil) to station "armed men" at the polls in a general or special election, except as necessary

“to repel armed enemies of the United States.”<sup>92</sup> Congress should extend this statute to expressly apply to persons responsible for enforcing the immigration laws, whether armed or not. Congress should also extend this statute to cover primary elections.

Temporary immigration checkpoints that are set up near polling stations can similarly chill lawfully-registered voters from coming to the polls, and they are almost always unnecessary to prevent imminent threats to public safety or the security of elections. To protect our elections, Congress should prohibit federal officers or employees from taking any immigration-related enforcement actions at, or within a specified radius of, a polling location on any election day. Vehicle stops by CBP on highways and other roadways, including those within 100 miles of the border, should also be prohibited on election days.

To ensure that voters are aware of this policy, Congress should require all polling places to post, in a prominent location, a simple notice in English, Spanish, and other dominant languages in the relevant community, stating that no immigration enforcement may take place at or within the radius of the polling place. And while state law may require poll workers to check identification at the polls, Congress should prohibit all federal officers and employees, acting in their official capacities, from checking any form of identification at a polling location on Election Day unless they are doing so as part of their response to an imminent threat to public safety or an imminent threat to the conduct of the elections.

Congress should additionally prohibit law enforcement authorities, including immigration enforcement authorities, from conducting any non-routine, non-emergency, and publicly-visible activity on election days, regardless of proximity to a polling place. Examples of the types of activities that should be prohibited include the “crowd control” training exercise that CBP had initially scheduled in El Paso on Election Day in 2018.<sup>93</sup>

Finally, the Department of Homeland Security (DHS) should provide advance notice of all actions that immigration authorities will take on Election Day to its Office of the Inspector General, the DHS Office for Civil Rights and Civil Liberties, the House and Senate Committees on Homeland Security, the House and Senate Judiciary Committees, and the Office of the Special Counsel.

For the purposes of this section, Congress should define an “election” as any general, primary, run-off, or special election held solely or in part for the purpose of nominating or electing a candidate for the office of president, vice president, presidential elector, member of the

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<sup>92</sup> 18 U.S.C. § 592.

<sup>93</sup> María Cortés González, *Border Patrol Cancels ‘Crowd Control’ Exercise on Election Day in El Paso*, El Paso Times (Nov. 6, 2018), <https://www.elpasotimes.com/story/news/2018/11/06/beto-orourke-border-patrol-crowd-control-exercise-election-day/1900712002/>.

Senate, member of the House of Representatives, or delegate or commissioner from a territory or possession.

### **Proposal #3: Enact a Federal Prohibition on Practices Intended to Deceive Voters and Strengthen Existing Prohibitions on Voter Intimidation**

The President has knowingly engaged in deceptive and intimidating practices to try to keep voters from exercising their right to vote.<sup>94</sup> Deceptive practices come in many forms. They might involve providing false information about the time or place of an election, or they might involve providing false information about who is eligible to vote, the risks of going to a polling place, or penalties for making an innocent mistake on a voter registration form. As detailed in a 2007 Senate Report, “[t]hese efforts are primarily targeted at racial minorities, new voters, the elderly, the disabled, low-income individuals, naturalized citizens, formerly-incarcerated voters, and other groups that are disadvantaged or have historically faced discrimination.”<sup>95</sup> The President and his allies have taken actions that seem designed to intimidate voters and deter them from participating in the political process.

Congress should make clear that actions taken to deceive or intimidate voters are not acceptable in our democracy. Congress should enact clear prohibitions on intentionally deceiving voters, modeling any such prohibitions on H.R. 1 and the Deceptive Practices and Voter Intimidation Prevention Act of 2019, both of which would empower the Attorney General to prosecute any person who knowingly communicates certain basic election information which they know to be false. Both bills would also promote transparency around non-prosecution decisions by the Attorney General.

More specifically, Congress should amend federal criminal law to prohibit any person, with the intent to prevent another person from exercising the right to vote or from voting for the candidate of the voter’s choice, from knowingly communicating information which they know to be false regarding: (1) the time, place or manner of the election or (2) the qualifications for or restrictions on voter eligibility for such election, including criminal penalties associated with voting or a voter’s registration status or eligibility.<sup>96</sup> So that victims can immediately seek redress during a hectic preelection period, Congress should include a private right of action, including the right to seek injunctive relief to bar future deceptive acts. Finally, Congress should

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<sup>94</sup> See Section 2, above.

<sup>95</sup> S. Rep. No. 110-191, at 2 (2007).

