

# H.R. 1: STRENGTHENING ETHICS

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## HEARING BEFORE THE COMMITTEE ON OVERSIGHT AND REFORM HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

FEBRUARY 6, 2019

**Serial No. 116-02**

Printed for the use of the Committee on Oversight and Reform



Available on: <http://www.govinfo.gov>  
<http://www.oversight.house.gov> or  
<http://www.docs.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

35-793 PDF

WASHINGTON : 2019

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## H.R. 1: STRENGTHENING ETHICS

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Tuesday, February 6, 2019

HOUSE OF REPRESENTATIVES  
COMMITTEE ON OVERSIGHT AND REFORM  
*Washington, D.C.*

The committee met, pursuant to notice, at 10:04 a.m., in room 2154, Rayburn House Office Building, Hon. Elijah Cummings (chairman of the committee) presiding.

Present: Representatives Cummings, Maloney, Norton, Clay, Lynch, Cooper, Connolly, Krishnamoorthi, Raskin, Rouda, Hill, Wasserman Schultz, Sarbanes, Welch, Speier, Kelly, DeSaulnier, Plaskett, Khanna, Ocasio-Cortez, Pressley, Tlaib, Jordan, Amash, Gosar, Massie, Meadows, Hice, Grothman, Comer, Cloud, Gibbs, Higgins, Norman, Roy, Miller, Green, and Armstrong.

Chairman CUMMINGS. The committee will come to order. Without objection, the chair is authorized to declare a recess at any time. I will now recognize myself for an opening Statement.

Today, we are holding a hearing on H.R. 1, the For the People Act. H.R. 1, introduced by my distinguished colleague, Congressman John Sarbanes of Maryland, a senior member of our committee. We thank Congressman Sarbanes for his—not only for his vision, but for his tenacity, and for putting his blood, his sweat, his tears into this over several years. He has compiled one of the boldest reform packages to be considered in the history of this body.

This sweeping legislation will cleanup corruption in government, fight secret money in politics, and make it easier for American citizens across this great country to vote. I believe that we should be doing everything in our power to make it easier for eligible American citizens to exercise their constitutional right to vote, not making it harder. We should be making it more convenient, not less. We should be encouraging more people to cast their votes, not fewer. We should be promoting early voting, absentee voting, voting by mail, and other ways to help citizens cast their ballots, not rolling back these very important programs.

Unfortunately, some people disagree, including most Republicans. They think we should make it harder to vote. They think we should make it more difficult by cutting back on early voting, eliminating polling places, and taking other steps to reduce the number of people who do vote. Especially troubling, in some cases, they have engaged in illegal efforts to suppress the vote that target minority communities.

For example, North Carolina drew legislative lines, and the 4th District Circuit Court of Appeals found that regarding the African Americans, and I quote, “the lines were drawn with almost surgical

precision,” that is, to suppress the vote. Georgia kept eligible individuals off the rolls and caused widespread problems with wait times and absentee ballots, particularly in areas with significant minority populations.

Kansas moved to the outskirts of town, the one and only polling place for 27,000 residents of Dodge City, most of whom were minorities. There’s something wrong with that picture. H.R. 1 would address many of these problems. The bill would institute procedures to automatically register eligible voters and put in place protections to keep them on the correct voting rolls. It would provide for expanded early voting and absentee voting and give additional funding to States to maintain enough polling sites so everyone can easily cast their ballot.

Senate majority leader Mitch McConnell, has described H.R. 1 as, and I quote, “a power grab by Democrats.” He’s right about one thing, it is a power grab, but it’s not by Democrats, it is by American citizens who voted for reform in this last election, and sent the clear message that they want to exercise their constitutional right to vote without interference.

Today, our hearing will focus on the part of H.R. 1 that is within our jurisdiction, Title VIII, which puts in place strong new reforms for the executive branch. For example, Title VIII includes a bill that I introduced, called the executive branch Ethics Reform Act. It would ban senior officials from accepting, quote, “golden parachute,” unquote, payments from private sector employers in exchange for their government service. This would have prevented Gary Cohn from receiving more than \$100 million in accelerated payments from Goldman Sachs, while leading the Trump administration’s efforts to slash corporate taxes.

Title VIII also includes another bill I introduced, the Transition Team Ethics Improvement Act, with Senator Carper and Senator Warren. This legislation would require transition teams to have ethics plans in place, and make those plans publicly available. Title VIII also would prohibit senior Federal employees from working on matters that affect the financial interest of their former employers or prospective employers. They could obtain waivers for this requirement, but those waivers would have to be made public.

Title VIII also would make clear that Congress expects the President to divest his business holdings, just as every single President since Jimmy Carter has done, and place them in an independent and truly blind trust. Both Democratic and Republican ethics experts warned President Trump to do this years ago, but he refused. They warned that every decision he made could be questioned. The American people would rightly wonder whether he was serving the Nation’s interest, or his own financial interests. Unfortunately, that is exactly what has happened over the past two years.

The American people gave this Congress and this committee a mandate to restore our democracy and cleanup our government. They want greater transparency. They want greater accountability in government. H.R. 1 makes good on that promise. It is a broad and brave step toward restoring a government that works for the people.

Now, it gives me great honor to recognize the author of the bill for two minutes, Mr. Sarbanes.

Mr. SARBANES. Thank you very much, Mr. Chairman. I appreciate your having this hearing on H.R. 1. I also want to salute some of the new members on the dais here, because they came with this message of reform pinned to their chest as a class. Americans from across the political spectrum want a democracy that works for them, a democracy where big money doesn't dominate the political debate, where access to the ballot box is ensured for all citizens; and where public servants work for the public interest.

Like any system, our republic requires regular maintenance, without it, the gears grind down, the operating systems fail, and the people's democratic will is ultimately compromised. This is what has happened to our democratic institutions over the past few decades. We have failed to beat back the new and inventive ways that big money has found to corrupt our politics. We have failed to modernize our election system, and we have failed to implement meaningful ethics rules.

No wonder the public's faith in elected representatives is flagging, why confidence in our democratic institutions is near historic lows, and why cynicism is so high. H.R. 1, the For the People Act, is about giving Americans their republic back...by fighting back against big money and politics, ensuring all Americans can vote, and ending partisan gerrymandering, and enacting tough new anti-corruption measures.

Today's hearing, Mr. Chairman, will be an opportunity to examine the imperative for, and the design of, anti-corruption measures that are included in H.R. 1. I very much look forward to that discussion.

Mr. Chairman, H.R. 1 will give Americans their power back and our democracy: the power of the ballot box; the power of political voice; and the power of accountable representative democracy. Put plainly, these reforms are not partisan, they are patriotic. We can and must do better to work together to repair our democratic institutions. Many of the provisions in here actually incorporate bills that have had bipartisan support in years past.

I hope my colleagues on the other side of the dais will join us in the effort to strengthen our democracy. Thank you Mr. Chairman, I yield back.

Chairman CUMMINGS. I yield to the distinguished member, Mr. Lynch, one minute.

Mr. LYNCH. Thank you very much, Mr. Chairman. My legislation that is incorporated in this bill, my bill, H.R. 391, is the White House Ethics Transparency Act which would simply require the Trump administration and future administrations to automatically disclose ethics waivers that they have issued to executive branch officials. These waivers allow former lobbyists, industry attorneys and consultants, who previously worked for the private sector and present a significant conflict of interest with their positions in the executive branch, to, nevertheless, participate in matters in which their prior employers, or clients, have a stake. Pursuant to the bill, disclosures must be submitted to the independent Office of Government Ethics within 30 days and be publicly posted on the White House and OGE websites.

Mr. Shaub is well-aware of this, one of our witnesses. Early on, we had—the White House just refused to say whether and when

they had given waivers to the various lobbyists to go to work in his administration. So the inclusion of this section of the bill will prevent that from happening in the future.

So, with that, I yield back and I thank you for the time.

Chairman CUMMINGS. I yield the final two minutes to Mr. Raskin of Maryland.

Mr. RASKIN. Mr. Chairman, thank you. With your leadership, with the robust new majority in the House of Representatives, it's a new day in Washington. A great Republican President, Abraham Lincoln, spoke of government of the people, by the people, and for the people, and that's always been the tantalizing dream of America. It is our role as Congress to guarantee that we are a government of the people.

But today, the executive branch is drowning in big money corruption, self-dealing, and lawlessness. They said they were going to drain the swamp, Mr. Chairman. They moved into the swamp, they built a hotel on it, and started renting out rooms to foreign princes and kings and governments. It is our job to restore government by the people in America, which is why I'm thrilled to introduce the executive branch Comprehensive Enforcement Act with Senator Blumenthal on the Senate side. It will give subpoena power to the Office of Government Ethics. It will allow formal proceedings to take place there; it makes clear that it extends to all White House personnel, as well as the executive branch agencies; it authorizes the Office of Government Ethics to order corrective actions, like divestiture, blind trusts and recusal; and impose appropriate administrative penalties where members of the executive branch are trampling our laws.

It protects the independence of the Office of Government Ethics by providing that the director can be removed only for cause. So it strengthens the independence of the Office of Government Ethics to make sure that we can ferret out the corruption, which is now pervasive throughout the executive branch of government in the Trump administration.

I yield back to you, Mr. Chairman.

Chairman CUMMINGS. Thank you very much. I now yield to the distinguished gentleman from Ohio, the ranking member of our full committee, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman. I want to thank our witnesses as well for being here. Normally, when you start a new Congress, the majority gives the designation of H.R. 1 to its key priority. In the last Congress, the H.R. 1 was the most significant tax reform, tax cut package in a generation, returned millions of the dollars to Americans, simplified our Tax Code, and was one of the key reasons, I think, we've seen 5 million new jobs added to our economy in the last couple of years. That bill, the Tax Cuts and Job Act, was bold, realistic, and it was signed into law just over a year ago.

I think it has also helped create the lowest unemployment in 50 years, an economy that is moving in exactly the direction we want. This Congress, the Democrats' H.R. 1, is the so-called For the People Act. A more accurate title would be "For the people who want Democrats to win elections from now on." The bill includes a laundry list of tired proposals designed to benefit the majority by tilting

the playing field in their favor. It's not a stretch to label many of these proposals radical. You can laugh, but it's true.

H.R. 1 would steer potentially billions of dollars to political allies in the name of campaign finance empowerment, restrict Americans' right to free speech, and exact political retribution on the President of the United States. Unfortunately, this isn't all that surprising. This is just the latest in a series of attacks by the Democrats to stifle the free exchange of ideas.

In 2013, we learned that the IRS targeted conservatives for their political beliefs during the 2012 election cycle. Systematically, for a sustained period of time, they went after people for their conservative beliefs, plan in place, targeted people, they did it. The gross abuse of power would have continued if not for the efforts of this committee.

In 2014, the Obama Administration doubled down and attempted to use the IRS rulemaking process to gut the ability of social welfare organizations to participate in public debate. Congress has so far prevented this regulation from going into effect, but H.R. 1 would change that.

Furthermore, this bill would roll back another critical victory for privacy and free speech secured just last summer. Following efforts by this committee and others, the IRS changed its policy as it relates to Schedule B information. Schedule B contains personal information like names, addresses, and the amounts donated to non-profit entities. Even though this information is supposed to remain private under current law, States and Federal Government have leaked these personal details in the past. In changing its policy, the IRS noted that there had been at least 14 breaches resulting in the unauthorized disclosure of Schedule B information just since 2010. The result was everyday Americans receiving death threats, and mail containing white powder, all because—all because someone disagreed with what they believe, and who they gave their hard-earned money to.

The reason that the protection of Schedule B information is important has nothing to do with the vast conspiracies on the right or the left, the so-called dark money issue; rather, it dates back to the Supreme Court's 1958 decision, critical decision, the NAACP v. Alabama, which formally recognized the freedom of association and prevented the NAACP from being compelled to turn over information about its members.

Look, I haven't even gotten to all the other problems with this bill. I mean, this bill's mandatory early—I mean, talk about violation of the Tenth Amendment in our Federal systems. Mandatory early voting, mandatory voting by mail, felons can vote. How about public financing of campaigns? The taxpayers have to pay for the politicians' campaigns. Think about this, taxpayers have to pay for the same politicians who created the swamp, who are in the swamp, so that they can get reelected. This is what this legislation does.

There's much that can be done to improve the functioning of transparency and effectiveness of the Federal Government. However, this 571-page bill reads more like a wish list for the Democratic Party than an honest attempt at reform. I fear that this legislation is a sign our friends in the majority want to play games,

engage in political theater to start this Congress, rather than use this time to work constructively to find solutions for hardworking Americans that sent us here.

Mr. Chairman, I would like to yield—I think we have a few more minutes left. I want to first yield to the gentleman, if I could, from Tennessee, Mr. Green, for two minutes.

Mr. GREEN. Thank you, Mr. Chairman and ranking member. I am outraged out at House Resolution 1, which really should be called the Fill the Swamp Act. It seems every year that passes more and more power is shifted away from the people and into the hands of wealthy elites in Washington. These politicians and bureaucrats can't help themselves from micromanaging more and more of our everyday lives, from roads and bridges, firearms, relationships with our doctors, even our toilets. These, freedom-and federalism-hating politicians can't seem to help themselves.

And now—now they want to decide how we can run our elections in Tennessee. You want to tell Tennessee to enact same-day voter registration with no time for verification? Do you want to tell Tennessee we can't require IDs to be shown at the polls, increasing the likelihood of voter fraud? You want to tell Tennessee that some unaccountable commission gets to draw our districts? You want to tell Tennessee it has to subsidize far left-leaning candidates in other States with our taxpayer dollars? How dare you. How dare you tell Tennessee what we can do with our elections.

This bill is wrong. It is a power grab. Politicians—politicians that want to give the Federal Government more power. Does the majority party care about voter fraud? Well, then, let's allow States to have voter identification laws. Do the Democrats suddenly care by foreign interference in our elections? Well, then, why are they on allowing illegal immigrants to vote? The hypocrisy is mind-boggling. The fact remains that there is no constitutional authority for the Federal Government to come down and seize control of elections in Tennessee.

The Constitution creates a Federalist system with power dispersed amongst the people. I will fight to ensure it always does. I will keep my oath to uphold the Constitution and my promise to Tennesseans to drain the swamp. Thank you, I yield back.

Mr. JORDAN. Mr. Chairman, I would like to recognize the gentleman from Texas for two minutes.

Mr. ROY. Thank you to the distinguished ranking member. I'd like to co-sponsor the remarks from my friend from Tennessee. I wholeheartedly endorse all that he just said, as well as what Mr. Jordan just said.

One question that I would be asking as we look into all of this is, why are we so divided? Why are we so divided as a Nation? I would suggest to you, in significant part, is because we try to govern from Washington 320, 330 million people with solutions here from the swamp in direct contradiction to the very republic our Founders gave us, looking ahead at knowing what it would look like if we tried to do that. We are a republic. We are a republic for a reason. We have a structure of government for a reason.

That structure of government serves to preserve our inalienable God-given rights. That structure of government has served well to do those things. That structure of government recognizes the im-

portance of States and the decisionmaking process across the vast majority of the issues we're supposed to deal with. When we take our eye off the ball of our core constitutional function, we don't do those functions well. We end up with a \$1 trillion deficit this year piling on top of \$22 trillion of national debt. And, yes, both parties are a part of that problem.

We end up immersed in foreign wars that continue, as the President pointed out last night. We end up with spiraling healthcare costs because a President immersed us into healthcare from Washington instead of allowing the people in markets and States to function. And now we want to extend into every aspect of every issue of voting, issues that are supposed to be left to the States so that the people in the States can decide who they want to send to Washington, whether they are Senators, or whether they're in the Congress.

We would undermine the very structure and the core of this government further if we pursue this path down H.R. 1. Thank you.

Mr. JORDAN. Mr. Chairman, for our remaining two minutes, I would like to recognize the gentleman from Georgia.

Mr. HICE. I thank the ranking member. I join with my colleagues in just being extremely alarmed by H.R. 1. It is virtually 600 pages, and almost every page has issues of great concerns. Just one small part of that, the chairman mentioned a while ago, the automatic voter registration. It forces States to automatically register people, which may sound good on the surface, but what this will do is open the floodgates for fraudulent voting by illegal individuals in this country, and here is how. Here is what happens.

These illegals who come into this country use government services and programs, and under H.R. 1, the information collected by these services and programs would automatically be transferred to election officials for registration. There's only one safeguard in H.R. 1, and that is, for the illegal alien to publicly declare that they are here illegally, and they are not eligible to vote. How can we really expect that to happen? It's not going to happen for them to draw attention to themselves, and identify themselves as being here illegally, and therefore, ineligible to vote.

So simultaneously when an illegal alien fails to decline—fails to recognize it, they are here illegally and they're ineligible to vote, despite the ineligibility, they cannot be prosecuted. So this bill is just going to make it extremely difficult to maintain accurate voting records. It's going to open the floodgate for fraud. So what we basically have here is a proposal that will lead to more illegal aliens registering to vote, making it virtually impossible to prosecute them for doing so, and making it difficult for States to clean up their voter lists. In the process, what that does to the American citizen, the voter, is it waters down the power of their vote by allowing illegals to do so. It makes those who are eligible, their vote, to have less impact. So I'm very concerned. I thank the gentleman, and I yield back.

Mr. JORDAN. Thank you, Mr. Chairman.

Chairman CUMMINGS. Thank you. I want to thank all of our members for your Statements. Now, all members will have 10 legislative days in which to submit opening Statements for the record.

Ladies and gentlemen, today we welcome five distinguished witnesses to our committee: Mr. Walter Staub is the former director of the Office of Government Ethics, and now serves as a senior advisor for Citizens for Responsibility and Ethics in Washington.

Ms. Karen Hobert Flynn is the president of Common Cause, a nonpartisan grassroots organization dedicated to upholding the core values of American democracy.

Mr. Rudy Mehrbani is the former director of the Office of Presidential Personnel, and now serves as a senior counsel at the Brennan Center for Justice.

Mr. Scott Amey is the general counsel for the Project on Government Oversight.

Finally, Mr. Bradley Smith, is the chairman of the Institute for Free Speech.

Pursuant to committee rules, all witnesses who appear before our committee must do so under oath. I now ask each of you to stand and raise your right hand to take the oath.

Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God? Everybody has now answered yes, and let the record reflect that.

I will now recognize each witness to present their testimony. I want to remind the witnesses that we have your written testimony before us, so you don't have to read it all, we have it. And I ask you to do me a favor, since we have five witnesses and we have a lot of members wanting to ask questions, that you obey the lights. You'll get a warning light, and then when it says red, I would appreciate it if you would let us—that you would stop and let us move on to the next witness.

So we're going with Mr. Staub first—Mr. Amey.

