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Maintaining Checks and Balances in a New Age of Conflict

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Abstract

This paper addresses how US-China rivalry is shaping the primary institutions of American constitutional governance. It asks whether new geopolitical demands have eroded traditional checks and balances between Congress, the President, and the courts. History teaches that global conflict can alter the balance of constitutional powers, leading at times to executive overreach, congressional abetment or acquiescence, and judicial deference. Are these structural patterns being reproduced today? How can politicians, policymakers, and governments lawyers ensure that healthy interbranch dynamics persist through a new age of conflict?[1]

Policy Implications and Key Takeaways

- Constitutional governance in the United States is premised on robust competition between three co-equal branches of government. Throughout American history, conflicts with foreign adversaries have tended to weaken interbranch competition. Foreign threats have at times motivated executives to amass new authorities, induced legislators to rally around the flag, and persuaded judges to defer to the judgments of national security leaders. While such consensus can facilitate decisive government action, it can also lead to the curtailment of rights and liberties and the suppression of alternative perspectives.

- US-China rivalry has not yet transformed the relationships between the three branches of our federal government. However, there have been troubling cases of prosecutorial overreach and administrative illegality, as well as a marked increase in executive-congressional collaboration, supported by a growing bipartisan policy consensus on China. Courts and other constitutional actors have helped to check certain of these acts, but their willingness and capacity to do so in the future remain uncertain.

- There is no necessary tradeoff between maintaining constitutional protections and successfully competing with Beijing. An unreflective, unchecked response to China may even undermine American interests by supplying Chinese propaganda authorities with fodder for

claims of American hypocrisy and by fostering ill-considered public and foreign policies.

- Policymakers can help fortify constitutional checks, or recreate some of the salutary effects of constitutional checks, in the following ways:

  - » Judicial confirmation processes should probe nominees' views on various doctrines of national security deference and, more generally, the role of courts in foreign affairs.

  - » The White House, executive agencies, and Congress should find ways to both empower and consult civil society and business groups who are distinctly situated to share information about the effects of overreaching policies.

  - » Key agency inspectors general offices ought to in some cases have a broader investigatory charge, and in other cases create a permanent position with a standing civil rights mandate.

  - » The executive and legislative branches should consider instituting other internal checks, as recently advocated by Professors Ashley Deeks and Kristen Eichensehr, including instituting forced dissent policies and incorporating sunset clauses into laws empowering the executive.[2]

  - » At a time of speech controversies, our political and civic institutions should reaffirm their commitment to free expression to help protect dissenting views and preserve space for civil society advocacy.

Introduction

This paper addresses how US-China rivalry is shaping the relationship between the primary institutions of American constitutional governance: the executive, legislative, and judicial branches. The basic theory of checks and balances is well-known. The US Constitution diffuses power between three coordinate branches of government. Each branch exercises the core of one element of federal power, and shares additional powers with other branches of government. By design, these branches are placed into institutional competition with one another, an ostensibly self-enforcing mechanism for preventing the excessive concentration of power.[3]

The traditional theory of checks and balances has not always been realized in practice. Interbranch competition is best thought of as an aspirational commitment of American governance, serving not mere abstract constitutional values, but other public goods, including the protection of civil rights and liberties and the enactment of well-considered public and foreign policies. Periods of conflict and crisis have been associated with an erosion in interbranch competition, and in turn, a diminishment in certain rights and the pursuit of ill-advised policy directions. This paper asks whether US-China conflict is beginning to influence interbranch dynamics.

The paper proceeds in three parts. Part I unpacks the connection between global conflict and interbranch competition, drawing on works of legal and constitutional history. It shows how periods of crisis can create a distinctive set of political incentives that motivate executives to expand their powers and discourages other constitutional actors from curbing executive overreach.

Part II assesses, through several case studies, how US-China conflict has begun to reproduce familiar dynamics of interbranch relations. It documents several cases of executive overreach, before surveying a broader trend of interbranch consensus and collaboration on China. While the effects so far are relatively modest relative to historic baselines, they could well intensify if the US-China rift continues to widen.