<sup>96</sup> Criminalizing intentionally false speech about elections does not violate the First Amendment. While even false speech may have constitutional value in some circumstances, see *United States v. Alvarez*, 567 U.S. 709 (2012), the false speech targeted by this proposal is intended to interfere with others’ right to vote — itself a paramount constitutional interest, see *Burson v. Freeman*, 504 U.S. 191, 210 (1992). See also Common Cause and the Lawyers’ Committee for Civil Rights Under Law, *Deceptive Election Practices and Voter Intimidation: The Need for Voter Protection* (July 2012), <https://lawyerscommittee.org/wp-content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf>.

require the Attorney General to take corrective action when deceptive statements are made and state and local officials do not make adequate efforts to correct the erroneous statements.

Congress should also strengthen existing prohibitions on intimidating voters or otherwise interfering with the right to vote. On the criminal law side, it should raise penalties for violations of 18 U.S.C. § 594 (voter intimidation) and 18 U.S.C. § 241 (conspiracy against rights). Congress should also expressly prohibit, and attach criminal penalties, to efforts to corruptly interfere with or prevent another person from voting, registering to vote, or aiding another person to vote or register to vote. On the civil law side, 42 U.S.C. § 1985(3) already prohibits, and creates a damages remedy for, conspiracies to intimidate voters. Congress should remove the conspiracy requirement from § 1985(3) to allow potential plaintiffs to seek relief from anyone who engages in voter intimidation, whether or not they do so as part of a conspiracy.

Finally, Congress should use its oversight and appropriations authorities to ensure that the Department of Justice is committing sufficient resources to investigating and prosecuting voter deception and voter intimidation crimes.

#### **Proposal #4: Make It Possible for Victims of Unconstitutional Government Interference in Elections to Obtain Money Damages**

Many of the ways a president and his allies might interfere in elections would violate basic constitutional rights, including the Fifteenth Amendment (right to vote), Fifth Amendment (equal protection), and the First Amendment (freedom of association).

But it can be very difficult to hold the government to account when it violates constitutional guarantees. One reason for this is that Congress has not enacted a general statute providing for damages suits against federal officials who act unlawfully to violate individuals' constitutional rights. The courts have partially filled this void by recognizing an implied cause of action in the Constitution — referred to as a *Bivens* remedy. But the Supreme Court has systematically limited the availability of a *Bivens* remedy over time.<sup>97</sup> The narrowness of *Bivens* doctrine, especially when paired with judicial limits on the availability of prospective injunctive relief against the government,<sup>98</sup> means that many people seeking to vindicate their constitutional rights against governmental defendants face a high burden before they can have their claims heard on the merits.<sup>99</sup>

In order to protect against federal violations of voting rights, associational rights, and other civil rights, Congress should enact a statutory *Bivens* remedy to clarify that individuals

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<sup>97</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017).

<sup>98</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>99</sup> See, e.g., Stephen I. Vladeck, Opinion, *Our Increasingly Unenforceable Constitution*, N.Y. Times (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/increasingly-unenforceable-constitution.html>.

whose constitutional rights are violated by federal officials are entitled to recover for their injuries.<sup>100</sup> While this would have salutary effects in a range of scenarios, it would be especially valuable in deterring election interference. People who, for example, are unconstitutionally stopped at the polls or demoted by government employers for their political advocacy, would have an available monetary remedy. Government actors, meanwhile, would have a new incentive to act lawfully.

### **Proposal #5: Strengthen Disciplinary Procedures in the Hatch Act for Certain High-Level Employees**

White House staffers have abetted President Trump’s abuse of the bully pulpit to delegitimize political opposition by using their official government positions to discredit Democratic politicians. For example, in June 2019, the Office of Special Counsel called for White House counselor Kellyanne Conway to be fired because of her repeated and flagrant violations of the Hatch Act.<sup>101</sup> She had been found to have violated ethics rules by advocating for Republican Roy Moore, and against Democrat Doug Jones, in the 2017 Alabama Senate race; more recently, she made further improper comments about Democratic presidential candidates Joe Biden and Bernie Sanders, among others.<sup>102</sup> In theory, the Hatch Act, 5 U.S.C. § 7321 et seq., should limit government employees’ participation in partisan political activities. But the Hatch Act has special rules for White House staff, rules that allow the president to let them off easy — as President Trump has since done for Conway.

For the typical government employee, Hatch Act violations are referred to the Merit Systems Protection Board.<sup>103</sup> But when the most powerful and influential public servants — those who are “in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President” — violate the Hatch Act, their matters are referred to the president,<sup>104</sup> who may be an especially biased adjudicator. Thus, despite repeated findings by the Office of Special Counsel that Conway had violated the Hatch Act, she remains in her White

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<sup>100</sup> See Protect Democracy, *Roadmap for Renewal: Bivens Remedy*, <https://protectdemocracy.org/roadmap-for-renewal/bivens-remedy/>.