#### **STATEMENT OF SCOTT AMEY, GENERAL COUNSEL, PROJECT ON GOVERNMENT OVERSIGHT**

Mr. AMEY. Thank you. I want to thank Chairman Cummings, Ranking Member Jordan, and the committee for asking the Project on Government Oversight, POGO, to testify about executive branch ethics.

I am Scott Amey, POGO's general counsel. POGO is a nonpartisan, independent watchdog that investigates and exposes waste, corruption, and abuse of power. H.R. 1, which POGO supports, is an opportunity to make a good—make good on the bipartisan work that this committee has performed and to reform the ethics system to meet old and emerging challenges.

We support stronger laws to slow the revolving door, improve the Office of Government Ethics, expand ethics restrictions to senior level officials. Title VIII and H.R. 1 is a step forward in improving consistency in enforcement, but more importantly, to reduce improper influence over government decisions, missions, programs, and spending that are often contrary to the public's interest.

Groups at this table have assembled for over a decade to correct problems created by the revolving door in cozy relationships that result in an unlevel playing field. POGO published reports on the revolving door in 2004, 2005, and one just last year. The 2018 report showed that lobbying was the occupation of choice when offi-



cials left government service. A job that relies less on management skills and more on your connections back inside of the government.

Despite the focus on the revolving door coming and going from the Department of Defense, the problems exist governmentwide, and concerns exist about having a personal or private interest, being lenient toward or favoring past or future employers, and gaining an unfair competitive advantage, all of which are the detriment to the public.

H.R. 1 would close the gaps in ethics and conflict-of-interest standards, especially the provisions in Title VIII. POGO particularly supports the provisions in Title VIII related to making the Office of Government Ethics more independent, slowing program and procurement officials from heading to companies they worked with or oversaw while in government service, codifying the Presidential ethics pledges that have come out since 1993, prohibiting a bonus for accepting a government position. This really came to light during the Obama Administration when Wall Street executives revolved into government, expanding cooling off periods when coming and leaving the government, and increasing transparency. With the limited time, I will briefly highlight the top three.

First, the Office of Government Ethics should become an independent agency with new authorities to ensure consistent enforcement of ethics laws governmentwide. H.R. 1 would provide the OGE director, when appropriate, approval over resolutions, and any recusals, exemptions, or waivers from ethics rules; increase transparency; give OGE improved investigative power; and grant OGE the authority to issue administrative and legal remedies when the ethics violation is found.

We support the provisions to add for-cause removal for the OGE director. For-cause removal will preserve the agency's independence, and help with continuity after turnovers in between administrations. We have heard stories of pressure coming from the top on the Office of Government Ethics, as well as agency ethics officials, and that must end.

Second, amending the Procurement Integrity Act is essential. We need to strike the provision in the law allowing former program and procurement officials to work for companies they contracted with or oversaw, so long as they go to a different part of the company. We can't risk allowing officials to leverage their relationship with the company for future employment, calling into question the decisions that they made while they were in government. Additionally, those officials should not be allowed to access their former colleagues, which can create an unfair competitive advantage.

Darleen Druyun, a senior Air Force acquisition official, left government and took a position with Boeing's missile division. Prior to leaving government service, she played a role in the award of a \$20 billion contract to Boeing for refueling tankers. In her plea agreement, she Stated that she agreed to a higher price, even though she believed it was not appropriate, as a parting gift to Boeing. Her cozy relationship also included helping her daughter keep a job with the Boeing company. The existing laws allowed Darleen Druyun to accept a job with Boeing. Druyun eventually pled guilty to a separate ethics violation and served nine months in prison. These violations were not exposed by ethics officials or

IGs. It was Senator McCain who found them while investigating the tanker deal, and he became concerned with the blatant revolving door concerns.

Third, H.R. 1 will codify the ethics pledge process that has been ordered by Presidents since 1993. POGO supports making the pledge law, because otherwise, ethics orders only exist at the whim of each President. Making the pledge law would add continuity within the ethics community and prevent the pledge from being revoked on the President's last day in office, as was the case with President Clinton.

In 1965, President Lyndon B. Johnson issued an executive order, stating in part, "Every citizen is entitled to complete confidence in the integrity of his or her government." President Johnson's order is a foundation for our ethics system today. Our support for Title VIII of H.R. 1 and the improvements that I have detailed for you today are both realistic and necessary to prevent conflicts of interest.

H.R. 1 is a step forward in reducing improper influence over our government and the bad deals that harm the public.

Thank you for inviting me to testify today. I look forward to answering the questions from the members of the committee and working with the entire committee to further explore how Federal ethics and conflict of interest systems can be improved. Thank you.

[Prepared Statement of Mr. Amey follows:]



**Testimony of Scott Amey, General Counsel  
Project On Government Oversight  
before the House Committee on Oversight and Reform  
on  
“H.R. 1 and Executive Branch Conflicts of Interest”**

I want to thank Chairman Cummings, Ranking Member Jordan, and the Committee for asking the Project On Government Oversight (POGO) to testify about executive branch ethics. I am Scott Amey, POGO’s General Counsel. POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. POGO strives above all else to be fair and accurate in our investigations and reporting. We are diligent in our research. We give credit where credit is due and hold those to account who need to be held accountable—without regard to party.

While some Members of Congress and some in the public might think H.R. 1, the For the People Act of 2019,<sup>1</sup> is solely aimed at President Trump and his Administration—and there are some bills drafted in the 115<sup>th</sup> and 116<sup>th</sup> Congresses with that purpose in mind—H.R. 1 is not such a bill. In fact, it addresses some problems that many good government groups have assembled for over a decade to correct, problems created by the revolving door and the unlevel playing field that have long existed. Organizations have worked for many years to strengthen ethics and conflict-of-interest standards, including badgering the ethics czar in the Obama Administration.

Those efforts began long before any candidate won the parties’ nominations in the 2016 campaign. We have worked tirelessly to revise the appointee ethics pledge, and we handed over our suggested reforms to both the Trump and Clinton campaigns and transition teams. I along with two colleagues had the privilege of meeting with an official from President Trump’s transition team in October 2016 to discuss our proposals and President Trump’s “drain the swamp” campaign promise. We also supported then-candidate Trump’s five-point ethics reform plan to expand lobbying bans on executive and legislative branch officials, expand the definition of lobbyists to include consultants and advisors, permanently ban senior executive branch officials from lobbying for foreign governments, and prevent “registered foreign lobbyists from raising money in American elections.”<sup>2</sup>

<sup>1</sup> U.S. House of Representatives, “For the People Act of 2019” (H.R. 1), introduced January 3, 2019, by Representative John P. Sarbanes, <https://www.congress.gov/116/bills/hr1/BILLS-116hr1ih.pdf>

<sup>2</sup> Ryan Lovelace, “Trump proposes ethics plan to ‘drain the swamp in Washington,’” *Washington Examiner*, October 17, 2016, <https://www.washingtonexaminer.com/trump-proposes-ethics-plan-to-drain-the-swamp-in-washington> (Downloaded February 4, 2019)

This Committee did not sit idle. On January 31, 2017, Chairman Jason Chaffetz and Ranking Member Elijah Cummings convened a gathering of Members and government watchdogs to discuss ethics concerns plaguing the federal government. Many groups in attendance followed up with Committee staff. POGO followed up with meetings and sent a letter to Chairman Chaffetz and Ranking Member Cummings with our thoughts on reauthorizing and improving the Office of Government Ethics (OGE).<sup>3</sup> H.R. 1 is an opportunity to make good on the previous work this Committee has performed and to reform the ethics system to meet old and emerging challenges.

There has not been a shortage of ethics concerns over the last decade. We have all read government reports, criminal indictments, and media accounts involving bribery,<sup>4</sup> illegal foreign lobbying,<sup>5</sup> illegal gifts,<sup>6</sup> personal financial conflicts of interest,<sup>7</sup> misuse of one's government position or government property,<sup>8</sup> the constantly spinning revolving door,<sup>9</sup> lack of impartiality,<sup>10</sup> and abuse of authority.<sup>11</sup> Everyone is now aware of something called an emolument,<sup>12</sup> although its precise definition is subject to intense debate and litigation.<sup>13</sup>

H.R. 1 is a comprehensive reform bill aimed at closing gaps in ethics and conflict-of-interest standards, and at reforming election and campaign finance processes. My testimony today will provide insights into the bill, focusing on the ethics reforms for the executive branch contained in Title VIII.<sup>14</sup> In addition, I will provide supplementary thoughts on common-sense ethics

<sup>3</sup> Letter from Danielle Brian, Executive Director, Project On Government Oversight, to Chairman Jason Chaffetz and Ranking Member Elijah Cummings, House Oversight and Government Reform Committee about the Office of Government Ethics, February 14, 2017. [http://www.pogoarchives.org/m/ga/POGO\\_Letter-to-HOGR-on-Ethics-Suggestions-2017-02-14.pdf](http://www.pogoarchives.org/m/ga/POGO_Letter-to-HOGR-on-Ethics-Suggestions-2017-02-14.pdf)

<sup>4</sup> Tom Vanden Brook, "Fat Leonard: Sprawling Navy bribery-and-fraud scandal nets another senior sailor," *USA Today*, November 26, 2018. <https://www.usatoday.com/story/news/politics/2018/11/26/fat-leonard-navy-bribery-and-fraud-scandal-nets-another-senior-sailor/2120233002/> (Downloaded February 4, 2019)

<sup>5</sup> Department of Justice, "FARA-Related Cases (2007-2018)," <https://www.justice.gov/nsd-fara/recent-cases>

<sup>6</sup> Department of Veterans Affairs, Office of Inspector General, *Administrative Investigation: VA Secretary and Delegation Travel to Europe* (Report No. 17-05909-106), February 14, 2018, pp. iv-vi. <https://www.va.gov/oig/pubs/VAOIG-17-05909-106.pdf>

<sup>7</sup> The Office of Government Ethics lists over 100 cases involving a personal financial conflicts of interest since 1990. Office of Government Ethics, "Conflict of Interest Prosecution Surveys." <https://oge.gov/Web/OGEnsf/Resouces/Conflict+of+Interest+Prosecution+Surveys+Index+by+Statute>

<sup>8</sup> Christopher Flavelle, "Rank-and-File FEMA Workers Rally Around Administrator Under Ethics Probe," *Bloomberg*, September 18, 2018. <https://www.bloomberg.com/news/articles/2018-09-18/fema-chief-faces-ethics-probe-amid-agency-s-hurricane-response> (Downloaded February 4, 2019)

<sup>9</sup> Mandy Smithberger, *Brass Parachutes: Defense Contractors' Capture of Pentagon Officials through the Revolving Door*, Project On Government Oversight, November 5, 2018. [https://s3.amazonaws.com/docs.pogo.org/report/2018/POGO\\_Brass\\_Parachutes\\_DoD\\_Revolving\\_Door\\_Report\\_2018-11-05.pdf](https://s3.amazonaws.com/docs.pogo.org/report/2018/POGO_Brass_Parachutes_DoD_Revolving_Door_Report_2018-11-05.pdf) (Hereinafter *Brass Parachutes*)

<sup>10</sup> Office of the Inspector General, Department of Justice, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe*, February 2018. <https://oig.justice.gov/reports/2018/o20180413.pdf>

<sup>11</sup> Virginia Canter, "Why did it take so long for Trump to drain the swamp of Pruitt?" *The Hill*, July 16, 2018. <https://thehill.com/opinion/white-house/397254-why-did-it-take-so-long-for-trump-to-drain-the-swamp-of-pruitt> (Downloaded February 4, 2019)

<sup>12</sup> U.S. Constitution, Article I, § 9, Cl. 8 and Article II, § 1, Cl. 7.

<sup>13</sup> Jacob Pinter, "Emoluments Lawsuit Against Trump Can Go Forward, Judge Says," *NPR*, November 3, 2018. <https://www.npr.org/2018/11/03/663933067/emoluments-lawsuit-against-trump-can-go-forward-judge-says> (Downloaded February 4, 2019)

<sup>14</sup> Testimony of Sarah Turberville, Director of The Constitution Project at the Project On

solutions to long-standing problems that are missing from the bill—reforms to the revolving door that many good government groups have promoted for years.

As the government has increased its reliance on the private sector for goods and services, the revolving door has become an accepted occurrence, with people coming and going between public service and private industry. In a recent study of the revolving door spinning to the defense industry, POGO found:

1. In 2018, there were 645 instances of the top 20 defense contractors hiring former senior government officials, military officers, Members of Congress, and senior legislative staff as lobbyists, board members, or senior executives.<sup>15</sup> Since some lobbyists work for multiple defense contractors, there are more instances than officials.
2. Of those instances, nearly 90 percent became registered lobbyists, where the operational skill is influence-peddling.
3. At least 380 high-ranking Department of Defense officials and military officers shifted into the private sector to become lobbyists, board members, executives, or consultants for defense contractors.
4. Of those Department of Defense officials, a quarter of them (95) went to work at the Department of Defense's top 5 contractors (Lockheed Martin, Boeing, General Dynamics, Raytheon, and Northrop Grumman).<sup>16</sup>

The most significant takeaway from POGO's study is that the vast majority of the high-ranking military officials who revolve through the door to the defense industry they once oversaw or dealt with are not being lured to the private sector because of their knowledge and experience with programs. Instead, they are jumping ship to go lobby their former colleagues and to provide their new employer or clients with access to information and government officials.

The revolving door is not unique to the Pentagon. In fact, the integrity of decisions, missions, programs, and spending throughout the government is at risk because they are being steered by individuals or companies that:

1. have a personal or private interest in the outcomes;
2. are lenient toward or favor past or future employers or industries; and
3. have an unfair advantage over competitors, which could be used to the detriment of the public.

Government Oversight, before the House Judiciary Committee, "Closing the Gap in Judicial Ethics," January 29, 2019. <https://www.pogo.org/testimony/2019/01/closing-the-gap-in-judicial-ethics/>

<sup>15</sup> The top-20 contractors list was as of FY 2016, the most current list available at the time POGO began its investigation.

<sup>16</sup> *Brass Parachutes: The Politics of Contracting*, Project On Government Oversight, June 29, 2004.

<https://www.pogo.org/report/2004/06/politics-of-contracting/> (Hereinafter *The Politics of Contracting*)

The revolving door and the tainted influence-peddling that it creates have resulted in intensified “public distrust in government” and in questions about who the government serves,<sup>17</sup> “a decline in civic participation,” and low morale within government circles.<sup>18</sup>

For years, POGO has advocated for stronger policies to ensure that high-level government officials going through the revolving door do so in a way that protects government policies from undue industry influence. H.R. 1 would help slow the revolving door, including the cycling of procurement officials leaving government service to work for companies they might have been doing business with. For instance, the bill would prohibit “golden parachute” incentive payments from non-government sources to former employees entering government service. It would also codify ethics restrictions created by executive orders since 1993 governing appointees.<sup>19</sup> These reforms are common-sense steps that will help ensure that those serving in the government are doing so with the public, not their own wallets, in mind.

We have witnessed through the years that ethics enforcement is weak and inconsistent across agencies.<sup>20</sup> Acting in part on long-standing recommendations from civil society, H.R. 1 would also strengthen the OGE, giving the OGE director final approval over any executive branch recusals, exemptions, or waivers from ethics laws or regulations, and requiring those recusals, exemptions, or waivers to be publicly posted on OGE’s website. This centralization of authority ensures consistent application of ethics rules and the exceptions to them, and greatly increases transparency. The bill would also give OGE improved investigatory powers over possible violations of ethics laws, and the authority to issue administrative remedies when an ethics violation has occurred, increasing the likelihood that those who violate ethics laws will be held accountable. Finally, the bill would limit any president’s ability to remove the OGE director to instances where there is cause for firing, allowing the director to truly serve independently and ensuring continuity after elections, which should provide more independence to this vital government position.

Not only does H.R. 1 address long-standing executive branch ethics concerns, it also addresses deficiencies in the Foreign Agents Registration Act (FARA). FARA requires all American citizens working to influence U.S. policy on behalf of foreign governments or political parties to register with the Department of Justice and report information about those lobbying efforts. However, a POGO investigation in 2014 found routine failures to follow the law and systemic non-prosecution by the Justice Department.<sup>21</sup> H.R. 1 would give the Department the authority to

<sup>17</sup> “Public Trust in Government: 1958 – 2017,” Pew Research Center, December 14, 2017. <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/> (Downloaded February 4, 2019)

<sup>18</sup> *A Matter of Trust: How The Revolving Door Undermines Public Confidence In Government—And What To Do About It*, Revolving Door Working Group, October 2005, p. 8. <http://pogoarchives.org/mv/ge/a-matter-of-trust-20051001.pdf>

<sup>19</sup> See Appendix A, “Ethics Rules Enacted by Presidents, 1993 – 2017.”

<sup>20</sup> Public Comments of the Campaign Legal Center, Common Cause, Democracy 21, Public Citizen, and U.S. PIRG to the Office of Government Ethics regarding “RIN 3209-AA04, Proposed Amendments Limiting Gifts to Employees of the Executive Branch,” November 14, 2011. <https://www.citizen.org/sites/default/files/oge-gift-comments.pdf> (Downloaded February 4, 2019)

<sup>21</sup> Ben Freeman and Lydia Dennett, “Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short,” Project On Government Oversight, December 16, 2014. <https://www.pogo.org/report/2014/12/loopholes-filing-failures-and-lax-enforcement-how-foreign-agents-registration-act-falls-short/>

levy civil fines to punish offenders who do not properly comply with the law, providing an effective enforcement mechanism between civil injunctions and criminal charges that would help end the Department's reliance on voluntary compliance.

The government isn't alone in the ethics game. Companies in the private sector require conflict-of-interest reviews and non-disclosure and non-compete agreements to protect their knowledge base, intellectual property, and bottom lines, all in an effort to best serve their stakeholders.<sup>22</sup> The federal government's ethics system similarly needs to protect its stakeholders, the American public. H.R. 1 was created to do that by mending cracks in the current ethics system, and sometimes adjust for conflicts of interest that were not envisioned. Provisions in Title VIII achieve that mission, although some of those provisions should be amended to better serve their purpose.

1. **Section 8002** amends 18 U.S.C. § 209, the supplementation of salary ban. The provision would redefine salary to include bonuses, infamously known as "golden parachutes," that companies pay employees contingent on their accepting a government job. Payouts for entering public service have concerned Congress for years. In 2013, Senate Finance Committee members questioned Jack Lew, President Obama's pick to run the Treasury Department, about his severance package from Citigroup for returning to public service.<sup>23</sup> POGO supports the amended language, which would prohibit former executives from receiving a financial payout for going into government service. While serving the public should be applauded, a financial windfall for doing so should not be considered equal to a "bona fide" pension, bonus, or other established benefit plan under the law.<sup>24</sup> In addition, "severance payments" should be included on the list of bonuses that are not considered "bona fide."<sup>25</sup>

2. **Section 8003** amends certain definitions in Section 601 of the Ethics in Government Act of 1978.<sup>26</sup> Congress should amend Section 602, which prohibits a covered employee from using his or her official position "to participate in a particular matter in which the covered employee knows a former employer or former client of the covered employee has a financial interest," to apply when a covered employee "knows or reasonably should know....," a change that would match existing language at 18 U.S.C. § 207(a)(2)(B). I would also urge Congress to include OGE in Section 602's provision on the publication of waivers by agencies, requiring OGE to collect the waivers and publish them on its website in the same place it publishes ethics agreements, financial disclosure forms, and compliance records.<sup>27</sup>

<sup>22</sup> *Brass Parachutes*, p. 2.