Part III addresses some ways in which our constitutional institutions continue to be working well. It highlights several examples of Congress and federal courts stepping in to check concerning executive actions responding to China. These developments are encouraging, but a closer look will suggest that future policies may be less vigorously policed.

Part IV concludes by recommending several measures designed either to bolster interbranch competition or to mimic the effects of interbranch competition by institutionalizing certain forms of intra-branch constraint. The specific recommendations are less important than the overarching need to recognize and manage threats to interbranch accountability in a new age of great power rivalry.

I. Background

This Part examines how the American system of checks and balances has historically responded to foreign conflict. The constitutional effects of foreign conflict have been multi-directional. Sometimes, one branch has vigorously checked another; more often, however, interbranch competition has weakened: executives have sought greater powers, legislators have acquiesced or abetted executive initiatives, and courts have deferred to national policymaking authorities. These structural tendencies have some upsides, but they can also work to limit basic rights, stifle alternative perspectives, and facilitate the adoption of ill-considered policies.

Periods of major conflict shape the incentives of constitutional actors in predictable ways. For the President, who is constitutionally charged as the commander in chief and vested with various foreign affairs powers, foreign threats present both a challenge to the President's national security responsibilities and an opportunity for political gain.[4] Demands for swift and decisive action have at times culminated in an expansion in executive power, often at the expense of the prerogatives of other branches of government or the protection of civil rights and liberties. Examples of the former include the executive's continued resistance to the War Powers Resolution—Congress's attempt to reign in executive unilateralism in initiating and maintaining foreign hostilities, the mass internment of Japanese and Japanese Americans during World War II, and the over-surveillance and over-policing of Muslim-American communities during the War on Terror.[5]

Like the President, Congress has followed certain patterns in times of conflict. Congress is constitutionally vested with certain exclusive and shared authorities over foreign affairs and national security.[6] While legislators are not as directly accountable for inadequate wartime responses as the executive,

they are elected officials with an incentive to respond vigorously to foreign threat. Congressional responses to foreign conflict tend to follow several patterns: legislators may actively abet executive efforts to amass greater powers by legislating more authority to the president, or they may passively acquiesce to such efforts initiated by the executive.[7] Historically, there have been waves of war-inspired congressional bipartisanship, for example, during the first few decades of the Cold War.[8] Many conflict-driven rights contractions were legislated by Congress, from the Alien and Sedition Acts of 1798 to legislation enacted during the McCarthy era.[9]

As with Congress, federal courts have often deferred to executive initiatives during wars and other conflicts. The Supreme Court has expressed an unwillingness to interfere with the political branches' national security judgments on grounds of institutional capacity and comparative expertise. Justices have been especially hesitant to second-guess military or foreign policy judgments during periods of foreign conflict, where the need for swift, decisive, and unencumbered action is perceived to be at an apex.[10] On these kinds of considerations, the Court has given legal sanction to an array of overreaching executive acts, from the internment of entire populations to the use of military tribunals with minimal legal protections for the accused.[11] Not long ago, the Supreme Court upheld President Trump's so-called "Muslim ban"—an executive proclamation that forbade nationals of eight designated countries from entering the United States—on the theory that a more "searching inquiry" would be "inconsistent with the broad statutory text [at issue] and the deference traditionally accorded the President in this sphere."[12]

The structural dynamics summarized above are worrying for two reasons. First, as the historical examples show, political leaders are more likely to infringe on fundamental rights and freedoms in times of conflict. Whereas constitutional checks exist in theory to police rights violations of this sort, foreign conflicts can lead to a significant amount of institutional deference to political and especially executive decision making. Second, periods of crisis can lead to less considered policymaking as a result of greater interparty and interbranch consensus. While consensus of this sort can lead to ambitious policy-making—no small thing in a system more concerned with limiting tyranny than empowering a strong federal government—it can also stifle alternative perspectives through imposing a kind of groupthink on national policy

debates and by generating political pressure to rally around the flag.[13] One wonders whether Congress would still have authorized military interventions in Vietnam or Iraq—two arguably mistaken foreign policy decisions of the last century—had the political environment been more conducive to dissent.[14]