<sup>101</sup> Letter from Special Counsel Henry J. Kerner, U.S. Office of Special Counsel, to President Donald J. Trump (June 13, 2019), <https://osc.gov/Resources/Report%20to%20the%20President%20re%20Kellyanne%20Conway%20Hatch%20Act.pdf>.

<sup>102</sup> MJ Lee, *Office of Special Counsel: Conway Violated Hatch Act*, CNN (Mar. 6, 2018), <https://www.cnn.com/2018/03/06/politics/kellyanne-conway-hatch-act/index.html>; Morgan Gstalter, *Watchdog Files Hatch Act Complaint Against Kellyanne Conway for Comments on Dem Candidates*, The Hill (May 8, 2019), <https://thehill.com/homenews/administration/442644-watchdog-files-hatch-act-complaint-against-kellyanne-conway-for>.

<sup>103</sup> 5 U.S.C. § 1215(a).

<sup>104</sup> 5 U.S.C. § 1215(b).

House position.<sup>105</sup> There is no indication that Conway has been disciplined for violating federal law.

Congress should update the Hatch Act to ensure that any employee “in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President” is held to a higher standard, not a lower one, for ethical and non-partisan conduct in office. The following reforms would help achieve that goal. First, Congress should require that any Hatch Act violation presented to the president under 5 U.S.C. § 1215(b) is also shared with the House and Senate oversight committees and the Department of Justice’s Public Integrity Section. Second, Congress should require that for matters concerning any such employee who is employed at an agency that has an inspector general, the Office of the Special Counsel must also refer the matter to that Office of the Inspector General. Third, Congress should amend the Hatch Act to add criminal penalties for repeat offenders, including high-level White House officials.

### **Proposal #6: Prevent the President from Colluding with Foreign Powers**

The president’s role as commander-in-chief gives him a unique ability to manipulate an election by inducing or accepting help in manipulating elections from a foreign power.

Soliciting or accepting assistance from a foreign national or a foreign government already violates existing campaign finance laws.<sup>106</sup> If the president were to accept or solicit such assistance, he would also violate the Constitution’s Emoluments Clause, which prohibits the president, or any other American officeholder, from accepting “any present, Emolument, Office, or Title” from a foreign government.<sup>107</sup>

Congress can do more to ensure that the public learns promptly about interactions between campaigns and foreign governments, and in particular about offers of assistance from foreign governments. First, Congress should require candidates and campaign organizations to promptly disclose such contacts to the Federal Election Commission and the Federal Bureau of Investigation.<sup>108</sup> Second, Congress should also make clear that government officials, as well as campaign workers, are prohibited from assisting the president in seeking foreign assistance to influence an election. Specifically, Congress should make it a crime to conspire to violate the

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<sup>105</sup> Letter from Special Counsel Henry J. Kerner, *supra* note 101.

<sup>106</sup> 52 U.S.C. § 30121.

<sup>107</sup> U.S. Const., art. I, sec. 9, cl.8 (“[N]o 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.”). In fact, the Trump Administration’s position in litigation over the Emoluments Clause has been that the Clause applies to official acts taken by the President. *See* Mot. to Dismiss, *District of Columbia v. Trump*, No 8:17-cv-01596, (D. Md. Sept. 29, 2017).

<sup>108</sup> Several bills to do this have already been introduced in the current Congress. *See* Duty to Report Act, S. 1247, 116th Cong. (2019); Foreign Influence Reporting in Elections Act, S. 1562, 116th Cong. (2019); Prevention of Foreign Interference with Elections Act, S. 1469, 116th Cong. (2019).

Emoluments Clause and make it clear that election-related assistance is covered by the statute. Congress should also ensure that White House employees, including translators and note-takers, are covered by whistleblower protections that absolve them from criminal liability under the new statute if they come forward to disclose potential violations of the Emoluments Clause.

## Conclusion

Our democracy depends on free and fair elections, where voters can choose our representatives and cast judgment on current office-holders. Through a series of actions and threats, President Trump has shown how an authoritarian-minded president might abuse the powers of the Oval Office to interfere with a free and fair election and avoid accountability at the polls.

This threat will not end with the 2020 election. As commentators have observed, President Trump is exposing gaps in U.S. governance that could be exploited again, and to a greater degree, by a future president.<sup>109</sup> That person could be a Democrat, Republican, or from a third party. Political party should be no obstacle to strengthening guardrails against executive overreach that keep our elections free and fair.

The proposals we lay out here will not hamstring legitimate political activity or good-faith policymaking — they serve only to check actions by a president and his supporters that interfere with free and fair elections. It's time for Congress to act, before it's too late. Our democracy is at stake.

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<sup>109</sup> See e.g. Jack Shafer, *Trump's American Emperor Moment*, Politico (June 5, 2019), <https://www.politico.com/magazine/story/2019/06/05/trumps-american-emperor-moment-227049>.