<sup>23</sup> Kevin G. Hall, "Treasury nominee Jack Lew grilled over Citi bonus, tax haven," *McClatchy DC Bureau*, February 13, 2013. <https://www.mcclatchydc.com/news/politics-government/congress/article24744838.html> (Downloaded February 4, 2019)

<sup>24</sup> 18 U.S.C. § 209(b).

<sup>25</sup> Charles J. Lewis, "Blumenthal angered by defense contractor bonus," *cipost*, June 12, 2012. <https://www.cipost.com/local/article/Blumenthal-angered-by-defense-contractor-bonus-3628747.php> (Downloaded February 4, 2019)

<sup>26</sup> 5 U.S.C. Appendix, Ethics in Government Act of 1978—( §§ 101—505).

<sup>27</sup> Office of Government Ethics, "Public Financial Disclosure Reports." <https://extapps2.oge.gov/201/Presiden.nsf/PAS%20Index?OpenView>

3. **Section 8004** strikes the exemption in the Procurement Integrity Act that allows acquisition and program officials to accept “compensation from a division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract[.]”<sup>28</sup> POGO fully supports this amendment. The current law’s weak distinction permits the covered officials to leave the government to go work for companies they contracted with or oversaw in their government positions. As a result, former officials are allowed to leverage their relationship with the contractor for future employment, calling into question the decisions they made while in government service, and are allowed access to former colleagues, which can create an unfair competitive advantage.<sup>29</sup> As we witnessed in the Darleen Druyun case, it is absurd to allow an acquisition official to go work for a company in, say, its missile division but prohibit her from going to the aircraft division.<sup>30</sup> Darleen Druyun was appointed deputy general manager for missile defense systems at Boeing soon after she awarded Boeing a large aircraft refueling contract. Existing laws allowed her to accept that job. Druyun eventually pleaded guilty to a separate ethics violation and served nine months in federal prison.<sup>31</sup>

We also support the addition of 41 U.S.C. § 2108, creating a two-year ban on a government official awarding or administering a contract to a former employer. This common-sense amendment strengthens and extends the current one-year cooling-off period governing personal and business relationships.<sup>32</sup> The Committee should clarify “administration of a contract awarded...” to include the “planning, creation, award, administration, and oversight of a contract.”

4. **Section 8005** extends the representational and lobbying ban covering “certain senior personnel” who are governed by 18 U.S.C. § 207(c) from one year to two years. POGO supports this amendment. There are, however, a number of additional amendments that Congress should include in this bill. Specifically, 207(c) should require employees who leave federal agencies to wait at least two years before contacting their former agency on behalf of any individual or entity to discuss agency business, including regulations or rules, policymaking, federal funds, examinations, or enforcement matters.<sup>33</sup>

Previous well-intentioned lobbying reforms have created a shadow influence industry of advisors, consultants, and trade-association chiefs who can peddle influence but are not required to register as lobbyists. To address this problem at the Department of Defense, Congress recently legislated a ban prohibiting “behind the scenes” activities<sup>34</sup> that should be extended government-

<sup>28</sup> 41 U.S.C. § 2104(b); 48 CFR § 3.104-3(d)(3).

<sup>29</sup> *Brass Parachutes: The Politics of Contracting*.

<sup>30</sup> “Boeing Fires Former Top Air Force Official Over Unethical Conduct,” Project On Government Oversight, November 24, 2003. <http://pogoarchive.pub30.convio.net/pogo-files/alerts/government-corruption/ge-rd-20031124.html>

<sup>31</sup> “Federal Contractor Misconduct Database,” Project On Government Oversight. <https://www.contractormisconduct.org/misconduct/48/united-states-of-america-v-darleen-a-druiyun>

<sup>32</sup> 5 CFR § 2635.502(b)(1)(iv) (restricting government activities for “[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.”).

<sup>33</sup> Executive Order 13490, January 21, 2009. President Trump’s ethics pledge restates the one-year ban at 18 U.S.C. § 207(c). See Appendix A.

<sup>34</sup> 2 U.S.C. § 1602(7) (defining “lobbying activities”); P.L. 115-91, §1045 (2017). See Appendix B.



wide.<sup>35</sup> Congress should also require departing federal employees to wait at least two years before taking a job with any entity that had business before the agency within a year prior to their departure. POGO also urges Congress to amend H.R. 1 to include a prohibition on political appointees and Senior Executive Service policymakers (people who develop rules and determine program requirements) seeking employment for a period of two years from companies materially impacted by—including financially benefiting from—the policies they helped draft. The term “materially benefiting” would include obtaining a direct and predictable economic, financial, business, or competitive advantage or right.

**5. Subtitle B—Presidential Conflicts of Interest** creates new ethics requirements for the president and vice president, which we support. Specifically, Section 8012 states that “[i]t is the sense of Congress that the president and the vice president should conduct themselves as if they were bound by section 208 of title 18, United States Code, by divesting conflicting assets...or by establishing a qualified blind trust[.]” While constitutional concerns have been raised about the application of certain conflict-of-interest laws to the President and Vice President,<sup>36</sup> this section strikes the right balance by asking those executives to “conduct themselves as if they were bound” by the personal financial conflict-of-interest law. This request follows decades of presidential precedents when it comes to such situations, and will help avoid real or apparent financial conflicts of interest.

**6. Section 8022** implements standards for waivers granted under Executive Order 13770.<sup>37</sup> POGO supports the provision because the public has little information about waivers under the President’s order. We also urge Congress to provide more transparency of waivers, exemptions, and recusals granted under other ethics laws and regulations, including those under 18 U.S.C. §§ 207 and 208 and 5 CFR §§ 2635.502 and 2635.503.

**7. Section 8033** amends the tenure of the OGE director. H.R. 1 limits the president’s ability to remove the director to only when there is just cause for removal. Traditionally, “just cause for removal” means only when there is “inefficiency, neglect of duty, or malfeasance in office.”<sup>38</sup> In recent years we have come to learn about OGE’s importance, whether in vetting presidential nominees or providing ethics training. In order to avoid potential impasses when ethics allegations involve White House staff, Cabinet-level officials, or agency officials, OGE needs to

<sup>35</sup> “[M]ost of the restrictions under 18 U.S.C. § 207 are limited to appearances and communications. They do not bar you from providing behind-the-scenes assistance to any person or entity. If you provide behind-the-scenes assistance, however, you should not have any communication to the Government attributed to you by another.” Office of Government Ethics, “Introduction to the Primary Post-Government Employee Restrictions Applicable to Former Executive Branch Employees,” September 23, 2016, p. 3. [https://www.oge.gov/Web/OGEL.nsf/0/3741DC247191C8B88525803B0052BD7E/\\$FILE/LA-16-08.pdf](https://www.oge.gov/Web/OGEL.nsf/0/3741DC247191C8B88525803B0052BD7E/$FILE/LA-16-08.pdf)

<sup>36</sup> Jack Maskell, “Conflict of Interest and ‘Ethics’ Provisions That May Apply to the President,” Congressional Research Service, November 22, 2016, pp. 1-2. (Citing Letter from Laurence H. Silberman, Acting Attorney General, U.S. DOJ, to the Chairman, Senate Committee on Rules and Administration, September 20, 1974, concerning the nomination of Nelson A. Rockefeller to fill the vacancy as Vice President.) <https://fas.org/sgp/crs/misc/conflict.pdf> (Downloaded February 4, 2019)

<sup>37</sup> Executive Order 13770, January 28, 2017.

[https://www2.oge.gov/web/oge.nsf/0/A43C4DBAB9EC4DC7852580BC006FBA83/\\$FILE/Exec%20Order%2013770.pdf](https://www2.oge.gov/web/oge.nsf/0/A43C4DBAB9EC4DC7852580BC006FBA83/$FILE/Exec%20Order%2013770.pdf)

<sup>38</sup> The Office of Special Counsel, the agency in charge of protecting whistleblower, has a similar removal-for-cause provision. 5 U.S.C. § 1211(b).

be insulated from political pressure rather than to be in the position of serving at the pleasure of the president. Yet a president also needs to be able to remove a director who engages in misconduct. Section 8033 appropriately balances the need for independence and the need for accountability. In addition to this, H.R. 1 should establish a line of succession in case the OGE director resigns or is terminated, which would help preserve the independence of the agency and avoid creating a lapdog who is trying to impress or appease senior leadership inside the White House.

8. **Section 8034** authorizes mandatory education and training programs for designated ethics officials, which would help ensure consistent and fair application of ethics laws. Absent is the frequency with which those programs should be required. I would urge Congress to amend the current provision in H.R. 1 to require education and training programs every two years.

H.R. 1 also includes provisions that allow OGE to “investigate an allegation” and recommend “appropriate disciplinary action.” While POGO supports these provisions, OGE already has limited authority to take these actions.<sup>39</sup> H.R. 1 should expand that authority to ensure OGE has clear, independent authority to investigate complaints and to issue binding corrective and disciplinary actions when there are ethics violations in noncriminal cases. POGO also supports the provision granting OGE subpoena power for the production of information, documents, records, and other data, which is essential to properly investigating an ethics allegation. That power, in addition to OGE’s existing authority to receive comments from an official or employee and hold a hearing,<sup>40</sup> would assist OGE investigations into violations. Congress should require OGE to report the use of such authority to the president and Congress.

9. **Section 8062** codifies the ethics pledge rules that started with the Clinton Administration and have continued through the Trump Administration.<sup>41</sup> POGO supports making the pledge rules a law, because otherwise they exist only at the whim of each president. For instance, President Clinton revoked his pledge on his last day in office, thereby lifting the restrictions that prohibited conflicts of interest.<sup>42</sup> Codifying the pledge would prevent a similar circumstance and add continuity within the ethics community, which has to adjust for changes in the ethics rules with each incoming Administration.

This provision, however, could go even further, building on other presidential executive orders that require ethics commitments by senior-level executive branch personnel. Although controversial at times, the ethics pledges have added and extended ethics restrictions to senior officials who often escape restrictions that exist in law and regulations for lower-level federal employees. Congress should codify President Trump’s executive order that requires a five-year limitation on former political appointees engaging in lobbying activities with respect to their former agency.<sup>43</sup> Congress also should ban former officials from lobbying any covered executive

<sup>39</sup> 5 U.S.C. Appendix, Ethics in Government Act, § 402(f)(2)(A)(ii) and (B)(iii); 5 CFR § 2635.106(b); 5 CFR § 2638.504.

<sup>40</sup> 5 U.S.C. Appendix, Ethics in Government Act, § 402(f)(2)(B)(ii) and (iii).

<sup>41</sup> Executive Order 12834, January 20, 1993.

<sup>42</sup> [https://www.oge.gov/Web/OGEnsf/0/5DEB1725A191ABB385257E96006A90F9/\\$FILE/eo12834.pdf](https://www.oge.gov/Web/OGEnsf/0/5DEB1725A191ABB385257E96006A90F9/$FILE/eo12834.pdf); See Appendix A.

<sup>43</sup> Executive Order 13184, December 28, 2000.

<sup>44</sup> Executive Order 13770, Section 1.1.

branch official or non-career Senior Executive Service appointee for the remainder of the Administration.<sup>44</sup>

The section could also be strengthened by preventing officials at the end of their government tenure from accepting positions during the two years after the official leaves government when their decisions or policies directly and substantially benefited their potential new employers, partners, or clients. One such official this restriction would have applied to is Daniel B. Poneman, a former acting secretary of energy in the Obama Administration who left the Energy Department in the fall of 2014 and started working at Centrus Energy Corporation in March 2015. Centrus is in the enriched uranium industry—an industry that Poneman supported while in his senior government positions.<sup>45</sup>

In 2016, POGO and other good government groups drafted ethics-pledge language restricting an incoming appointee's financial conflicts of interest or acceptance of a position with an entity that directly and substantially benefited from the official's decisions. We provided this draft language to both the Clinton and Trump campaigns and transition teams in 2016. Congress should add the following language to Section 8062:

*3. Revolving Door Ban—All Appointees Leaving Government.*

(a) If, upon my departure from the Government, I am covered by 207(c) of title 18, United States Code, I will abide by post-government restrictions on communications to or appearances before my former executive agency as set forth in section 207(c) of title 18, United States Code, for a period of 2 years. Additionally, I will do the same with respect to such communications to or appearances before the Executive Office of the President.

(b) I will not for a period of 2 years from the end of my appointment accept employment from, or representation of, any party that materially benefited from a particular matter involving specific parties, or from a particular matter benefiting a single source, in which I personally and substantially participated. I agree that my Stop Trading On Congressional Knowledge (STOCK) Act notifications and recusals will be made publicly available upon my leaving government service.

(c) Upon my departure from the Government I will not have any communications with or appearances before any executive branch agency, including the Executive Office of the President, regarding a particular matter involving specific parties on which I worked and I, my current employer, my current client, or a member of my household have a financial interest.

<sup>44</sup> Executive Order 13770, Section 1.3.

<sup>45</sup> Hannah Northey, "Former DOE deputy to lead controversial enrichment company," *E&E News*, March 6, 2015. <https://www.eenews.net/stories/1060014618> (Downloaded February 4, 2019); Darius Dixon, "Ex-energy official's \$1.7 million gig draws fire," *Politico*, March 16, 2015. <https://www.politico.com/story/2015/03/dan-poneman-centrus-116089> (Downloaded February 4, 2019); Centrus Energy was formerly known as "USEC Inc., a private, investor-owned company" operating uranium enrichment plants. USEC Inc. closed down in 2013. Prior to becoming a public company, it was a part of the Department of Energy known as the United States Enrichment Corporation, which handled the government's uranium enrichment operations. Centrus Energy, "History." <https://www.centrusenergy.com/who-we-are/history/> (Downloaded February 4, 2019)

Finally, Section 8062 should require that all records related to the codified ethics pledge, including any recusals, waivers, or exemptions to that pledge, be publicly posted by OGE with other ethics records (ethics agreements, financial disclosure reports, certificates of divestiture, and certification compliance forms).

The following are additional recommendations that Congress should pass to make the government more ethical and to help restore the public's faith in government.

#### 1. Promoting Ethics and Addressing Corruption

- **Create a government-wide database of senior officials who go through the revolving door.** Ten years ago, Congress required the Department of Defense (DoD) to create a system for officials to obtain "a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor."<sup>46</sup> That law also required DoD to store those opinions in a database to ensure compliance. Congress should amend H.R. 1 to create a similar system for civilian agencies. Congress should also expand the coverage to include covered officials who are involved in the planning, creation, awarding, administration, and oversight of a contract or grant. POGO has urged DoD to make its database public since March 2009.<sup>47</sup> As a fervent believer in the aphorism "sunshine is the best disinfectant," we recommend that Congress make the civilian database public. Taxpayers have a right to know when former senior officials seek employment with those they were doing government business with.
- **Require the Justice Department's Office of Professional Responsibility to report findings of intentional misconduct or reckless disregard.** Through Freedom of Information Act requests, POGO learned the Justice Department's Office of Professional Responsibility (OPR) documented more than 650 instances from 2002 to 2013 of federal prosecutors and other Justice Department employees violating rules, laws, or ethical standards that governed their work. Because the Department of Justice does not generally make the names of those officials public, the Department is largely insulated from meaningful public scrutiny and accountability.<sup>48</sup> Congress should require OPR to notify both the relevant state bar authorities and the House and Senate Judiciary Committees about any findings of intentional misconduct or reckless disregard by Justice Department attorneys. Further, Congress should give the Justice Department's Inspector General explicit authority to investigate allegations of misconduct throughout the agency, including those against attorneys, an authority that other agency inspectors general already have.

<sup>46</sup> P.L. 110-181, § 847 (2008). See Appendix C.

<sup>47</sup> Scott Amey, "POGO Wants Public DoD Revolving Door Database," Project On Government Oversight, March 16, 2009, <https://www.pogo.org/letter/2009/03/pogo-wants-public-dod-revolving-door-database/>

<sup>48</sup> Nick Schwellenbach, "Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards," Project On Government Oversight, March 13, 2014, <https://www.pogo.org/report/2014/03/hundreds-of-justice-department-attorneys-violated-professional-rules-laws-or-ethical-standards/>

- **Improve transparency of Foreign Corrupt Practices Act (FCPA) enforcement.** Congress should establish a centralized public repository of information about open and pending investigations and cases in order to make the United States' efforts to combat international bribery more effective. Additionally, when a company reports possible FCPA violations to the Department of Justice and/or the Securities and Exchange Commission (SEC) and either agency decides against bringing an enforcement action, Congress should require the public disclosure of the facts that the company reported and the reasons enforcement action was not taken. Either the Justice Department or the SEC should also be required to report statistics regarding instances when the United States government seeks help from, or provides help to, other countries in foreign bribery cases.<sup>49</sup>
- **Improving foreign-influence transparency.** POGO applauds the inclusion of reforms to the Foreign Agents Registration Act (FARA) in H.R. 1. Since 2014, POGO has recommended incorporating civil fines into the statute to give the Department of Justice a middle-of-the-road enforcement mechanism to punish offenders who do not properly label their FARA filings, who file late, who don't file if they should have, or who do not register if they should have. We support the provision in H.R. 1 that creates a dedicated enforcement unit. We believe this change will significantly boost the compliance by foreign agents and public access to FARA disclosures the law is supposed to afford.

However, more can be done to clarify registration and reporting requirements under the law. For example, a lack of Departmental guidance or definitions for terms like "principal beneficiary" has left many wondering exactly what triggers a registration requirement. POGO recommends that FARA be amended to eliminate a confusing exemption that allows those representing foreign companies to register under the far less strict domestic lobbying law, the Lobbying Disclosure Act. Foreign governmental and commercial interests are not always as distinct from one another as they are in the United States, and this exemption has frequently been misunderstood and exploited.
- **Require disclosure of "beneficial owners" of corporations and limited liability companies.** Congress should require persons who form corporations and limited liability companies in states where they are not required to disclose the beneficial owner of that entity to disclose that information to the federal government. The Federal Awardee Performance and Integrity Information System collects information involving corporate relationships, the highest and immediate owners, predecessors, and subsidiaries.<sup>50</sup> Missing, however, is information about owners who have an interest in the benefits of an

<sup>49</sup> Neil Gordon, "United States Among Leaders in Fighting Bribery," Project On Government Oversight, September 12, 2018. <https://www.pogo.org/analysis/2018/09/united-states-among-leaders-in-fighting-bribery/>

<sup>50</sup> Federal Awardee Performance and Integrity Information System.