To be sure, the trends summarized here admit of important exceptions. Congress has at times sought to limit executive war powers, especially in later phases of conflict where the public had begun to weary of war, and the Supreme Court has in notable cases curbed executive unilateralism in wartime.[15] Scholars have argued that conflict-driven exigencies can sometimes even expand rights where rights enlargement is thought to advance geopolitical goals.[16] Still, the examples of conflict-driven overreach are numerous, and invites the question of whether today's principal conflict—a deepening US-China rivalry—will have similar effects.

II. Structural Trends in the US-China Conflict

The current era of US-China rivalry is relatively new, as measured by the extent to which foreign conflict has consumed national politics. As such, one does not expect it to have immediately transformed interbranch competition. Unlike some of the conflicts of the twentieth century, the United States and China are still highly integrated economically, notwithstanding recent efforts to "derisk," and they have not clashed militarily. What is discernible, however, are structural trends that are beginning to evoke historical patterns, including a number of instances of prosecutorial overreach and administrative illegality, as well as a rise in interbranch and interparty consensus on China.

Consider first a few examples arising out of the US government's concerns over Chinese espionage—a practice that, though longstanding, intensified as the Chinese Party-state's high-tech economic ambitions grew in the 2010s.[17] Although the federal government has had legitimate basis for sounding the alarms over growing levels of economic espionage, its measures have at times been legally excessive.

During this period, a security unit within the Commerce Department called the Investigations and Threat Management Services (ITMS) began to investigate Asian-American employees as suspected spies. According to a Senate Commerce Committee report, ITMS transformed from an agency

with a limited security mandate "into a rogue, unaccountable police force" that "engaged in a variety of improper law enforcement activities."[18] The report continues:

> Investigations launched by the unit often lacked a sufficient basis…The ITMS…broadly targeted departmental divisions with comparably high portions of Asian-American employees, ostensibly to counter attempts of espionage by individuals with Chinese ancestry…[T]he unit's improper exercises of law enforcement powers likely resulted in preventable violations of civil liberties and other constitutional rights.[19]

In one instance of ITMS overreach, a longtime hydrologist with the National Weather Service named Sherry Chen was interrogated, detained, and portrayed as a spy before prosecutors dismissed their charges on the eve of trial.[20] In a follow-on lawsuit, a federal dispute resolution board acknowledged that Chen was a "victim of gross injustice."[21]

More cases resembling Sherry Chen's were brought under the umbrella of the Justice Department's (DOJ's) "China Initiative"—a federal effort launched in 2018 to direct departmental resources and personnel towards investigating Chinese industrial espionage. To be sure, the Initiative led to successful prosecutions of individuals who had been enlisted by China to advance Chinese industrial goals. But it also led to a number of failed or abandoned prosecutions of scientists of Chinese descent, who—like Chen—were surveilled, fired, detained, and publicly shamed.[22] According to legal scholar Margaret Lewis, a prominent critic of the China Initiative, "using 'China' as the glue connecting cases under the Initiative's umbrella create[d] an overinclusive conception of the threat and attache[d] a criminal taint to entities that possess "China-ness." The result, Lewis argues, was "not blunt guilt by association…It [was] threat by association."[23] Gisela Kusakawa, the Executive Director of the Asian American Scholars Forum offered a similar portrayal of the Initiative:

> Under this initiative, officials have relied on a broad theory of "non-traditional collectors"—a euphemism for "spies"—to broadly scrutinize individuals of Chinese descent. Academics with connections

> to China have been painted as national security threats regardless of any wrongdoing. Reports have found the majority of cases under the initiative do not involve charges of economic espionage or trade secret theft. The initiative incited fear that many individuals are being targeted based on their ethnicity rather than evidence of criminal activity, leaving lives and careers ruined, and driving widespread distrust of our government.[24]

Kusakawa was one of several civil society leaders advocating against the Initiative at the time.

