

The Washington Post

Trump can give anyone he wants a security clearance — but Congress can ask why

'Can' doesn't always mean 'should' when it comes to presidential powers.



White House senior adviser Jared Kushner, speaking in December. (Joshua Roberts/Reuters)

By [David Priess](#) and [Mark S. Zaid](#)

March 2, 2019 at 4:24 p.m. GMT-4

President Trump directed his chief of staff in 2017 to award Jared Kushner a top-secret security clearance, overruling career officials who deemed the senior adviser and presidential son-in-law unworthy of eligibility access to that level of classified information, both the [New York Times](#) and [The Washington Post](#) reported on Thursday.

The reaction has been swift and fierce, especially from Democrats on Capitol Hill. House Oversight Committee Chairman Elijah E. Cummings (D-Md.), who had

already requested security clearance-related information from the White House, called for “full compliance with its requests as soon as possible, or it may become necessary to consider alternative means to compel compliance.” Rep. Adam B. Schiff (D-Calif.), chairman of the House Intelligence Committee, wrote: “There is no nepotism exception for background investigations.”

In fact, there is. It’s part of a huge “exception” for granting security clearances: the whim of the person in the Oval Office.

To use a term made famous by George W. Bush, the president is the ultimate “decider” of both how to classify national security information and who gains eligibility to see it, derived from his status as commander in chief under Article II of the Constitution.

Normally, presidents delegate this authority to subordinates in the executive branch. That’s just good government: After all, thousands of security clearance adjudicative decisions occur every year, and the president has more important issues to focus on. Plus, the process works best when it remains apolitical, run by an investigatory bureaucracy rather than an elected leader.

But it need not be so. The president can grant or revoke security clearances in any way he well pleases.

Of course, “can” doesn’t mean “should.” Just as with other near-absolute presidential prerogatives, like issuing pardons and ordering the use of the country’s nuclear weapons, the commander in chief’s power to issue or revoke security clearances relies on derived constitutional sanction. Although doing any of these improperly and inappropriately is using power he clearly holds the right to use, the president can misuse that power.

Ordering the military to unleash the nation’s entire nuclear arsenal on Iceland because the president alone sees Björk as a national security threat, for instance, would fall within his lawful authority. It would also misuse that authority.

Where does the granting of a top-secret clearance to Kushner fall on the scale of appropriate use of the president’s power? It’s hard to say, since the investigation into Kushner’s full background is, understandably, protected. Legitimate questions remain about Kushner’s suitability for a senior position in the White

House given [his reported attempt](#) to establish a secret back-channel with Russia during the transition — and to do it with Russian embassy communication equipment rather than anything under U.S. government control or knowledge.

Nevertheless, the president's authority to give Kushner — or anyone else — a security clearance is clear. It wastes time and energy to argue otherwise. Instead, Trump should be, and will be, held accountable by the Congress and ultimately the people for what is the good and proper use of his powers. Our political system provides remedies even for firm constitutional prerogatives of chief executives.

First among these is congressional oversight, derived from its legislative function under Article I of the Constitution. It has been appropriate for the White House not to disclose Kushner's security clearance information casually; it represents the very kind of privacy-protected information that [many Americans](#) fear the [U.S. government misuses](#) in other contexts.

But now, there are numerous legitimate questions for Congress to pursue. Why couldn't Kushner get favorable approval through a system that millions of others have gone through? Does he have specific counterintelligence vulnerabilities for foreign manipulation? Did the president actually overrule career advice given to him — and, if so, why? Demanding information with subpoenas or with power-of-the-purse tactics about the president's decision-making — not his inherent underlying authority — is how oversight should work in this case.

If sensitive information is central, as seems the case on this issue, some of this may need to be done in closed session. Congress might give the lead to the House Select Committee for Intelligence, which has a better ability to handle classified testimony and documents than the House Oversight Committee. Avoiding political theater is especially important with privacy-protected information.

In the past, public pressure resulting from congressional oversight and/or the media's investigative reporting has prompted administrations to fire or force the resignation of irresponsible officials. It's been less common for scandals to drive such responses from this administration, but keep in mind that Trump's first national security adviser, Michael Flynn, found himself without a job amid public outcry.

Even if oversight doesn't prompt the administration to walk back an inappropriate action or hold senior executive branch officers responsible, it will educate the public about the administration's use of its powers, informing us as we decide whether to exercise our own lawful authority to [remove the president](#) from office in next year's election.

Some means of pushing back against the president can take place even sooner, especially if Congress determines that bribery or high crimes and misdemeanors have occurred. A discovery that the president accepted something of value for a security clearance decision could prompt impeachment proceedings. Even short of bribery, proposed or passed articles of impeachment against previous presidents in the House of Representatives often have included "abuse of power" — as a political term, not a constitutional or legal one — among their listed high crimes and misdemeanors.

Under our system, the president has the right to decide how to exercise his powers. The people, through their representatives and eventually through the ballot box, have the power to determine presidential fitness for office.