<https://www.fapiis.gov/fapiis/viewcorpdetail.action?rcrID=146390067&rcrCage=8X637&rcrName=AHNTECH%62C+INC>.

entity, but are not on record as owners. Beneficial owners can lurk in the shadows, but can create conflicts of interest that should be known.<sup>51</sup>

- **Require nominees to disclose when someone with a financial interest in a nomination helps with the process.** Individuals, known as “Sherpas,” guide presidential nominees through the confirmation process and gain access to senior officials and information. While these Sherpas are sometimes government officials, they can be government outsiders, where existing conflict-of-interest laws do not apply.<sup>52</sup> The risk is that these individuals can use the access and information for personal or private gain. Congress should ensure that nominees publicly disclose any material benefit they received throughout their confirmation process from any individual who currently has or had in the past year employers or clients with financial interests involving the nominee's agency.
- **Require clear limits to employment for departing government officials.** Congress should require government officials to enter into a written, binding revolving-door exit plan that sets forth the programs and projects from which the former employee is banned from working. Like financial disclosure statements, these reports should be filed with the Office of Government Ethics and made available to the public.

When it comes to government ethics, the one thing that everyone can agree on, no matter who is in the White House or controlling Congress, is that the system is complex. In 2004, POGO called the revolving door laws and regulations a “spaghetti bowl.”<sup>53</sup> Add in numerous other ethics and conflict-of-interest laws, government-wide and agency-specific regulations, ethics pledges,<sup>54</sup> and commitments made to Senate committees during nomination hearings, and you have a spaghetti trough.<sup>55</sup> Different ethics laws and regulations apply to the president and vice president, appointees, senior and very senior officials, government employees, agency procurement officers, Justice Department lawyers, and government scientists. The intertwined criminal and civil laws have been smashed together from the Constitution; codification of bribery; graft; and conflict-of-interest laws in 1962<sup>56</sup>; the Ethics in Government Act of 1978; and defense authorization acts, to name just a few.<sup>57</sup>

While complex, that system is necessary for the government to represent and serve the people rather than a few or the well-connected. On May 8, 1965, President Lyndon B. Johnson issued Executive Order 11222, which instructed agencies to establish “standards of ethical conduct for

<sup>51</sup> Gavin Hayman and Chris Taggart, “How a global register of beneficial ownership can help end secrecy,” Open Contracting Partnership, April 4, 2016. <https://www.open-contracting.org/2016/04/04/open-contracting-beneficial-ownership/> (Downloaded February 4, 2019)

<sup>52</sup> Laura Peterson, “Washington’s Sherpas: Lobbyists Shepherding Agency Nominees Create Ethics Concerns,” Project On Government Oversight, December 20, 2018. <https://www.pogo.org/investigation/2018/12/washington-sherpas/>

<sup>53</sup> *The Politics of Contracting*, p. 23.

<sup>54</sup> See Appendix A.

<sup>55</sup> See *Brass Parachutes*, Appendix A.

<sup>56</sup> P.L. 87-849 (1962).

<sup>57</sup> Office of Government Ethics, “Laws and Regulations.” <https://www.oge.gov/web/oge/ns/Laws+and+Regulations/>

government officers and employees.”<sup>58</sup> President Johnson wrote that “[w]here government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.”<sup>59</sup>

As a result, the government created an ethics system that is designed to prevent, expose, and resolve any ethics violations, and punish, if necessary, any public servant who violates the public trust for personal or private gain. President Johnson’s order became the foundation for the basic obligations of public service, which state the general principle that:

Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.<sup>60</sup>

Even the Federal Acquisition Regulation affirms the need for government contracting decisions to be “above reproach”:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.<sup>61</sup>

Our support for Title VIII of the For the People Act of 2019 and the improvements that I have detailed for the Committee are common sense. Government ethics are important, and improving that system is vital. H.R. 1 is a step forward in reducing improper influence over government decisions, missions, programs, and spending that is often contrary to what is in the public’s interest.

<sup>58</sup> Executive Order 11222, May 8, 1965.  
[https://www2.oge.gov/web/oge/nsf/01F0C74554C7759BA85257E96006A90EF/\\$FILE/48bd8af3f2ec4dcf80bbd125adaabb42.pdf](https://www2.oge.gov/web/oge/nsf/01F0C74554C7759BA85257E96006A90EF/$FILE/48bd8af3f2ec4dcf80bbd125adaabb42.pdf) (Hereinafter EO 11222)

<sup>59</sup> EO 11222, Section 101.

<sup>60</sup> 5 CFR § 2635.101(a).

<sup>61</sup> 48 CFR § 3.101-1.

Thank you for inviting me to testify today. I look forward to answering any questions from Committee Members and to working with the Committee to further explore how the federal ethics and conflict-of-interest system can be improved.



## APPENDIX A

Ethics Rules Enacted by Presidents, 1993 - 2017

**Ethics Rules Enacted by Presidents, 1993 - 2017<sup>1</sup>**

	President Trump	President Obama	President Bush	President Clinton	Ideal Appointee Ethics Pledge <sup>2</sup>
<b>Ban on Lobbying the Appointee's Former Agency</b>	Every appointee 5 years covering "lobbying activities."	<i>None</i>	<i>None</i>	Every appointee 5 years	5 years
<b>Ban on Communicating with the Appointee's Former Agency</b>	Senior appointees 1 year as required by 18 U.S.C. § 207(c).	Senior appointees 2 years (a 1-year increase above 18 U.S.C. § 207(c)).	Restatement of post-employment restrictions at 18 U.S.C. § 207.	<i>None</i> , but subject to post-employment restrictions at 18 U.S.C. § 207.	2 years
<b>Ban on Lobbying Other Appointees</b>	No "lobbying activities" for the remainder of the Administration.	No lobbying the Administration.	Restatement of post-employment restrictions in 18 U.S.C. § 207.	For Executive Office of the President appointees 5 years with respect to any executive agency for which they had personal and substantial responsibility.	The remainder of the Administration
<b>Ban on Former Appointee Working for Any Foreign Government or Foreign Political Party</b>	Permanent for those registered under the Foreign Agents Registration Act (FARA), but won't cover those registered under the Lobbying Disclosure Act (LDA) (2 U.S.C. § 1601 <i>et seq.</i> ).	<i>None</i>	Restatement of post-employment restrictions in 18 U.S.C. § 207.	Permanent (additional provisions applied to trade negotiators).	Permanent for FARA and LDA registered lobbyists

<sup>1</sup> President Trump, EO 13770; President Obama, EO 13499 (revoked by EO 13770); President Bush, Standards of Official Conduct, President Clinton, EO 12834 (revoked by EO 13184).

<sup>2</sup> POGO urges Congress to pass additional restrictions applying to entities with a financial conflict of interest and entities that benefited from a former government official's decisions.

	President Trump	President Obama	President Bush	President Clinton	Ideal Appointee Ethics Pledge <sup>3</sup>
<b>Ban on Appointee Accepting Gifts from Lobbyists or Lobbying Organizations</b>	No gifts from registered lobbyists or lobbying organizations.	No gifts from registered lobbyists or lobbying organizations.	Restatement of Subpart A of Standards of Conduct (5 CFR § 2635.101 <i>et seq.</i> ).	<i>None</i>	No gifts from lobbyists or lobbying organizations.
<b>Ban on Appointee Handling Matters Related to Former Employers and Clients</b>	2 years No participating in any particular matter involving specific parties that is directly and substantially related to former employers or clients.	2 years No participating in any particular matter involving specific parties that is directly and substantially related to former employers or clients.	Restatement of Subpart A of Standards of Conduct.	<i>None</i>	2 years
<b>Ban on Former Registered Lobbyists</b>	2 years No participating in any particular matter on which they lobbied within the 2 years before the date of the appointment; also includes a 2-year ban on participating in the specific issue area in which that particular matter falls.	2 years No participating in any particular matter on which they lobbied within the 2 years before the date of their appointment; no participating in the specific issue area in which that particular matter falls. Appointees also pledged to not seek or accept employment from any executive agency that they lobbied within 2 years of their appointment.	<i>None</i>	<i>None</i>	2 years for participating on matters on which they lobbied; 2 years for participating in an issue area in which the matter falls; 2 years for seeking or accepting employment with an agency that the appointee lobbied.

<sup>3</sup> POGO urges Congress to pass additional restrictions applying to entities with a financial conflict of interest or that benefited from a former government official's decisions.

	President Trump	President Obama	President Bush	President Clinton	Ideal Appointee Ethics Pledge <sup>4</sup>
Hiring Based on Qualifications, Competence, and Experience	Included	Included	None	None	Include hiring requirements
Public Disclosure	None. Pledges and waivers filed with appointee's agency.	The Office of Government Ethics (OGE) was required to file a public report on the administration of the pledge. Pledges and waivers filed with appointee's agency.	None	Pledges and waivers filed with appointee's agency.	OGE should publicly post final submissions of ethics paperwork for executive branch officials occupying positions for which the pay is set at Levels 1 or 2 of the Executive Schedule. Final submissions should include signed ethics pledges pursuant to Executive Order 13770, ethics pledge waivers pursuant to Executive Order 13770, waivers under 18 U.S.C. § 208, authorizations under 5 CFR § 2635.502, waivers under 5 CFR § 2635.503, Certificates of Divestiture and requests for disclosure reports, ethics training records, authorizations to accept gifts of free attendance at widely attended gatherings, STOCK Act notices of employment negotiations (limited to employment for which the government employee was hired), disciplinary actions and reprimands related to ethics violations, and any documents demonstrating compliance or noncompliance with ethics agreements.
Report to the President	None	Required to report to the President.	None	None	Require a report to the President and Congress.

<sup>4</sup> POGO urges Congress to pass additional restrictions applying to entities with a financial conflict of interest or that benefited from a former government official's decisions.

	President Trump	President Obama	President Bush	President Clinton	Ideal Appointee Ethics Pledge <sup>5</sup>
<b>Lobbying Defined</b>	LDA definition of "lobbying activities," but the term does not include communicating or appearing with regard to a judicial proceeding, a criminal enforcement inquiry, investigation, or any proceeding, or any agency process for rulemaking, adjudication, or licensing, as defined in and governed by the Administrative Procedure Act, as amended, 5 U.S.C. § 551 et seq.	"to act ... as a registered lobbyist" under the LDA	Restatement of post-employment restrictions in 18 U.S.C. § 207	<p>Knowingly communicating or appearing before an agency with intent to influence official action, not including:</p> <ol style="list-style-type: none"> <li>1. Lobbying for state or local government</li> <li>2. Certain judicial, criminal, civil, or administrative proceedings</li> <li>3. Work for a college, hospital, research institution or not-for-profit organization</li> <li>4. Lobbying for international organizations, if the secretary of state approves</li> <li>5. Furnishing scientific or technological information</li> <li>6. Testimony under oath pursuant to 18 U.S.C. § 207(j)(6)</li> </ol>	Expand the definition to go beyond the current limitations on registered lobbyists to cover anyone with a financial conflict of interest, closing loopholes, and adopting a single standard that will apply to lobbyists for moneyed interests; those who secretly advise them; and the people they work for—all those who might affect public policy for private gain.

<sup>5</sup> POGO urges Congress to pass additional restrictions applying to entities with a financial conflict of interest or that benefited from a former government official's decisions.

	President Trump	President Obama	President Bush	President Clinton	Ideal Appointee Ethics Pledge <sup>6</sup>
<b>Executive Agency Defined</b>	Excludes separate agency components as designated by OGE.	Covers the entire agency.	None	Excludes separate agency components as designated by OGE.	Cover the entire agency
<b>Administration</b>	Agency heads are required to establish rules to ensure pledges are signed and ensure compliance with the order within the agency.	Agency heads are required to establish rules to ensure pledges are signed, ensure compliance with waivers in written ethics agreements, and ensure that spousal employment issues and other conflicts are addressed in written ethics agreements.	None	Agency heads are required to establish rules to ensure pledges are signed by appointees and trade negotiators, and ensure compliance with the order within the agency.	Agency heads should be required to establish rules to ensure pledges are signed and ensure compliance with written ethics agreements. POGO has urged Congress to provide OGE with clear investigative authority and the ability to make binding corrective and disciplinary actions. We also recommend public disclosure of Level I and II ethics records and that the OGE director should only be removed for cause.
<b>Waiver Authority</b>	Granted to the President or his designee and takes effect when a certification is signed by the President. A copy is provided to the agency.	Granted to the OMB director or their designee, if certified in writing that the restriction is inconsistent with the purpose of the restriction or it is in the public interest (national security or economic exigent circumstances).	None	Granted to the President and must be certified by the President in writing that the waiver is in the public interest. The waiver would be published in the Federal Register and given to the appointee and agency.	Waivers should be allowed and once granted, they should be placed on OGE's public website.

<sup>6</sup> POGO urges Congress to pass additional restrictions applying to entities with a financial conflict of interest or that benefitted from a former government official's decisions.

## APPENDIX B

Prohibition on lobbying activities with respect to the Department of Defense  
by certain officers of the Armed Forces and civilian employees  
of the Department following separation from military service  
or employment with the Department.  
P.L. 115-91, § 1045 (2017)

**SEC. 1044. PROHIBITION ON CHARGE OF CERTAIN TARIFFS ON AIRCRAFT TRAVELING THROUGH CHANNEL ROUTES.**

(a) IN GENERAL.—Chapter 157 of title 10, United States Code, is amended by adding at the end the following new section:

**“§ 2652. Prohibition on charge of certain tariffs on aircraft traveling through channel routes**

“The United States Transportation Command may not charge a tariff by reason of the use by a military service of an aircraft of that military service on a route designated by the United States Transportation Command as a channel route.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

“2652. Prohibition on charge of certain tariffs on aircraft traveling through channel routes.”.

**SEC. 1045. PROHIBITION ON LOBBYING ACTIVITIES WITH RESPECT TO THE DEPARTMENT OF DEFENSE BY CERTAIN OFFICERS OF THE ARMED FORCES AND CIVILIAN EMPLOYEES OF THE DEPARTMENT FOLLOWING SEPARATION FROM MILITARY SERVICE OR EMPLOYMENT WITH THE DEPARTMENT.**

(a) TWO-YEAR PROHIBITION.—

(1) PROHIBITION.—An individual described in paragraph (2) may not engage in lobbying activities with respect to the Department of Defense during the two-year period beginning on the date of retirement or separation from service in the Armed Forces or the date of retirement or separation from service with the Department, as applicable.

(2) COVERED INDIVIDUALS.—An individual described in this paragraph is the following:

(A) An officer of the Armed Forces in grade O-9 or higher at the time of retirement or separation from the Armed Forces.

(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee's retirement or separation from service with the Department.

(b) ONE-YEAR PROHIBITION.—

(1) PROHIBITION.—An individual described in paragraph (2) may not engage in lobbying activities with respect to the Department of Defense during the one-year period beginning on the date of retirement or separation from service in the Armed Forces or the date of retirement or separation from service with the Department, as applicable.

(2) COVERED INDIVIDUALS.—An individual described in this paragraph is the following:

(A) An officer of the Armed Forces in grade O-7 or O-8 at the time of retirement or separation from the Armed Forces.

(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee's retirement or separation from service with the Department.

(c) DEFINITIONS.—In this section:



(1) The term “lobbying activities with respect to the Department of Defense” means the following:

(A) Lobbying contacts and other lobbying activities with covered executive branch officials with respect to the Department of Defense.

(B) Lobbying contacts with covered executive branch officials described in subparagraphs (C) through (F) of section 3(3) of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602(3)) in the Department of Defense.

(2) The terms “lobbying activities” and “lobbying contacts” have the meaning given such terms in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602).

(3) The term “covered executive branch official” has the meaning given that term in section 3(3) of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602(3)).

**SEC. 1046. PROHIBITION ON USE OF FUNDS FOR RETIREMENT OF LEGACY MARITIME MINE COUNTERMEASURES PLATFORMS.**

(a) **PROHIBITION.**—Except as provided in subsection (b), the Secretary of the Navy may not obligate or expend funds to—

(1) retire, prepare to retire, transfer, or place in storage any AVENGER-class mine countermeasures ship or associated equipment;

(2) retire, prepare to retire, transfer, or place in storage any SEA DRAGON (MH-53) helicopter or associated equipment;

(3) make any reductions to manning levels with respect to any AVENGER-class mine countermeasures ship; or

(4) make any reductions to manning levels with respect to any SEA DRAGON helicopter squadron or detachment.

(b) **WAIVER.**—The Secretary of the Navy may waive the prohibition under subsection (a)—

(1) with respect to an AVENGER-class ship or a SEA DRAGON helicopter, if the Secretary certifies to the congressional defense committees that the Secretary has—

(A) identified a replacement capability and the necessary quantity of such systems to meet all combatant commander mine countermeasures operational requirements that are currently being met by the ship or helicopter to be retired, transferred, or placed in storage;

(B) achieved initial operational capability of all systems described in subparagraph (A); and

(C) deployed a sufficient quantity of systems described in subparagraph (A) that have achieved initial operational capability to continue to meet or exceed all combatant commander mine countermeasures operational requirements currently being met by the ship or helicopter to be retired, transferred, or placed in storage; or

(2) with respect to a SEA DRAGON helicopter, if the Secretary certifies to such committees that the Secretary has determined, on a case-by-case basis, that such a helicopter is non-operational because of a mishap or other damage or because it is uneconomical to repair.

## APPENDIX C

Requirements for Senior Department of Defense Officials  
Seeking Employment with Defense Contractors  
P.L. 110-181, § 847 (2008)

evidence in any de novo action at law or equity brought pursuant to this subsection.”

(d) DEFINITIONS.—Subsection (e) of such section is amended—

(1) in paragraph (4), by inserting “or a grant” after “a contract”; and

(2) by inserting before the period at the end the following: “and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the Secretary of Defense”.

**SEC. 847. REQUIREMENTS FOR SENIOR DEPARTMENT OF DEFENSE OFFICIALS SEEKING EMPLOYMENT WITH DEFENSE CONTRACTORS.**

10 USC 1701  
note.

(a) REQUIREMENT TO SEEK AND OBTAIN WRITTEN OPINION.—

(1) REQUEST.—An official or former official of the Department of Defense described in subsection (c) who, within two years after leaving service in the Department of Defense, expects to receive compensation from a Department of Defense contractor, shall, prior to accepting such compensation, request a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor.

(2) SUBMISSION OF REQUEST.—A request for a written opinion under paragraph (1) shall be submitted in writing to an ethics official of the Department of Defense having responsibility for the organization in which the official or former official serves or served and shall set forth all information relevant to the request, including information relating to government positions held and major duties in those positions, actions taken concerning future employment, positions sought, and future job descriptions, if applicable.