US-China conflict has also led to several cases of administrative overreach, where federal agencies have acted beyond the scope of their governing statutory mandates to counter a purported China threat. This was the case in the Commerce example, with ITMS diverging from its narrow mandate to provide basic security services into performing wide-ranging counter-espionage and law enforcement activities. As the Commerce Department General Counsel's own report later concluded, "The Department's law enforcement and intelligence authorities do not include the full scope of the criminal law enforcement and counterintelligence authority that ITMS claimed to exercise."[25] But the examples don't end there.

Several other instances of administrative overreach stem from agency efforts to implement recent executive orders targeting China. According to the US-China Economic and Security Review Commission, the Trump Administration issued eight executive orders "that primarily involved China" and seven more "that did not explicitly target China but affected key policy areas relating to the US-China relationship."[26] The Biden Administration has largely continued in this tradition.[27] Not all such orders or their implementing regulations have been legally problematic, but several have clearly exceeded statutory authorities.

Consider first an executive order issued by President Trump on "addressing the threat from securities investments that finance Communist Chinese military companies."[28] Finding that China was "increasingly exploiting United States capital to resource and to enable the development and modernization of its military, intelligence, and other securities apparatuses," President Trump declared "a national emergency" and forbade United States persons

from transacting in the publicly traded securities of any "Communist Chinese military company" (CCMC). The Order called on the Secretary of Defense to designate certain companies as CCMCs pursuant to Section 1237 of the National Defense Authorization Act for Fiscal Year 1999.[29] Section 1237 defines CCMCs as any person who "is owned or controlled by, or affiliated with, the People's Liberation Army or a ministry of the government of the People's Republic of China or that is owned or controlled by an entity affiliated with the defense industrial base of the People's Republic of China."[30]

In carrying out this task, the Department of Defense appeared to have violated its statutory mandates. So the Federal District Court for the District of Columbia held in two separate cases brought by Chinese companies that found themselves labeled as CCMCs: Xiaomi Corporation and Luokung Technology Corporation.[31] The Department of Defense's decision documents were based on very little. The Xiaomi designation, for example, cited only two facts: that its CEO, Lei Jun, had once been honored as an "Oustanding Builder[] of Socialism with Chinese Characteristics" by China's Ministry of Industry and Information Technology, and that Xiaomi had prioritized investing in advanced 5G and artificial intelligence (AI) capabilities—"[c]ritical [t]echnologies essential to modern military operations." The District Court was not persuaded, however. It turns out that that same award had been given to all kinds of company leaders, including executives of firms that produced infant milk formula, chili sauce, and barley wine. And just because there were military applications to AI hardly meant that all companies investing in AI were affiliated with China's military industrial complex. For these reasons, the Court found that the Department had violated the Administrative Procedure Act on several grounds, including acting "in excess of the agency's authority."[32]

The Trump Administration also exceeded statutory authorizations in implementing two 2020 executive orders addressing threats associated with the Chinese social media apps WeChat and TikTok. Both orders urged that "the spread in the United States of mobile applications developed and owned by companies in the People's Republic of China (China) continue to threaten the national security, foreign policy, and economy of the United States," and ordered actions that would have amounted to a complete ban of both apps in the United States.[33] The principal legal basis for these orders was the International Emergency Economic Powers Act (IEEPA). That statute authorizes the

President to assume a number of powers upon a declaration of national emergency, including the power to regulate or prohibit transactions involving property in which foreign countries or persons may have an interest.[34] An order forbidding persons in the United States from engaging in transactions relating to WeChat or TikTok would seem at first to fall under this grant.

The problem, as several federal district courts later concluded, was that IEEPA also contained express exceptions to this grant of authority. Most relevant here, a President may not, under IEEPA, "regulate or prohibit, directly or indirectly...the importation from any country, or the exportation or any country...regardless of format or medium of transmission, of any information or informational materials, including but not limited to publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and newswire feeds." IEEPA also excepts regulations or prohibitions on "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value."[35] TikTok and WeChat users routinely share photographs and artworks on those platforms, as well as all kinds of other personal data. For these reasons, multiple federal district courts have found that the Administration likely violated IEEPA.[36] (Note, however, that the legality of President Trump's executive order banning TikTok is a separate question from the legality and constitutionality of Congress's recently enacted TikTok divestiture law).

Finally, there has been a notable rise in interbranch and interparty consensus on China. "Not only have Democrats and Republicans in Congress found consensus on the underlying rationale and elements of a hardened China policy," writes David Shambaugh, "but it spans across various professional sectors."[37] Shambaugh's assessment is supported by a recent empirical study of China-related legislation and American lawmakers' China-related social media messaging, which found that bipartisan consensus on China arose in the 2017–2018 period and has led to concrete and substantive proposals in a number of areas, including human rights, technology, public health, the environment, trade, investment, and military affairs.[38] The new consensus has had some clear upsides, for example helping the federal government to enact major semiconductor legislation amid stark political polarization.[39]

The new consensus is more worrying from a structural constitutional law perspective. It can result in what Deeks and Eichensehr call "friction-

less government," where "there is overwhelming bipartisan and bicameral consensus about a particular set of policies, as well as consensus between Congress and the Executive." They continue:

"In such cases, the normal checks and balances that typically arise during policymaking weaken and, in some cases, disappear entirely, creating a risk of policy going off the rails. The usual tensions between congressional and executive desires disappears; the rough-and-tumble partisan interactions between Republicans and Democrats fade; and the often-contentious interagency negotiations inside the executive branch are streamlined. These conditions can amplify the cognitive biases that often arise in decision-making, including optimism bias, confirmation bias, and groupthink, and often result in governmental actions that spark or escalate conflict, trigger actions by US adversaries that undercut US security goals, and unlawfully target domestic constituencies perceived to be linked to foreign adversaries."[40]

In separate work, Eichensehr and Cathy Hwang use the example of the Committee on Foreign Investment in the United States (CFIUS), an interagency committee that reviews inbound foreign investments for national security risks, to illustrate how interbranch collaboration against an ostensible foreign threat can raise structural constitutional concerns. They note how, over time, Congress has expanded the President's CFIUS authorities in response to China. "A Congress seemingly pushing the executive to exercise power may not scrupulously monitor that such power is used properly," they warn, "and an executive pushed to use delegated authorities…by the branch doing the delegating may be less careful than it would if facing robust critical oversight."[41]

III. Resilient Institutions

The preceding section discussed several cases of executive overreach and administrative illegality that have grown out of worsening US-China tensions. An important question is how other constitutional institutions have responded to these episodes, and in particular, whether they have successfully checked instances of illegality. The first part of this section will suggest that checks and balances has worked reasonably well so far. In many cases, coordinate constitutional institutions have sought to curb instances of abuse or illegality. Yet, as the second part will show, the general trends remain concerning. They impose

real human costs, even if they are eventually remedied. And there is reason to believe that growing interparty consensus on China and a highly deferential Supreme Court will be less likely to maintain strong checks if bilateral relations deteriorate in the years ahead.