(3) WRITTEN OPINION.—Not later than 30 days after receiving a request by an official or former official of the Department of Defense described in subsection (c), the appropriate ethics counselor shall provide such official or former official a written opinion regarding the applicability or inapplicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor.

Deadline.

(4) CONTRACTOR REQUIREMENT.—A Department of Defense contractor may not knowingly provide compensation to a former Department of Defense official described in subsection (c) within two years after such former official leaves service in the Department of Defense, without first determining that the former official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate ethics counselor regarding the applicability of post-employment restrictions to the activities that the former official is expected to undertake on behalf of the contractor.

(5) ADMINISTRATIVE ACTIONS.—In the event that an official or former official of the Department of Defense described in subsection (c), or a Department of Defense contractor, knowingly fails to comply with the requirements of this subsection, the Secretary of Defense may take any of the administrative actions set forth in section 27(e) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(e)) that the Secretary of Defense determines to be appropriate.

(b) RECORDKEEPING REQUIREMENT.—

(1) DATABASE.—Each request for a written opinion made pursuant to this section, and each written opinion provided pursuant to such a request, shall be retained by the Department of Defense in a central database or repository for not less than five years beginning on the date on which the written opinion was provided.

Deadline.

(2) INSPECTOR GENERAL REVIEW.—The Inspector General of the Department of Defense shall conduct periodic reviews to ensure that written opinions are being provided and retained in accordance with the requirements of this section. The first such review shall be conducted no later than two years after the date of the enactment of this Act.

(c) COVERED DEPARTMENT OF DEFENSE OFFICIALS.—An official or former official of the Department of Defense is covered by the requirements of this section if such official or former official—

(1) participated personally and substantially in an acquisition as defined in section 4(16) of the Office of Federal Procurement Policy Act with a value in excess of \$10,000,000 and serves or served—

(A) in an Executive Schedule position under subchapter II of chapter 53 of title 5, United States Code;

(B) in a position in the Senior Executive Service under subchapter VIII of chapter 53 of title 5, United States Code; or

(C) in a general or flag officer position compensated at a rate of pay for grade O-7 or above under section 201 of title 37, United States Code; or

(2) serves or served as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10,000,000.

(d) DEFINITION.—In this section, the term “post-employment restrictions” includes—

(1) section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423);

(2) section 207 of title 18, United States Code; and

(3) any other statute or regulation restricting the employment or activities of individuals who leave government service in the Department of Defense.

#### SEC. 848. REPORT ON CONTRACTOR ETHICS PROGRAMS OF MAJOR DEFENSE CONTRACTORS.

(a) REPORT REQUIRED.—Not later than one year after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the internal ethics programs of major defense contractors.

(b) ELEMENTS.—The report required by subsection (a) shall address, at a minimum—

(1) the extent to which major defense contractors have internal ethics programs in place;

(2) the extent to which the ethics programs described in paragraph (1) include—

Chairman CUMMINGS. Thank you very much.  
Ms. Hobert Flynn.

**STATEMENT OF KAREN HOBERT FLYNN, PRESIDENT,  
COMMON CAUSE**

Mrs. Hobert Flynn. Thank you, Chairman Cummings, Ranking Member Jordan, and members of the committee, for holding this critically important hearing. I'd also like to thank Congressman Sarbanes for his leadership championing the For the People Act as the type of bold, innovative package of solutions that can restore people's trust in our government. One final note of thanks to House Speaker Pelosi for her commitment for making this her first order of business in the new Congress.

My name is Karen Hobert Flynn, and I'm president of Common Cause, a national nonpartisan watchdog organization with 1.2 million supporters. For nearly 50 years, we have been working to strengthen the people's voice in their democracy. I'm here to testify in support of For the People Act.

First, I want to say that Americans have not been waiting for Washington to fix what ails them in our democracy. We have been working at the State and local level with many other groups to pass significant pro-democracy reforms. This is the second consecutive election cycle where voters have passed 95 percent of the democracy reforms on the ballot.

In 2018, voters in 20 red, blue, and purple States and localities have passed democracy reforms with strong support from Republicans, Independent, and Democratic voters. This includes voting rights restoration in Florida, same-day voter registration in Maryland. It includes independent redistricting commissions in Colorado, Michigan, and redistricting reform in Utah, automatic voter registration in Nevada and Michigan, and independent ethics commission in New Mexico, and an anti-corruption package in Missouri.

I should note that also these kinds of reforms and many embodied in H.R. 1, campaign finance disclosure, ethics reforms, and others, also passed with bipartisan support in State legislatures. The reforms embodied in H.R. 1 are not lofty and tested ideas; most are pragmatic solutions that are already working in a city or State somewhere in this country. These solutions are proven to work, and, in many cases, save taxpayers money.

The timing of this legislation has never been more important as Americans grow more frustrated and cynical about our State of politics. While every Presidential administration, in our Nation's history, has had various ethical challenges, we have never seen so many corruption scandals and appalling lack of concern for the ethic rules that should govern our executive branch than with this administration.

We have a series of reports that detail dozens and dozens of ethical challenges and conflicts of interest that have plagued this administration in the last two years. The American people want transparency, honesty, and accountability from its elected representatives. They do not want their elected leaders to use their public office for private gain to enrich their businesses, their wealthy donors, their family, or themselves.

We believe tough ethics laws like the ones that we're talking about here today with the strength in Office of Government Ethics that has independent oversight and investigative and enforcement tools can help us prevent the incessant assault on our democratic values and institutions to self-government.

My written testimony outlines our support for all the measures before the committee today, and I'll just add two more comments. One is, I agree with Chairman Cummings that on Election Day, we should make Election Day a holiday. We have found, as we do election protection, nonpartisan election protection across the country, that with aging infrastructure and machines—machines malfunctioning, and a lack of polls—poll workers, that people have long lines up to 4 hours. Many working Americans can't afford to take 4 hours off of their day in order to vote. So making it a holiday would make a huge difference.

In addition, we strongly support the conflicts from Political Fundraising Act, because Americans deserve to know whether people nominated to serve in the executive branch have raised money, or benefited from special interest money from the industries they are supposed to regulate. There are currently no requirements for Presidential appointees to disclose whether they have solicited funds or contributed funds for political purposes to PACs, super-PACs, 501(c)(4)'s, or 501(c)(6) business associations, and it's a significant gap that we think should be closed.

We don't work on these issues just to look good, we pass reforms so that the government can be more responsive to the needs of everyday Americans. You will hear some who benefit from the current system, use tired arguments that defend the current system saying it works fine. The American people do not believe that our current system is just fine.

You will also hear people talking about the First Amendment to justify billionaires, corporations, and special interest spending millions of dollars in politics, while our children, our families, and schools and communities, and our environment all suffer. Polls show that people want bold ethics and transparency reforms, and they want to clean up our system and give people more voice in our democracy.

We look forward to working with this committee. We believe that this is a strong package. There are always elements that can be strengthened. We look forward to the questions ahead. Thank you.

[Prepared Statement of Mrs. Hobert Flynn follows:]



*Holding Power Accountable*

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**House Committee on Oversight and Government Reform  
“H.R. 1, For the People Act: Strengthening Ethics Rules for the Executive Branch”  
February 6, 2019**

**Written Testimony of  
Karen Hobert Flynn  
President  
Common Cause**

**Introduction**

Thank you, Chairman Cummings, for inviting me to testify before the Oversight and Government Reform Committee. And thank you to Chairman Cummings, Ranking Member Jordan, and all Members of the Committee for holding this critically important hearing. My name is Karen Hobert Flynn, and I am the President of Common Cause, a national nonpartisan watchdog organization with 1.2 million supporters and 30 state chapters. For nearly 50 years, Common Cause has been holding power accountable through lobbying, litigation, and grassroots organizing. Common Cause fights to reduce the role of big money in politics, enhance voting rights for all Americans, foster an open, free, and accountable media, strengthen ethics laws to make government more responsive to the people, and stop gerrymandering.

Let me start by saying that H.R. 1, the For the People Act, is the biggest, boldest democracy reform package introduced in Congress since the Watergate era. Congressman Sarbanes and many democracy reform leaders in Congress have done incredible work to develop and compile this comprehensive bill that now has 227 cosponsors. I also want to express our appreciation to House Speaker Pelosi for her national leadership on this effort, for making this essential democracy reform package H.R. 1, and for making it a first order of business in the new Congress.

Common Cause was founded by John Gardner, a Republican, at a time when Republicans and Democrats worked together on the most pressing issues of the day. During the 1970s, Common Cause worked with many Members of Congress—Democrats and Republicans alike—who put country over party, and we were able to help pass major democracy reforms that sought to correct some of the most egregious abuses of power, including the Federal Election Campaign Act, the presidential public financing system, and the Ethics in Government Act.

**Democracy in Crisis**

We now face a democracy crisis with many similarities to the Watergate era, and H.R. 1 is a comprehensive and effective solution to address the rampant corruption, conflicts of interest, and abuses of power that have significantly worsened in the last two years under the Trump administration. The timing of this legislation has never been more important as Americans grow more frustrated and cynical about our state of politics. Hundreds of thousands of Americans have called, written, and visited the offices of their Members of Congress about H.R. 1 to demand an end to the abuses of power and corruption in the current administration. While every presidential administration in our nation's history has had various ethical challenges, never before have we seen such corruption and a lack of concern for executive branch ethics rules as we have seen with the Trump administration.



Shortly after his election in 2016, President Trump promised to remove himself from all of his business operations. Instead, he simply transferred day-to-day control of the businesses to his sons by forming a revocable trust, which meant that, contrary to what he told the American people, he fully retained his financial interests in his businesses and the ability to profit from them, as well as the ability to reassume control. President Trump's business holdings expose him to unprecedented conflicts of interest.

His failure to eliminate his conflicts by divesting himself of his business empire and releasing his income tax returns has struck a serious blow to government accountability. President Trump's conflicts of interest pose real dangers for the country. The American people have no way to know if decisions made by the President or his administration are being made to benefit the country or to benefit the President's own personal finances. There is no way for the American people to know if domestic or foreign interests are buying influence and currying favor with President Trump by funneling business to his commercial empire. His conflicts cast doubt on the motives driving presidential decisions, allow him to profit from his office, and quite likely violate the Constitutional ban on emoluments.

It is not just the President who is damaging our democratic norms and institutions with his unethical behavior. It is also the people with whom he has surrounded himself. The President's family exacerbates his ethical problems. While his elder sons run the Trump Organization on his behalf, they expand the net of conflicts around his administration. Meanwhile, his daughter and son-in-law face similar conflicts of interest.

In staffing his administration, the President has deepened rather than drained "the swamp." Many of the officials in his administration are former lobbyists. Time and time again, President Trump ignores their ethical breaches until public pressure becomes intense. On top of this, a rushed vetting and confirmation process has resulted in a cabinet with an unsettling variety of ethics issues of its own. Numerous officials in the Trump administration have been forced to resign under the cloud of scandal or investigations, including former Health and Human Services Secretary Tom Price, former EPA Administrator Scott Pruitt, and former Interior Secretary Ryan Zinke, among others.

The unending deluge of scandals that have rocked the first two years of this Administration has been extremely challenging to keep up with, even for those groups like Common Cause that serve as full-time watchdogs of government ethics.

It is impossible for the American people to keep track of the myriad scandals, especially when we have a President who makes false and misleading claims and states untruths on an almost daily basis. President Trump's lies and false statements have done immense damage to our country and around the world. His lies have undermined our institutions and fueled division and rage. He has undermined the right of citizens to know what their government is doing and to work from a common base of facts. He has subverted our nation's credibility and effectiveness on the world stage. He has made clear to our allies and adversaries alike that his word can never be trusted.

Strong ethics laws, coupled with a strengthened Office of Government Ethics, with independent oversight and investigative tools, can help us combat what has become an incessant assault by the Trump administration on our democratic values and institutions of self-government. These laws won't eliminate every single conflict of interest, but they can go a long way in preventing conflicts, can help shed sunlight on corruption, and build public support for appropriate action to rein in abuses of public office.

#### **Reforms Moving at State and Local Level**

Despite significant barriers to advancing reform at the federal level in recent years, Common Cause and many other reform groups have continued to pass significant pro-democracy reforms at the state and local levels on ethics and other critical issues that help empower the voices of all Americans and hold public officials accountable. Just last year, as we outlined in our [Democracy on the Ballot report](#),



voters in more than 20 red, blue, and purple states and localities passed pro-voter democracy reforms, with strong support from Republican, Independent, and Democratic voters. This includes voting rights restoration for formerly-incarcerated individuals in Florida, an anti-gerrymandering measure in Utah, independent redistricting commissions in Colorado and Michigan, automatic voter registration in Michigan and Nevada, and an anti-corruption package in Missouri.

Additionally, we led the successful campaign in Maryland to pass same-day voter registration. In Ohio, we spearheaded the successful effort to create a bipartisan redistricting commission that passed with support from 75% of voters. We also led a multi-year effort in New Mexico to successfully create an independent ethics commission to oversee state elected officials, lobbyists, and state contractors.

It isn't just through direct democracy ballot initiatives that ethics, voter registration modernization, and money-in-politics reform measures like citizen-funded elections and enhanced disclosure become law. Over the past few years, dozens of democracy reform measures have passed with bipartisan support in state legislatures as well as at the city and county levels.

Strengthening ethics and anti-bribery laws are issues that people across the political spectrum believe are critically important to a strong democracy. While certain states are increasingly facing big donors who blockade reform efforts, it is mainly in Washington, D.C., that we see wealthy special interests block progress on democracy reform so that they can continue rigging the rules to benefit their bottom line.

#### Executive Branch Ethics

With regard to the H.R. 1 provisions that are within the Committee's jurisdiction, Common Cause has supported many of the underlying bills that are incorporated into Title VIII of H.R. 1, as well as several other key policies. At the outset, let me state that it is very important to provide new conflict of interest rules that cover the President and Vice President. We are aware that H.R. 1 currently recognizes this problem, and we believe H.R. 1 must provide a solution to this problem. We urge that the final version of H.R. 1 contain new conflict of interest rules that would prevent the spectacle of the American people never knowing whether presidential decisions are being made in the nation's interests or the president's personal financial interests.

#### Election Day Holiday

Certain critics of H.R. 1, including Senate Majority Leader Mitch McConnell, say that making Election Day a national holiday would be a power grab, and I couldn't agree more—it would be a power grab for the American people. An Election Day holiday, alongside other registration and voting reforms built into this landmark piece of legislation, would ease current voting restrictions for many Americans and provide for greater turnout and participation.

While citizens in this country recognize that elections are important, many voters face significant barriers to voting. Indeed, during the most recent 2018 midterm, field volunteers and reporters across the country noted that in a handful of counties, voters waited in line to vote for more than four hours. The Election Protection hotline, too, received thousands of calls from individuals saying wait times were simply too long and that many had to leave their spots in line so they could return to work. While many states do require employers to provide workers with time off to vote, most do not ensure any more than one to three hours. As we've learned time and again during elections, that is simply not enough time to vote. Polls confirm that voters need more time: the majority of Americans cite "inconvenience," "too busy," and "not enough time" as their primary reasons for missing elections. With Americans putting more hours into work — not to mention schooling, childcare, and other personal responsibilities — they're stretched thin as it is. If we want to ensure a favorable experience for voters and help them form the

habit of regular participation, this Congress must declare Election Day a national holiday to facilitate the vote.

#### Access to Congressionally Mandated Reports

Common Cause strongly supports this common-sense, bipartisan proposal that would enhance government transparency so all Americans can better understand how government works. The measure would strengthen congressional oversight and create a central repository for agency reports submitted to Congress. The portal will also track whether agencies have submitted reports and improve congressional access to all reports. Importantly, the measure will make all congressional reports from federal agencies accessible to the public, easy to search, and downloadable.

#### Executive Branch Conflict of Interest Act

Americans deserve public officials who are doing the people's work while in their government positions, not doing favors for past or future employers. Common Cause supports the Executive Branch Conflict of Interest Act, which strengthens "revolving door" restrictions for Executive Branch officials to reduce or eliminate conflicts of interest, so the American people can have confidence that public officials are doing what's best for our nation and not lining their own pockets or those of their friends.

The Executive Branch Conflict of Interest Act prohibits incentive payments from corporations to individuals entering or leaving government service by amending the current statutory prohibition on private sector payment for government work to include bonuses and any other compensation or benefit contingent on accepting a position in government.

This Act would further guard against unethical activities by government employees revolving into government service from the private sector or revolving out of government service to the private sector. The Act would prohibit federal employees entering government service from being substantially involved in awarding contracts to, or participating in other government matters regarding, their former employers for two years after leaving the private company. The Act would also prohibit federal employees leaving government service from joining an industry they oversaw for two years after leaving government service (an extension of the current one-year prohibition). And if a waiver is granted exempting any government employee from these provisions, it must be published on the employing agency's website within 30 days so the public knows that these ethics protections have been waived.

#### Presidential Conflicts of Interest Act

For more than forty years, presidents and vice presidents have voluntarily complied with conflict of interest laws and standards of conduct set forth in Executive Order No. 11222. But President Trump has shattered those ethics norms by maintaining ownership of the Trump Organization and doing little or nothing to address the avalanche of conflicts of interest that has resulted. We now know that the democratic norms and values that have guided past presidents are not enough for President Trump and must be supplemented by stronger measures.

This sense of Congress resolution makes clear the expectation of the American people that presidents and vice presidents will comply with the same conflicts of interest laws that other public officials must comply with—divesting assets to avoid conflicts and recusing from matters when conflicts exist.

This is an important first step, but as noted earlier, we believe H.R. 1 should contain provisions to ensure that presidents and vice presidents eliminate any potential financial conflicts of interest they may have. We believe that it is constitutional for Congress to put conflict of interest policies in place for the president and vice president. We also believe that it is essential to pass a measure *requiring* the president and the vice president to place all assets that create conflicts of interest into a blind trust managed by an independent trustee who oversees the conversion of assets into conflict-free holdings.

White House Ethics Transparency Act

Our nation's conflict of interest and other ethics laws protect us from corrupt, self-enriching, unethical behavior by public officials. Only under very rare circumstances should public officials receive waivers from compliance with these laws—and issuance of such waivers should be a fully transparent process. The White House Ethics Transparency Act secures public access to any ethics waivers issued in the Executive Branch via the Office of Government Ethics website.

Executive Branch Comprehensive Ethics Enforcement Act

In its current state, the Office of Government Ethics (OGE) is a paper tiger—well-intentioned but borderline powerless. Congressman Raskin's bill that was incorporated into H.R. 1 gives the Director of the OGE real power, including subpoena power, to implement and enforce our ethics laws, to investigate possible violations, and to discipline those who violate ethics laws.