Consider each of the examples in turn. After years of ITMS misconduct, whistleblowers began to come forward. The Republican minority staff of the Senate Commerce Committee interviewed several dozens of them before composing a committee report detailing ITMS abuses.[42] Senate Commerce Committee Ranking Member Roger Wicker (R-MS) portrayed the committee report in classic separations of powers terms: "It is my duty to ensure that we hold agencies accountable, especially when whistleblowers come forward with information suggesting chronic abuses of power." "Congress has a defined role in performing oversight," he continued, "and I intend to make sure that the federal agencies operate within the proper bounds."[43] The committee report garnered significant media attention and prompted the Commerce Department Office of General Counsel to investigate. That office substantiated several of the report's key findings and ultimately recommended that the Department eliminate ITMS—which it agreed to do in late 2021.[44]

The Biden Administration likewise terminated the China Initiative in 2022. In remarks explaining the Justice Department's decision, Assistant Attorney General for National Security stated that, "By grouping cases under the China Initiative rubric, we helped give rise to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or that we in some way view people with racial, ethnic or familial ties to China differently."[45] The elimination of the China Initiative followed significant outcry from several members of Congress and civil society. In July 2021, for example, Congressman Jamie Raskin (D-MD) and Judy Chu (D-CA) convened a roundtable that was highly critical of the China Initiative.[46] Asian-American advocacy groups called repeatedly for ending it.[47] More recently, an effort to reinstate the China Initiative through legislation was blocked following similar opposition from lawmakers and advocacy groups.[48]

As preluded in an earlier section, several instances of administrative illegality have been curbed through judicial injunction. In separate lawsuits brought by Xiaomi and Luokung, the Federal District Court for the District

Court of Columbia agreed that the Department of Defense had likely violated the Administrative Procedure Act when it designated both companies as CCMCs.[49] The judge criticized the Department for misstating the governing statutory language, adopting an implausible definition of a key statutory term, and neglecting to adequately explain the basis for its decision, noting at one point that the Department failed to "provide a rational connection between the facts found and the choice made."[50] Later in both decisions, the same judge asserted that he was "skeptical that weighty national security interests are actually implicated here," given both the "innocuous facts" relied on to designate these companies as CMCCs, and the fact that the Department had failed to use its CCMC designation authority for two decades until "a flurry of designations were made in the final days of the Trump Administration."[51]

The district courts that reviewed President Trump's WeChat and TikTok orders similarly enjoined these orders. A group of WeChat users challenging the former persuaded the court to issue a preliminary injunction on free speech grounds. The judge concluded that the users showed "serious questions going to the merits of their First Amendment claim that [the ban] effectively eliminate the plaintiffs' key platform for communication, slow or eliminate discourse, and are the equivalent of censorship of speech or a prior restraint of it."[52] As for TikTok, the company itself won preliminary injunctions from Judge Carl Nichols, who had been appointed by President Trump, on the theory that the ban likely violated IEEPA.[53] A group of Tiktok users also won a preliminary injunction after making a similar argument.[54] In each of these cases, judges noted the thinness of the government's national security justifications.[55]

There is much to commend and to criticize in these developments. Beyond question, the political branches are beginning to mobilize to meet challenges posed by China, at times in ways that overstep legal bounds and raise constitutional concerns. The institutional response, however, has in many cases been to check executive assertions of authority through congressional or judicial oversight.

To celebrate eventual policy correction, however, would be to overlook the real human and institutional costs of aggrandizing executive behavior to begin with. Many scientists, for example, were eventually vindicated in the course of their legal process and in the Department of Justice's ultimate abandonment of

the China Initiative. But those outcomes did not prevent them from being surveilled, fired, arrested, detained, and depicted as spies—sometimes for years, and with harmful effects that continue to reverberate today.[56]

More worrying still, there is reason to believe that curbs on executive overreach may not always be as robust as they have in recent cases. Start with Congress. In the various cases of congressional oversight discussed here, most involved individual members of Congress exercising oversight over specific instances of executive overreach. There is little question that members of Congress who are especially focused on Asian-American affairs or civil rights will continue to speak out against abuse. It is less likely, however, that Congress, when acting collectively to enact legislation or to make or withhold appropriations, will be similarly skeptical of China-driven executive actions. Given recent bipartisan trends, we are far more likely to see Congress abet and empower executive efforts than to constrain them.