One of the most important provisions of the Executive Branch Ethics Enforcement bill is to ensure that the director of OGE is protected from retaliatory efforts to remove them from office for political or retaliatory reasons. This measure allows the OGE director to be removed only for cause. This is a key component to ensure the integrity of the agency's independence.

This proposal also provides strong investigatory and enforcement provisions, including the ability to investigate allegations of ethics violations and recommend disciplinary action. The director can also issue subpoenas. Only with these kinds of provisions will we have an OGE that can ensure widespread compliance with our ethics laws.

Common Cause also recommends that the OGE have budgetary independence, as other independent agencies do, so that they can submit their budget requests directly to Congress.

Conflicts from Political Fundraising Act

Americans deserve to know whether people nominated to serve in the executive branch have raised money or have benefitted by receiving special interest money from the industries they are supposed to regulate. The political fundraising transparency mandated by this section is the only way that the public can understand who these executive branch staff are working for—the American people or the industries they regulate.

There are currently no requirements for presidential appointees to disclose whether they have solicited or contributed funds for political purposes to political action committees, Super PACs, 501(c)(4) social welfare organizations, or 501(c)(6) business associations.

Scott Pruitt, the former head of the Environmental Protection Agency who resigned last summer amid many ethics scandals and more than a dozen federal investigations, inquiries, and audits,<sup>1</sup> is a perfect example of why we need this transparency measure. It was no secret that Pruitt was hostile to the mission of the agency that he oversaw. Before heading the agency, he had sued the EPA 14 times when he was Attorney General in Oklahoma.

Scott Pruitt's political career leading up to his stint as EPA Administrator was heavily funded by the energy industry. According to the National Institute on Money in Politics, Pruitt received \$350,000 from contributions from individuals and political action committees from the energy sector in his 2002 race

<sup>1</sup> <https://www.vox.com/2018/7/5/17192716/scott-pruitt-resigns-epa-administrator-andrew-wheeler>

for state senator, his 2006 race for Lieutenant Governor, and his 2010 and 2014 races for Attorney General.<sup>2</sup>

As head of the EPA, Pruitt banned scientists receiving EPA grants from serving on its scientific advisory boards and filled those advisory boards instead with industry officials and lobbyists.<sup>3</sup> The EPA has shed hundreds of employees, many through buyouts, and now has fewer staff "than at any time since the final year of the Reagan administration."<sup>4</sup> He also packed his calendar with industry meetings and almost entirely avoided meeting with environmental groups, despite the EPA's mission ostensibly encompassing both camps.<sup>5</sup> Pruitt's tenure benefitted the energy sector with his track record of delaying, rolling back or repealing more than 22 environmental regulations and his move to lift the limits of measuring what is considered toxic air pollution.<sup>6</sup>

Our current conflicts of interest laws leave a big piece of the picture blank because we don't require high-level executive branch appointees to disclose their political fundraising relationships, thus obscuring from public view the financial entanglements that agency officials have had with special interest groups prior to their government service.

#### Transition Team Ethics Improvement Act

Ethical executive branch governance begins during the presidential transition. The Transition Team Ethics Improvement Act requires transparent ethics standards to be adhered to by transition teams, including standards related to security clearances, conflicts of interest, and personal financial disclosure. These standards would be laid out in an "ethics plan" and reviewable by the public via the General Services Administration. Common Cause supports these measures to increase transparency and improve ethics during the transition process.

#### Ethics in Public Service Act

The Ethics in Public Service Act requires incoming members of a new president's administration to make clear to the public their commitment to ethical governance by signing an "Ethics Pledge" and acknowledging their duty to act ethically when doing the public's business and after leaving government employment. Such an Ethics Pledge is good step toward setting the right tone—and making expectations clear—for all members of a president's administration.

These provisions of H.R. 1 are common sense measures to ensure enhanced transparency and accountability in our government. These ethics policies described above are desperately needed given the near-daily conflicts and ethical problems of the Trump administration.

In Common Cause's "State of the Swamp" and "Art of the Lie" (co-authored with Democracy 21) reports, we detail the hundreds of ethical challenges and conflicts of interest the Trump administration has had. H.R. 1, however, is about much more than President Trump and his administration. While President Trump and his associates have broken many political and ethical norms (and likely some laws), these could just as easily be broken by future presidents. That's why we must codify into law key ethical norms and standards that this administration continually ignores.

<sup>2</sup> <https://www.followthemoney.org/research/blog/energy-interests-power-pruitt/>

<sup>3</sup> <https://www.sciencemag.org/news/2017/11/epa-unveils-new-industry-friendlier-science-advisory-boards>

<sup>4</sup> [http://www.slate.com/blogs/the\\_statest/2017/03/27/carl\\_icaohn\\_is\\_latest\\_ethics\\_red\\_flag\\_in\\_trump\\_white\\_house.html](http://www.slate.com/blogs/the_statest/2017/03/27/carl_icaohn_is_latest_ethics_red_flag_in_trump_white_house.html)

<sup>5</sup> [http://www.slate.com/blogs/the\\_statest/2017/03/27/carl\\_icaohn\\_is\\_latest\\_ethics\\_red\\_flag\\_in\\_trump\\_white\\_house.html](http://www.slate.com/blogs/the_statest/2017/03/27/carl_icaohn_is_latest_ethics_red_flag_in_trump_white_house.html)

<sup>6</sup> <https://www.vox.com/2019/7/5/17192716/scott-pruitt-resigns-epa-administrator-andrew-wheeler>

### Key Components of H.R. 1

In addition to supporting the portions of H.R. 1 before this Committee today, Common Cause also supports the rest of the For the People Act, and I want to highlight several key components of the bill in particular that fall outside the Committee's jurisdiction.

#### Getting Big Money out of Politics

- Citizen-funded elections: Citizen-funded elections help break down barriers to participating in our democracy, creating a government that looks like the people it represents and a government that works in the interest of everyday people. Reforms that provide matching funds to small donations from ordinary Americans help to amplify their voices in the election and enhance their voice in the public policy process. The small donor, matching funds system in H.R. 1 is essential if we are to prevent future influence-buying corruption. These reforms mean ordinary people who are not wealthy or well-connected can obtain resources to run for and win elected office. Candidates receiving matching funds campaign differently, talking to voters about issues rather than focusing on raising large contributions from lobbyists and big donors. As a result, policies and laws are more responsive to public needs and less skewed by wealthy special interests. When I ran Common Cause's state organization in Connecticut, I led a successful multi-year campaign to pass the Citizens' Election Program there, and we have seen many jurisdictions across the country introduce and pass citizen-funded elections. These programs at the state and local level have proven successful and popular with candidates of both major political parties.
- DISCLOSE Act: With hundreds of millions of dollars in secret money spent in elections in recent years, all Americans deserve to know who is trying to influence their voices and their votes. The DISCLOSE Act would ensure there is disclosure of this "dark money" that is flowing into federal elections through non-profit groups and Super PACs, thus improving transparency in elections. The Supreme Court has made clear that such laws are constitutional.
- Honest Ads Act: Russia has exploited millions of Americans who get their news through social media by posting misleading and sometimes false information online that masks the true identity of the poster. The Honest Ads Act would protect Americans from hostile foreign actors who attempt to manipulate public opinion and meddle in our elections.

#### Empowering Voters and Securing Our Elections

- Voting Rights Advancement Act: After the Supreme Court's 5-4 decision gutting the Voting Rights Act, Congress failed to even hold a hearing. The For the People Act creates a path for new legislation that will restore and update the Voting Rights Act to protect citizens who continue to suffer targeted and illegitimate methods to deprive them of their ability to vote. If we are to have a true democracy, we must eliminate discrimination at the ballot box.
- Automatic Voter Registration: Decades ago, many states passed restrictive and discriminatory registration laws to try to disenfranchise voters. In the last few years, 15 states, from Alaska to West Virginia, have created automatic voter registration programs and enabled millions of eligible voters to register to ensure their voices can be heard at the ballot box. Automatic voter registration makes common sense updates so more eligible Americans can register to vote and be able to have their voices heard, while at the same time safeguarding our election system with mandatory audits and better technology, as well as saving taxpayers money.

- Same-Day Voter Registration: 17 states now offer same-day (sometimes called Election Day) registration. This common-sense reform improves the voting process by allowing registration to take place at the same time voters are casting their ballots. This can be helpful when voters have been erroneously purged from the rolls or faced early registration deadlines. In states where same-day voter registration has been implemented, it has helped increase voter turnout by an average of 5%.<sup>7</sup>
- Election Security: After the United States was attacked in the 2016 elections when Russia attempted to manipulate our elections, Congress provided \$370 million in election security funding to update voting machines and help secure our elections. While that was a step in the right direction, we desperately need much more. We need a bolder response to counteract continued Russian attacks and potential future attacks by other foreign interests as well. The Election Security Act is a strong response because it would promote post-election risk-limiting audits, voter-verifiable paper ballots, and increased funding for states to improve their voting machines.
- Independent Redistricting Commissions: Elections are supposed to represent the will of the people, but in many states, partisan politicians manipulate voting maps to keep themselves and their party in power. Politicians should not get to cherry pick their voters; instead, voters must have choices in deciding their elected officials. Independent, citizen-led redistricting commissions remove self-interested politicians from the map-drawing process and give that power to the people.

Common Cause led the successful effort to eliminate gerrymandering in California by putting in place an independent citizens' redistricting commission that operated in a transparent and fair way, with significant public input. Thirty thousand people applied to be citizen commissioners. The Bureau of State Audits, which led the selection process, operating in public view, yielded a diverse group of commissioners, more diverse than the demographics of California. The process led to 34 public hearings; more than 70 deliberation meetings; meetings and hearings in 32 cities and 23 counties; more than 2,700 speakers at hearings; and written submissions of more than 20,000 individuals.<sup>8</sup> The process resulted in much fairer districting.

#### **Making Government More Accountable and Stopping Corruption**

- Supreme Court Ethics: Justices on the Supreme Court are the only federal judges not bound by the Judicial Code of Conduct. Supreme Court justices are not above the law. Our judicial system depends on public confidence that judges are deciding cases based on law and the evidence, not their personal relationships with lawyers or litigants, or the impact of their rulings on their finances. Supreme Court justices should abide by the same ethics rules as all other federal judges.
- Congressional Ethics
  - When Members of Congress are accused of employment discrimination and reach a settlement, taxpayers should not be responsible for paying for this reprehensible behavior. Common Cause fully supports requiring Members of Congress to personally reimburse the Treasury for settlements and awards under the Congressional Accountability Act of 1995.

<sup>7</sup> <http://www.socsci.uci.edu/~bgröfman/18%20Brians-Grofman-Election%20day%20registration%27s%20effect.pdf>

<sup>8</sup> <https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf>

- o Members of Congress are elected to serve the public interest, not some private, financial interest. We fully support the ban preventing Members of Congress from serving on the boards of for-profit entities.

While we think the provisions to strengthen ethics reforms for the judicial and executive branches are quite strong in the For the People Act, we'd like to work with bill sponsors and this committee to strengthen congressional ethics reforms, especially for the Office of Congressional Ethics (OCE), which Common Cause helped create in 2008.

Common Cause supports maintaining, strengthening, and expanding the independent Office of Congressional Ethics to provide more accountability for the ethics process that would otherwise be left entirely to Members themselves. History has shown that in a political environment, where relationships are key, that it is extremely difficult for Members of Congress to sit in judgement of each other.

The OCE has faced repeated attacks from some Members of Congress. In the first legislative action of 2017, for example, House Republicans moved to strip the office of its independence, which would have gutted its ability to function. Thousands of Americans spoke up, calling and emailing their Members of Congress, which ultimately helped stop this effort to derail the OCE. But the real challenge is that the OCE must be renewed every two years. The American public fully understands that no one should ever be one's own judge and jury. It's time to pass legislation to make the OCE permanent and create a similar independent watchdog for the U.S. Senate. Common Cause is aware of the dynamics surrounding the OCE, but we think there is a way to strengthen this important entity and would like to work with interested Members to codify the OCE into law, give it subpoena power, help diversify it, and ensure it receives the necessary resources it needs to succeed.

### Conclusion

We don't pass reforms for the sake of passing reform. We pass reforms so that government can be more responsive to the needs of everyday Americans. Some status quo politicians use old, tired arguments to defend the current system by saying it works just fine. They try to hide behind the First Amendment to justify billionaires, corporations, and special interests spending millions of dollars in politics while our children, our families, our schools, and our environment all suffer.

Senator McConnell wants to scare us because he knows that, on the merits, he has no good arguments against letting all eligible Americans vote. He essentially admitted that when more people vote, Republicans might not win. Senator McConnell, I have a message for you: the people will win. Maybe not today, maybe not tomorrow, maybe not next week, but we will win. Common Cause has been in this fight for nearly 50 years, and we'll continue to fight until the voices of all Americans can be heard.

You can be on the correct side of history and support reforms that strengthen our democracy and empower the voices of all Americans, or you can be on the side of the status quo and turn a blind eye to conflicts of interest, corruption, and abuse of power. For nearly 50 years, Common Cause has helped bring to public attention the ethical lapses of leaders in both political parties in states and in Washington, D.C. It's a Republican in the White House now, but in five or 10 years, there might be a Democrat in the White House who engages in significant ethics abuses and undermines the rule of law. It's past time for Congress to enact strong ethics and other democracy reform laws because no American is above the law, not even the President.

Chairman CUMMINGS. Thank you very much.  
Mr. MEHRBANI.

**STATEMENT OF RUDY MEHRBANI, SPITZER FELLOW AND  
SENIOR COUNSEL, BRENNAN CENTER FOR JUSTICE**

Mr. MEHRBANI. I would like thank Chairman Cummings, Ranking Member Jordan, and the entire committee, for the opportunity to testify today in support of House Resolution 1, the For the People Act. The Brennan Center enthusiastically supports H.R. 1, it would be historic legislation. It addresses longstanding problems with our system of self-government, long lines, vast sums of money of dark money, harmful rules and practices that make it harder for many, especially voters of color, to cast their ballot, the ongoing challenges of gerrymandering, inadequate election administration, and at-risk technology. It addresses these issues with groundbreaking reforms that are proven to work. Automatic voter registration, small donor matching, the Voter Rights Act, redistricting commissions, early voting, election security and more.

It is thus fitting that this bill is the very first introduced in this Congress. Today, I will focus on Title VIII of the Act, ethics reform for the President, Vice President, and Federal officers and employees. The reforms respond to the erosion of ethical guardrails in government that we have seen over a number of years. They are a strong first step to restoring public faith in accountable and ethical government.

We have long assumed that all Presidential administrations would follow longstanding ethics practices and ideals that aren't required by law. For example, following precedent established by their predecessors over the last 40-odd years to publicly release their tax returns; voluntarily comply with conflicts of interest law that apply to other executive branch employees by divesting from potentially conflicting assets, or keeping their assets in a qualified blind trust; strive to avoid the appearance of improper or undue influence of outside interests in the way their administration has formulated official policy, or strive to fully enforce existing ethics laws.

Unfortunately, these commonsense practices that Presidents from both parties followed for decades can no longer be taken for granted. This means that new laws are needed to compel a commitment to ethics and ensure accountability. As I detail in my written testimony, when President's and agency heads do not lead on ethics issues, they can result in serious ethical lapses: the improper use of government positions; running afoul of other laws like appropriations laws; and violations of revolving-door prohibitions. This results in an incredible waste of taxpayer resources, and it seriously harms public trust and faith in government. From my experience in government, Presidential leadership on ethics issues filters down throughout an administration. When I ran the Presidential Personnel Office, we followed certain practices, not just because of my office's commitment, but because President Obama demanded that we have an ethical personnel process. That meant that we worked collaboratively with the Office of Government Ethics, and strengthened post-employment lobbying restrictions, even if that wasn't technically required by law.



Some have said that more robust ethics rules would deter talented individuals from serving in government. But many of the reforms in H.R. 1 have long been voluntarily followed by administrations. Some administrations, like the one that I served in, went further and supplemented those rules. What was the result? A historic number of Americans expressing interest to serve in an administration; arguably, the most diverse administration in history, and appointees who, on average, served in their positions substantially longer than their predecessors. Strong ethics laws, in short, help recruitment.

The recent poll showed only a third of Americans trust government to do what is right, a decline of 14 percent from 2017. More than three-quarters of voters ranked corruption in government as a top issue in the 2018 election. With almost a third calling it the most important issue. At the same time, we know Americans are yearning for solutions to these problems, and real action on those solutions.

This Congress was elected with the highest voter turn-out in a midterm since 1914. Many of you were elected with a pledge to reform democracy. And in States across the country, major ballot measures were passed by large bipartisan margins to implement bold and creative reform. Voters spoke clearly. The best way to respond to a tax on democracy is to strengthen it, which is exactly what H.R. 1 does. We urge to you to pass it.

Thank you, and I look forward to answering your questions.

[Prepared Statement of Mr. Mehrbani follows:]

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*Written Testimony of*

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Hearing on H.R. 1: Strengthening Ethics Rules for the Executive Branch

Committee on Oversight and Reform

United States House of Representatives

Wednesday, February 6, 2019

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I would like to thank Chairman Cummings, Ranking Member Jordan, and the entire Committee for the opportunity to submit this statement for the record in support of House Resolution 1, the *For the People Act* (“the Act”) – a sweeping set of sorely needed reforms to revitalize and restore faith in our democracy.

This testimony is based on my years of service in government – as a policy advisor at the Department of Housing and Urban Development; as an associate counsel and special assistant to the president, as general counsel for the Peace Corps, an executive branch agency; as an assistant to the president and director of the Presidential Personnel Office in the White House; and as a member of the 2016 White House Transition Coordinating Council.

It is also based on my work since leaving government at the Brennan Center, a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. The Brennan Center’s experts have testified dozens of times over the last decade before Congress and state legislatures around the country. Officials across the political spectrum have relied on the Brennan Center’s research in crafting innovative policies. Indeed, a number of the Center’s signature policy proposals have been incorporated into the Act.

The Brennan Center enthusiastically supports H.R. 1. It would be historic legislation. For far too long, public trust in government has declined, as longstanding problems with our system of self-government have worsened. In this past election, we witnessed the result. Long lines. Vast sums of dark money, thanks to *Citizens United* and other misguided rulings. Harmful rules and practices that made it harder for many, especially voters of color, to cast their ballot. The ongoing challenges of gerrymandering, inadequate election administration, and at-risk technology.

But in the 2018 election, we also saw the awakening of citizens to the urgent need for action. This Congress was elected with the highest voter turnout since 1914. Many of you were elected with a pledge to reform democracy. And in states across the country, major ballot measures were passed by large bipartisan margins to implement bold and creative reform. Voters spoke clearly: the best way to respond to attacks on democracy is to strengthen it.

If we cherish American democracy, the world’s oldest such system, we must acknowledge that it urgently needs repair. It is, thus, fitting that this bill is designated as the very first introduced in this Congress. Democracy reform must be a central challenge for our politics now and going forward.

**Protecting the Right to Vote.** Among other things, the Act will bring automatic, online, and same-day voter registration to voters across the country, which we know from the experience of more than a dozen states will lead to big gains in voter registration and participation, as well as decreases in errors and voter disenfranchisement. It affirms a strong commitment to restoring the full protections of the 1965 Voting Rights Act, which was hobbled by the Supreme Court’s 2013 decision in *Shelby County v. Holder*, resulting in a wave of discriminatory and restrictive voting measures across the country. It provides all voters with the flexibility to vote early during the two weeks before Election Day, which will boost turnout and make it easier for hard-working Americans to vote. And it will restore voting rights to citizens with past criminal convictions

living in our communities, strengthening those communities, offering a second chance to those who have paid their debts to society, and removing the stain of a policy born out of Jim Crow.

**Empowering Citizens.** The Act creates a small-donor matching system for congressional elections to amplify the voices of average Americans. A similar system has existed for decades in New York City, where it has diversified the pool of voters donating to candidates, helped candidates of modest means run for office, and allowed elected officials to spend more time speaking with their constituents rather than dialing for dollars from big donors. It gives ordinary citizens a louder voice, even in the face of Super PACs and dark money. The Act also revamps the presidential public financing system, closes the “dark money” loophole in existing campaign finance disclosure laws, extends transparency requirements to online political ads, and overhauls the dysfunctional Federal Election Commission. These reforms will reduce public corruption, make elected leaders more accountable to the public, allow voters to better detect who is trying to influence them and whether elected leaders are in the pocket of “moneyed interests,”<sup>1</sup> and help keep foreign money out of our campaigns.

**Ensuring Fair, Effective, and Accountable Representation.** The Act curbs extreme partisan gerrymandering by ensuring that states draw congressional districts using independent redistricting commissions, follow fair criteria for line-drawing, and increase transparency in the redistricting process, while ensuring fair representation for diverse communities. In addition to stemming anti-democratic gerrymandering practices, these reforms will ensure that the electoral system is more responsive and accountable to the voters and includes more competitive races, as we know from the experience of states that currently use similar practices.

**Securing Elections from Interference.** The Act contains a number of provisions for making America’s elections more secure and less susceptible to foreign cyber-attacks. It requires states to replace old paperless machines and provides new resources to states to enhance their security efforts and develop auditing processes. Upgrading our aging voting infrastructure will also help reduce the unconscionably long lines that so many voters experience every election.

**Strengthening Government Ethics and Transparency.** Finally, the Act shores up ethics rules in the executive branch by increasing transparency about senior officials’ conduct, strengthens enforcement of ethics rules, and slows the “revolving door.” It also adopts stronger ethics rules for the legislative and judicial branches, helping make clear that Congress and the courts should also follow a set of ethics standards like the rest of the federal government.

This testimony focuses on this last point – ethics in government.

## I. Background

We are facing a crisis of confidence in American democracy today – a crisis that existed long before the recent government shutdown. A recent poll showed only a third of Americans trust their government “to do what is right” — a decline of 14 percent from 2017.<sup>2</sup> More than three-

<sup>1</sup> *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003)).

<sup>2</sup> Uri Friedman, “Trust Is Collapsing in America,” *The Atlantic*, Jan. 21, 2018, <https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/>.

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quarters of voters ranked corruption in government as a top issue in the 2018 election, with almost a third calling it the most important issue.<sup>3</sup> I believe two factors are to blame: (1) the pervasive sentiment that people are not adequately or equally represented in government; and (2) the belief that public officials put their own best interest ahead of the public's.

These views are not unfounded. In the most recent election, we witnessed some of the most troubling attempts at voter suppression in years.<sup>4</sup> We saw malfunctioning of voting machines that caused long lines at the polls and voter registration problems.<sup>5</sup> We also saw the impact of big money in politics, which gives the very wealthiest donors a far greater say than other Americans,<sup>6</sup> and the ongoing prevalence of extreme partisan gerrymandering that distorts the political process.<sup>7</sup>

At the same time, with each passing day, we read another story about alleged or real ethics abuses by sitting government officials, ranging from senior officials utilizing their official positions for their own personal financial benefit<sup>8</sup> to selective or lax enforcement of ethics rules when senior or well-connected officials run afoul of them.<sup>9</sup>

Americans are yearning for solutions to these problems — and real action on those solutions. The 2018 election featured record-breaking turnout,<sup>10</sup> with many voters motivated by democracy

<sup>3</sup> Ashley Kirzinger, Bryan We, Cailey Muñana, and Mollyann Brodie, "Kaiser Health Tracking Poll – Late Summer 2018: The Election, Pre-Existing Conditions, and Surprises on Medical Bills," *Henry J. Kaiser Family Foundation*, Sept. 5, 2018, <https://www.kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-late-summer-2018-the-election-pre-existing-conditions-and-surprises-on-medical-bills/>.

<sup>4</sup> Wendy R. Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, 2018, available at <https://www.brennancenter.org/publication/state-voting-2018>; Rebecca Ayala, "Voting Problems 2018," *Brennan Center for Justice*, Nov. 5, 2018, <https://www.brennancenter.org/blog/voting-problems-2018>.

<sup>5</sup> Edgardo Cortés and Lawrence Norden, "Paper Trails for All," *Brennan Center for Justice*, Nov. 13, 2018, <https://www.brennancenter.org/blog/paper-trails-all>.

<sup>6</sup> Anu Narayanswamy, Christ Alcantara, and Michelle Ye Hee Lee, "Meet the Wealthy Donors Pouring Millions into the 2018 Elections," *Washington Post*, Oct. 26, 2018, [https://www.washingtonpost.com/graphics/2018/politics/supercap-donors-2018/?utm\\_term=.68bcdbe7c951](https://www.washingtonpost.com/graphics/2018/politics/supercap-donors-2018/?utm_term=.68bcdbe7c951).

<sup>7</sup> Laura Royden, Michael Li, and Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 2018, available at <https://www.brennancenter.org/publication/extreme-gerrymandering-2018-midterm>.

<sup>8</sup> See, e.g., Lisa Friedman, "Scott Pruitt Sought 'Business Opportunity,' With Chik-fil-A While Leading E.P.A.," *New York Times*, June 5, 2018, <https://www.nytimes.com/2018/06/05/climate/pruitt-epa-chick-fil-a.html>; Brad Plumer and Eric Lipton, "Scott Pruitt, E.P.A. Chief, Rented Residence from Wife of Energy Lobbyist," *New York Times*, March 30, 2018, <https://www.nytimes.com/2018/03/30/climate/scott-pruitt-epa-rental.html>; Dan Alexander, "Wilbur Ross Scheduled Meetings with Chevron, Boeing Despite Conflicts of Interest," *Forbes*, Oct. 25, 2018, <https://www.forbes.com/sites/danalexander/2018/10/25/wilbur-ross-scheduled-meetings-with-chevron-boeing-despite-conflicts-of-interest/>; Juliet Eilperin, Josh Dawsey, and Lisa Rein, "White House Concerned Interior Secretary Zinke Violated Federal Rules," *Washington Post*, Nov. 1, 2018, [https://www.washingtonpost.com/national/health-science/white-house-concerned-interior-secretary-ryan-zinke-violated-federal-rules/2018/11/01/e5e4d2f4-dddc-11e8-b3f0-62607289efee\\_story.html](https://www.washingtonpost.com/national/health-science/white-house-concerned-interior-secretary-ryan-zinke-violated-federal-rules/2018/11/01/e5e4d2f4-dddc-11e8-b3f0-62607289efee_story.html).

<sup>9</sup> See, e.g., Richard Pérez-Peña and Rachel Abrams, "Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns," *New York Times*, Feb. 9, 2017, <https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html>; Michelle Ye Hee Lee, "White House Adviser Kellyanne Conway Violated Hatch Act, Federal Investigator Says," *Washington Post*, Mar. 6, 2018, [https://www.washingtonpost.com/politics/white-house-adviser-kellyanne-conway-violated-hatch-act-federal-investigator-says/2018/03/06/28995c06-2162-11e8-94da-ebf9d112159c\\_story.html](https://www.washingtonpost.com/politics/white-house-adviser-kellyanne-conway-violated-hatch-act-federal-investigator-says/2018/03/06/28995c06-2162-11e8-94da-ebf9d112159c_story.html).

<sup>10</sup> Camila Domonske, "A Boatload of Ballots: Midterm Voter Turnout Hit 50-Year High," *NPR*, Nov. 8, 2018, <https://www.npr.org/2018/11/08/665197690/a-boatload-of-ballots-midterm-voter-turnout-hit-50-year-high>.

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reforms appearing on ballot measures around the country and the commitment by candidates from both parties to address these defining challenges.<sup>11</sup> The message from voters was loud and clear — they want reform — and all of us at the Brennan Center for Justice are pleased to see this Congress respond by moving forward with a bold and transformative package of reforms as the first legislative initiative, in H.R. 1.

## **II. Ethics in Government**

For a number of years, we have been witnessing an erosion of the ethical guardrails that generally prevented abuse by public officials. The recent spate of allegations focusing on ethical transgressions by public officials has further undermined faith in our democratic institutions and highlights the urgent need for Congress to respond with effective reforms.

I hope to convey four points in this testimony:

1. Ethics practices followed by past administrations — Republican and Democratic — are consistent with and bolster fundamental democratic principles. But they are not required by law, though many long assumed that they were.
2. Legislative reform is needed to fill the gaps. Without binding regulation, ethics in the executive branch depends primarily on leadership — namely, a commitment to visible and sustained leadership on ethics issues, which is not guaranteed. We need to shore up the guardrails that exist to ensure consistent ethical behavior from senior political leaders.
3. A robust and transparent ethics program supports the goals of the political appointments process. Though some argue that common-sense ethics rules deter talent from federal government service, in my experience, the opposite is true. In fact, a commitment by an administration to ethical conduct in government can result in more interest from quality candidates from a diversity of backgrounds who are willing to serve longer.
4. H.R. 1 contains common-sense reform proposals that are strong first steps for addressing existing gaps in government ethics rules. These proposals warrant strong bipartisan support from all Members of Congress.

### **A. Observed Gaps in Existing Rules**

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<sup>11</sup> Wendy Weiser and Daniel Weiner, “Voters are Hungry for Reform: Congress Must Deliver,” *The Hill*, Nov. 11, 2018, <https://thehill.com/opinion/campaign/415842-voters-are-hungry-for-reform-congress-must-deliver>. See also *Elections in America: Concerns Over Security, Divisions Over Expanding Access to Voting*, Pew Research Center, Oct. 29, 2018, available at <http://www.people-press.org/2018/10/29/elections-in-america-concerns-over-security-divisions-over-expanding-access-to-voting/> (showing bipartisan support among Americans for, among other things, streamlining the way people register to vote and cast ballots, restoring voting rights to felons who have completed their sentences, and making Election Day a national holiday).

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Our democracy is rooted in the idea that government officials should serve the public and not themselves. Government power derives from the people and is intended to be used for the people. So central is this idea that it is expressly supported by our founding documents, including in specific provisions in the Constitution.<sup>12</sup> Periods of real and perceived increases in corruption in public life previously resulted in a bipartisan recommitment to this idea.

#### 1. Ethics Reforms Consistently Received Bipartisan Support in Congress

Prohibitions on conflicts of interest by government employees have been in place for more than a century.<sup>13</sup> More recently, in the wake of Watergate, Congress strengthened existing conflict of interest laws by passing the Ethics in Government Act of 1978 (EGA). Its purposes were to renew a sense of trust in government and to promote a general philosophy of ethics in public service by mandating, in part, a public financial disclosure requirement, the establishment of the Office of Government Ethics to promote and lead the administration of an ethics program in the executive branch, and prohibitions to slow the “revolving door” between public service and private business.<sup>14</sup>

At the time, there were several arguments against these reforms: that they would deter potential nominees and candidates for federal office; that they would overly burden senior officials; that the rules would be difficult to administer; and that disclosure in particular would slow down the appointment process.<sup>15</sup> In spite of these objections, the EGA was passed with bipartisan support and signed by President Jimmy Carter.

In 1989, when President George H. W. Bush signed into law amendments to strengthen key provisions of the EGA,<sup>16</sup> similar arguments were made against reform.<sup>17</sup> Yet the bill was passed with bipartisan support.<sup>18</sup> Further bipartisan action was taken in 1995 to prevent undue influence by the private sector over governmental activities with the passage of the Lobbying Disclosure Act, which strengthened the transparency and disclosure requirements for defined activities of lobbyists and lobbying firms.<sup>19</sup>

<sup>12</sup> U.S. Const. Art. I § 9 cl. 8; U.S. Const. art. II, § 1, cl. 7.

<sup>13</sup> Olivia B. Waxman, “Questions of Profit in Politics Raised by Trump Administration Are Older than You May Think,” *TIME*, Mar. 10, 2017, <http://time.com/4669729/conflict-of-interest-history/>.

<sup>14</sup> S. Rep. No. 95-170 (1977), reprinted in 1978 U.S.C.C.A.N. 4216. The EGA also established the rules and procedures for the appointment of independent counsels, which I omit from discussion because it is not the subject of today’s hearing.

<sup>15</sup> Charles R. Babcock, “Hill Leaders Agree on Plan to Soften Federal Ethics Code,” *Washington Post*, Mar. 30, 1979; James D. Carroll and Robert N. Roberts, “If Men Were Angels: Assessing the Ethics in Government Act of 1978,” *Policy Studies Journal* 17 (Winter 1988-89): 444.

<sup>16</sup> The Ethics Reform Act of 1989 extended the “revolving door” restrictions to the legislative branch, increased the financial disclosure requirements, imposed greater limits on gifts and travel, and imposed additional restrictions on outside earned income for high-salaried, non-career employees in all branches. U.S. President George H. W. Bush, “Statement on Signing the Ethics Reform Act of 1989,” *Weekly Compilation of Presidential Documents*, vol. 25, no. 48 (Nov. 30, 1989), 1855.

<sup>17</sup> See, e.g., “New Ethics Law Will Squeeze Federal Employees,” *Associated Press*, Dec. 27, 1990, available at <https://www.nytimes.com/1990/12/27/us/new-ethics-law-will-squeeze-federal-employees.html>.

<sup>18</sup> 135 Cong. Rec. S15964-02, 1989 WL 189219.

<sup>19</sup> Under the LDA, individuals are required to register and disclose their activities if they are employed or retained by a client for financial or other compensation, and for services that include more than one lobbying contact, and

## 2. Presidents from Both Major Parties Filled the Gaps

Separate from these laws, Republican and Democratic presidents have taken additional steps to promote a culture of ethics in their administrations that have proven critical. One prominent example is the practice of presidential candidates disclosing certain personal tax information to the public. After President Richard Nixon released his personal tax returns in 1973,<sup>20</sup> all major party presidential nominees voluntarily disclosed their returns to the public.<sup>21</sup> This practice provided the public with more information about candidates' personal finances and confirmed that candidates were paying their fair share in taxes.

Presidents and vice presidents also chose to comply with conflict of interest laws that do not technically apply to them. Since the passage of the EGA, the public could count on presidents and vice presidents to divest from potentially conflicting assets or to keep their investments in a blind trust whose contents were hidden from them.<sup>22</sup> This practice reinforced the general view that our most senior leaders should only take official action in the public's best interest, without consideration of their own personal financial interest.

Presidents also issued executive orders and memoranda supplementing the ethics rules applicable to personnel in their administrations.<sup>23</sup> Three of those orders – issued by Presidents Clinton, Obama, and Trump – contained an “ethics pledge” that appointees were required to sign as a condition of their employment.<sup>24</sup> The orders contained significant and meaningful rules to further reduce the influence of private sector and other actors on government activities, that is, to slow the “revolving door.”<sup>25</sup> The orders specifically adopted restrictions on lobbyists entering

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lobbying activities for that client must amount to twenty percent or more of the time that the individual expends on services to that client over a six-month period. 2 U.S.C. § 1603.

<sup>20</sup> Revelations that President Nixon had sought to evade his federal income tax obligations in the early 1970s using dubious charitable deductions seriously damaged his credibility with the public and arguably set the stage for his resignation from office. Stephen Mihm, “Nixon’s Failed Effort to Withhold His Tax Returns,” *Bloomberg*, Aug. 2, 2016, <https://www.bloomberg.com/view/articles/2016-08-02/nixon-s-failed-effort-to-withhold-his-tax-returns>.

<sup>21</sup> See “Presidential Tax Returns,” *Tax History Project*, accessed Feb. 1, 2019, <http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns>.

<sup>22</sup> Matt O’Brien, “Donald Trump Won’t Do What Ronald Reagan, George H. W. Bush, Bill Clinton and George W. Bush Did,” *Washington Post*, Nov. 15, 2016, <https://www.washingtonpost.com/news/wonk/wp/2016/11/15/ronald-reagan-did-it-george-h-w-bush-did-it-bill-clinton-did-it-george-w-bush-did-it-donald-trump-wont-do-it/>.

<sup>23</sup> See Jacob R. Straus, *Ethics Pledges and Other Executive Branch Appointee Restrictions Since 1993: Historical Perspective, Current Practices, and Options for Change*, CRS Report No. R44974 (Washington, D.C.: Congressional Research Service, 2017), 7, <https://fas.org/srg/crs/misc/R44974.pdf>.

<sup>24</sup> Each pledge defined “appointee” in a slightly different manner but generally applied to full-time, non-career presidential appointees, non-career appointees in the Senior Executive Service, and appointees to confidential or policymaking positions. Straus, *Ethics Pledges*, 18-25. Note that President Clinton revoked his ethics pledge prior to leaving office, Exec. Order No. 13,184, 66 Fed. Reg. (Dec. 28, 2000) (Revocation of Executive Order 12,834), and President Trump’s order revoked President Obama’s pledge. Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017), § 6.

<sup>25</sup> Perhaps unsurprisingly, public detractors claimed these orders would deter exceptional candidates from pursuing positions in these administrations and harm employment prospects when appointees departed government. See, e.g., *Collateral Damage: How the Obama Administration’s Ethics Restrictions on Public Service Have Harmed Nonprofit Advocacy and the Public Interest*, Center for Lobbying in the Public Interest, 2011, <https://opensocietypolicycenter.org/wp-content/uploads/CollateralDamageCLP11020111.pdf>; Ryan Grim, “Obama’s Anti-Lobbyist Policy Causing Unintended Harm,” *Huffington Post*, Apr. 5, 2009, [https://www.huffingtonpost.com/2009/03/05/obamas-anti-lobbyist-poli\\_n\\_172244.html](https://www.huffingtonpost.com/2009/03/05/obamas-anti-lobbyist-poli_n_172244.html). Some reports indicate that



government and appointees leaving government to lobby. President Trump's and President Clinton's orders also contained prohibitions on appointees representing foreign principals, as defined by the Foreign Agents Registration Act, upon leaving office.<sup>26</sup>

### 3. The Commitment to Unwritten Rules Is Eroding

The fact that these presidential practices were not legally required was not seen as a major problem by members of the public or Congress because our leaders generally committed to them and aimed to foster an ethical and accountable government. Today, we can no longer assume administrations will follow these unwritten rules.