Courts too may not always be relied on to police wayward executive or congressional acts on China. While several courts enjoined the implementation of Trump Administration executive orders, those decisions are of limited predictive value. Each were issued by district courts at the first level of the federal judicial system. It is an open question whether appellate courts, and especially the Supreme Court, would have held the same. The modern Supreme Court is highly deferential towards executive claims of national security exigency. In *Trump v. Hawaii*, the Court upheld President Trump's "Muslim ban" on the reasoning that even if that order was "overbroad" or had only tenuous ties to national security, the Court could not as a matter of its institutional role "substitute [its] own assessment for the Executive's predictive judgments."[57] Deference doctrines like this one will make it exceedingly difficult for any party to successfully challenge executive actions taken with respect to China.

Finally, checks and balances will face further pressure if US-China conflict deepens over time. Despite efforts to decouple or de-risk, the two powers continue to trade in large volumes and are not clashing militarily. Were American society and government to mobilize more forcefully against China, as it has in previous periods of actual war, the forces that tend to erode checks and balances in periods of conflict will likely exert far greater impact on our constitutional system. As legal scholars have noted, large-scale "total" wars may occupy a constitutional category of their own.[58]

IV. Policy Implications and Recommendations

The aim of this final section is to propose recommendations to help maintain constitutional checks in the years ahead. The goal is not to discount the real policy challenges associated with managing China's rise, but to suggest ways to guard basic principles of American governance against the temptation to concentrate power in the face of foreign threat. It is a false choice to say that successfully competing with Beijing will require relaxing our foundational constitutional protections. Properly situated, checks and balances can help to promote sound policy and to protect civil rights and liberties. In fact, an unreflective, unchecked response to China may even undermine American interests by supplying Chinese propaganda authorities with fodder for claims of American hypocrisy, and by pushing American policy into reckless provocation.

Policymakers can help maintain constitutional checks in the following ways.

- Judicial confirmation processes should probe, more than is currently stressed, nominees' views on various doctrines of national security deference and, more generally, the role of courts in foreign affairs. Where possible, senators and their staff should scrutinize nominees' prior record for evidence that they believe there is a meaningful role for courts to check the activity of the political branches even in times of conflict. Legislators examining nominees for key executive branch positions should also probe their views on the constitutional role of the other branches in foreign affairs in particular.

- The White House, executive agencies, and Congress should find ways to both empower and consult civil society and business groups who are distinctly situated to share information about the effects of potentially overreaching policies. These exchanges can happen through regular meetings and events or through more formal hearings or administrative law channels. Institutionalizing regular standing meetings with key groups will help ensure that information about potential abuses are collected in real time.

- Inspector generals at key agencies should be accorded a wider and more permanent mandate to police prosecutorial and investigative overreach. Within the executive branch, inspector generals are particularly important safeguards because they are formally insulated from presidential control and more beholden to Congress. As Professor Shirin Sinnar has proposed in the context of the War on Terror, Congress should consider broadening the Justice Department Inspector General's charge to include professional misconduct allegations in the course of investigations or litigation, and to create a permanent Assistant Inspector General for Civil Rights with a standing civil rights mandate.[59]

- The executive and legislative branches should consider instituting other internal checks, as recently advocated by Professors Deeks and Eichensehr, to replicate some of the salutary benefits of checks and balances in times of "frictionless government." Their recommendations include: requiring a subset of key policymaking groups to dissent (i.e. play devil's advocate), mandating reason-giving by various branches in the policymaking process, and adding "off-ramps" such as sunset clauses to statutes that empower the executive.[60]

- More broadly, our political and civic institutions, including universities, should reaffirm their commitment to free expression, at a time when speech rights are a matter of national controversy. Maintaining America's culture of free expression is vital towards protecting and encouraging dissenting views in periods of conflict, and in empowering civil society groups whose efforts will be vital in ensuring that government continues to work well and for everyone.[61]

The views expressed are the author's alone, and do not represent the views of the US Government, Carnegie Corporation of New York, or the Wilson Center.

Notes

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