As we have seen, President Trump's resistance to publicly disclosing his personal or business tax returns raises serious doubts among many in the public about his financial ties and whether he is paying his fair share. Even more concerning are the questions about President Trump's conflicts of interest following his decision to keep ownership and control of his global business empire.<sup>27</sup> The public outcry and reaction to the president's departure from these longstanding unwritten rules serve as validation of the rules' importance. Doubts about a president's interests can sap his legitimacy and the legitimacy of his actions, even when they are not actually motivated by self-interest.

The implementation of President Trump's ethics pledge has also raised questions about how thoroughly it is being followed. The efficacy of such pledges in promoting public trust depends, in part, on how they are administered. For example, President Obama's included important

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these arguments persuaded President Clinton to revoke his executive order prior to leaving office. John Mintz, "Clinton Reverses 5-Year Ban on Lobbying by Appointees," *Washington Post*, Dec. 29, 2000, [https://www.washingtonpost.com/archive/politics/2000/12/29/clinton-reverses-5-year-ban-on-lobbying-by-appointees/e5a0571f-5c54-4988-adc6-5571a7557e83/?utm\\_term=.0a70ab32c85e](https://www.washingtonpost.com/archive/politics/2000/12/29/clinton-reverses-5-year-ban-on-lobbying-by-appointees/e5a0571f-5c54-4988-adc6-5571a7557e83/?utm_term=.0a70ab32c85e); Jason Peckenpaugh, "Clinton Lifts Lobbying Restrictions on Appointees," *Government Executive*, Jan. 2, 2001, <https://www.govexec.com/federal-news/2001/01/clinton-lifts-lobbying-restrictions-on-appointees/8217/>.

<sup>26</sup> Exec. Order No. 13,770, § 1 ¶ 4; Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 20, 1993), § 1 ¶ 3.

<sup>27</sup> Numerous situations have arisen where it is hard to discern whether the president is acting in support of his personal financial interest or the public's interest. For example, the Trump administration's reversal of long-pending plans to sell and relocate the Federal Bureau of Investigation's headquarters after the president reportedly showed an interest in the decision has led some to believe the course correction was influenced by the president's desire to eliminate potential competition with the Trump International Hotel, operating out of the Old Post Office Building across the street from the FBI's current headquarters. Thomas Kaplan, "Trump's Focus on a Washington Building Draws Scrutiny," *New York Times*, Oct. 18, 2018, <https://www.nytimes.com/2018/10/18/us/politics/fbi-headquarters-building-trump.html>; Niels Lesniewski, "IG Confirms Trump's Involvement in FBI Headquarters Project Across from His Hotel," *Roll Call*, Aug. 27, 2018, <https://www.rollcall.com/news/politics/ig-confirms-trumps-involvement-fbi-headquarters-project-across-hotel>. The Inspector General of the General Services Administration (GSA) recently concluded that GSA, in analyzing the validity of the lease of the Old Post Office Building, improperly excluded issues raised under the Constitution's Emoluments Clauses in its analysis. The IG found that this omission affected GSA's conclusion that the lease remains valid. U.S. General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease* (Washington, D.C.: U.S. General Services Administration Office of Inspector General, 2019): 4-6, [https://www.gsaig.gov/sites/default/files/ipa-reports/IE19-002%20OIG%20EVALUATION%20REPORT-GSA%27s%20Management%20of%20Administration%20of%20OPO%20Building%20Lease\\_January%2016%202019\\_Redacted.pdf](https://www.gsaig.gov/sites/default/files/ipa-reports/IE19-002%20OIG%20EVALUATION%20REPORT-GSA%27s%20Management%20of%20Administration%20of%20OPO%20Building%20Lease_January%2016%202019_Redacted.pdf). The report raises significant questions about whether improper influence or motivation contributed to GSA's decision-making, which might have been avoided if the president had followed precedent and divested.

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transparency requirements, including a provision that OGE publish an annual report on the administration of the ethics order and a list of appointees entering and exiting public service who received waivers from the pledge's requirements. It also included a criterion for issuing waivers, which provided some consistency in their authorization. President Trump's, on the other hand, does not.<sup>28</sup> In fact, the current administration made unprecedented claims about the applicability of OGE's rules and regulations, initially balking at OGE's request to review and disclose waivers issued to White House staff.<sup>29</sup> And the lack of a criterion for evaluating and issuing waivers has made the process susceptible to abuse.<sup>30</sup>

In short, we can no longer assume that presidents will follow the norms and practices of their predecessors. Presidents may simply not show the same commitment to ethics rules as we have come to expect. And as we have seen, past erosion will lead to future abuse. We need a broader set of reforms to ensure our leaders remain committed to using their powers to advance the people's interests. That begins with enshrining transparency requirements in law so the public is able to identify improper influences, providing a mechanism for ensuring accountability when abuse occurs, and eliminating avenues for personnel to handle matters involving their personal or financial interests.

### B. Filling the Gaps Is Essential

Without additional regulation, the effectiveness of the executive branch ethics program will depend entirely on future presidents' and agency heads' willingness to voluntarily adopt effective accountability and ethics mechanisms.

In the administration in which I happened to work, the president's steadfast commitment to ethics filtered down throughout government and drove many related processes. For example, when I ran the Presidential Personnel Office in the White House, we followed certain processes not just because my staff and I were committed to the ethics rules but because President Obama demanded that we follow strong ethics practices in administering the personnel process. Among

<sup>28</sup> Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009) §§ 3-4.

<sup>29</sup> Eric Lipton, "Top Ethics Officer Challenges Trump Over Secret Waivers for Ex-Lobbyists," *New York Times*, May 1, 2017, <https://www.nytimes.com/2017/05/01/us/politics/top-ethics-officer-challenges-trump-over-secret-waivers-for-ex-lobbyists.html>; Eric Lipton and Steve Eder, "White House Details Ethics Waivers for Ex-Lobbyists and Corporate Lawyers," *New York Times*, May 31, 2017, <https://www.nytimes.com/2017/05/31/us/politics/lobbyist-ethics-waivers-trump-administration.html>. Four of the fourteen waivers initially released in May of 2017 did not indicate the dates on which they were approved. Of those four, three were initialed, and one was signed. Sara Swann, "Release of Ethics Waivers Still Problematic," *Center for Responsive Politics*, June 5, 2017, <https://www.opensecrets.org/news/2017/06/release-ethics-waivers-still-problematic/>. Experts have speculated that the waiver disclosure seems insufficient in light of other known issues in executive branch staffing. Marilyn Geewax, "Trump Administration Names More Former Lobbyists with Ethics Waivers," *NPR*, June 7, 2017, <https://www.npr.org/2017/06/07/531093101/trump-administration-names-more-former-lobbyists-with-ethics-waivers>.

<sup>30</sup> President Trump's executive order allows for waivers of any provisions of the ethics pledge, but without specific conditions (for example, matters of national security) that may warrant the grant of a waiver. Compare Exec. Order 13,770, § 3 and Exec. Order No. 13,490, § 3. One statistic shows that President Trump issued around the same number of waivers to White House staff in the first four months of his administration as President Obama did over his entire eight years. Daniel Van Schooten and Laura Peterson, "Trump's Ethics Pledge Is Paper-Thin," *Project on Government Oversight*, June 6, 2017, <https://www.pogo.org/investigation/2017/06/trumps-ethics-pledge-is-paper-thin/>.

other things, this meant collaboratively working with the Office of Government Ethics to pre-clear candidates in advance of their nominations,<sup>31</sup> though no law required us to do so. In reviewing financial disclosures, we worked with career ethics professionals to ensure we were not cutting corners or holding our appointees to different standards. And our standard procedure was to have the Federal Bureau of Investigation complete background investigations before nominating individuals to positions requiring Senate confirmation.

To members of small and large organizations alike, it goes without saying that leadership starts at the top. It's no different when it comes to ethics in government. There is no substitute for the president, vice president, and agency heads demonstrating and articulating a steadfast commitment to a vigorous ethics program and the expectation that appointees act ethically and with integrity. As a result, other senior officials are: more likely to set time aside in their busy schedules to attend mandatory ethics trainings; more likely to encourage and remind their subordinates to attend trainings; more likely to meet deadlines pertaining to the sometimes burdensome financial disclosure filing process; and more likely to work collaboratively with Designated Agency Ethics Officials and other ethics officers. These seemingly mundane tasks are critically important to maintaining public support and confidence in government actions.

But when this commitment is lacking, and without appropriate safeguards in place, it can result in real ethical lapses and actions that run afoul of laws and regulations, not to mention incredible waste of taxpayer resources. And when there is an insufficient disciplinary or other response to initial lapses, then the problem compounds itself, signaling to others that the rules don't matter.

The past two years provide ample examples, including:

- **Improper Use of Government Position.** During a television appearance from the White House briefing room, the counselor to the president promoted Ivanka Trump's product line, despite ethics rules that prohibit federal employees from using their official positions to promote commercial products.<sup>32</sup> In another instance, the same counselor was found by the Office of Special Counsel to have violated the Hatch Act when she weighed in on the Alabama special election for U.S. Senate during interviews from the White House lawn.<sup>33</sup>

<sup>31</sup> Witnessing the Trump administration nominate individuals before OGE and the FBI have completed their reviews has been troubling enough, but much worse has been witnessing the Senate take the unprecedented step of advancing nominees without the benefit of these critical reviews. See Ed O'Keefe and Sean Sullivan, "Ethics Official Warns Against Confirmations Before Reviews Are Complete," *Washington Post*, Jan. 7, 2017, [https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8\\_story.html](https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8_story.html).

<sup>32</sup> Richard Pérez-Peña, "Ethics Watchdog Denounces Conway's Endorsement of Ivanka Trump Products," *New York Times*, Feb. 14, 2017, <https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html>.

<sup>33</sup> Letter from Henry J. Kerner, Special Counsel, to Donald J. Trump, President (Mar. 6, 2018), available at <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf>.

The former secretary of the Interior was also alleged to have violated the Hatch Act in connection with his participation in an event with the governor of Florida and his use of social media.<sup>34</sup> There are multiple inquiries into other alleged acts of impropriety by the former secretary, including whether he used his official position to personally benefit from a Montana development deal linked to the energy giant Halliburton.<sup>35</sup>

- **Violating Appropriations Law and Improperly Using Government Resources.** The former administrator of the Environmental Protection Agency resigned under a cloud of scandal after a variety of ethics allegations were levied against him. They related to: EPA's violation of federal spending laws to install an approximately \$43,000 soundproof booth in the administrator's office;<sup>36</sup> rental of one or more rooms in a condo owned by a campaign contributor who was lobbying his agency;<sup>37</sup> extensive use of first-class flights and taxpayer-funded trips to Morocco, Italy, and other destinations;<sup>38</sup> use of his security detail to run odd errands;<sup>39</sup> and his use of official resources to pursue a Chick-fil-A franchise opportunity for his wife.<sup>40</sup>
- **Violating Ethics Agreement and Possibly Conflict of Interest Rules.** The secretary of Commerce's alleged participation in matters related to his family's financial interests and non-compliance with his ethics agreement, whether intentional or unintentional, have significantly harmed the public trust. His failure to timely divest from potentially conflicting assets pursuant to his ethics agreement and other reported errors and omissions on his public financial disclosure raise the possibility that he used his official position for personal financial gain.<sup>41</sup> There are numerous allegations that he continues to involve himself in matters that would reportedly benefit his family's financial interests.<sup>42</sup>

<sup>34</sup> Lisa Friedman, "A Guide to the Ryan Zinke Investigations," *New York Times*, Oct. 31, 2018, updated Dec. 15, 2018, <https://www.nytimes.com/2018/10/31/climate/ryan-zinke-investigations.html?module=inline>.

<sup>35</sup> *Id.*

<sup>36</sup> Thomas H. Armstrong, General Counsel, Government Accountability Office, "B-329603, U.S. Environmental Protection Agency — Installation of Soundproof Privacy Booth" (memorandum, Washington, D.C.: Government Accountability Office, 2018), available at <https://www.gao.gov/assets/700/691272.pdf>.

<sup>37</sup> Plumer and Lipton, "Scott Pruitt, E.P.A. Chief, Rented Residence from Wife of Energy Lobbyist."

<sup>38</sup> Eric Lipton, Lisa Friedman, and Kenneth P. Vogel, "A Lobbyist Helped Scott Pruitt Plan a Morocco Trip. Then Morocco Hired the Lobbyist." *New York Times*, May 1, 2018, <https://www.nytimes.com/2018/05/01/us/pruitt-epa-trips-lobbyists.html>.

<sup>39</sup> Juliet Eilperin, Josh Dawsey, and Brady Dennis, "Pruitt Enlisted Security Detail in Picking up Dry Cleaning, Moisturizing Lotion," *Washington Post*, June 8, 2018, [https://www.washingtonpost.com/news/energy-environment/wp/2018/06/07/pruitt-enlisted-security-detail-in-picking-up-dry-cleaning-moisturizing-lotion/?utm\\_term=.1f04c83a2e41](https://www.washingtonpost.com/news/energy-environment/wp/2018/06/07/pruitt-enlisted-security-detail-in-picking-up-dry-cleaning-moisturizing-lotion/?utm_term=.1f04c83a2e41).

<sup>40</sup> Friedman, "Scott Pruitt Sought 'Business Opportunity' with Chick-fil-A While Leading E.P.A."

<sup>41</sup> Ana Swanson, "Wilbur Ross Says He Will Sell Stock After Watchdog Warns of Potential for Criminal Violation," *New York Times*, July 13, 2018, <https://www.nytimes.com/2018/07/13/us/politics/wilbur-ross-stocks.html>.

<sup>42</sup> He has reportedly conducted official meetings with executives from an oil company in which his wife holds a financial interest. Dan Alexander, "Wilbur Ross Scheduled Meetings with Chevron, Boeing Despite Conflicts of Interest." He is also leading trade negotiations with China and Russia, despite knowing that the assets he transferred to his family members apparently include interests in China and Russia. And he is leading an investigation into imports of car parts at a time when his family is believed to own an interest in one of the largest manufacturers of car parts in the world. Dan Alexander, "Lies, China and Putin: Solving the Mystery of Wilbur Ross' Missing

- **Possible “Revolving Door” Violations.** Apart from Cabinet members and senior White House staff, there have also been many examples of lower-level political appointees working on specific regulatory matters on which they previously lobbied the government for industry, creating at least an appearance of biased decision-making.<sup>43</sup>

Ethics challenges exist in every administration. But without effective rules and regulations, one can only hope for visible and sustained leadership, including accountability when ethics lapses do occur. Unfortunately, when leaders do not exhibit the requisite leadership, other officials are less likely to take ethics rules and their official duties seriously. This can result in intentional or unintentional violations of ethics rules, which undermine public trust and confidence that government is acting in the public’s best interest.

### C. Strong Ethics Rules Support the Personnel Process

Presidential administrations should aim to fill political appointments with the most qualified, competent, and experienced candidates. A common refrain whenever stronger ethics rules or post-employment restrictions are proposed is that they hinder recruitment efforts for bringing talent into government. It was an argument against the EGA, the 1989 amendments to the Act, the LDA, and the Obama Ethics Pledge. My experience and available data demonstrate that a commitment to government ethics advances personnel goals rather than hinders them.

First, when President Obama announced his intent to have “the strictest, and most far reaching ethics rules of any transition team in history,”<sup>44</sup> it did not slow down the incredible national interest by Americans to serve in his administration. After President Obama won the 2008 election, the administration received at least 130,000 completed applications.<sup>45</sup> The interest in serving in the administration did not wane during the president’s two terms. Even in the last months and weeks of President Obama’s administration, his Presidential Personnel Office continued to receive new applications for consideration. In short, interest in serving remained strong throughout the president’s term, even with the administration’s ethics standards widely known.

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Fortune,” *Forbes*, June 18, 2018, <https://www.forbes.com/sites/danalexander/2018/06/18/lies-china-and-putin-solving-the-mystery-of-wilbur-ross-missing-fortune-trump-commerce-secretary-cabinet-conflicts-of-interest/#2b595d537e87>. See also *Complaint Regarding Commerce Secretary Wilbur L. Ross Jr. from the Campaign Legal Center to the Inspector General for the U.S. Department of Commerce*, Campaign Legal Center, Aug. 13, 2018, available at <https://campaignlegal.org/sites/default/files/2018-08/Hon%20Wilbur%20L.%20Ross%20Jr.%20Complaint%20%2813%20Aug%202018%29.pdf>.

<sup>43</sup> See, e.g., David Pittman, “Former Drug Industry Lobbyist Helps Steer Trump Drug Plan,” *Politico*, May 27, 2018, <https://www.politico.com/story/2018/05/27/trump-drug-plan-lobbyist-joe-grogan-609170>; Laura Peterson, “The Snack Food and Corn Syrup Lobbyist Shaping Trump’s Dietary Guidelines for Americans,” *Project on Government Oversight*, Aug. 23, 2018, <https://www.pogo.org/investigation/2018/08/the-snack-food-and-corn-syrup-lobbyist-shaping-trumps-dietary-guidelines-for-americans/>.

<sup>44</sup> Jeanne Cummings, “Obama’s Ethics Rules for Lobbyists,” *Politico*, Nov. 11, 2008, <https://www.politico.com/story/2008/11/obamas-ethics-rules-for-lobbyists-015515>.

<sup>45</sup> Neil A. Lewis, “300,000 Apply for 3,300 Obama Jobs,” *New York Times*, Dec. 15, 2008, <https://www.nytimes.com/2008/12/06/us/politics/06seek.html>.

## BRENNAN CENTER FOR JUSTICE

Second, according to data from the Office of Personnel Management, appointees serving in the Obama administration stayed in their positions longer than appointees in the prior two administrations.<sup>46</sup> Retention is frequently cited as a significant challenge in administrations, with associated high turnover costs. Steep learning curves also mean new appointees are not as impactful and effective as experienced ones. The Obama administration's retention numbers tell me that its ethics and personnel standards served to identify individuals who wanted to serve for the right reasons. The administration's ethics and personnel standards, combined with concerted professional development, training, and advancement opportunities, helped improve retention.

Third, the Obama administration was able to recruit appointees who were from as diverse backgrounds as, if not more diverse than, any presidential administration in history.<sup>47</sup> The president was able to recruit candidates from underrepresented backgrounds so that appointees in his administration reflected the diversity of the country they served. This is significantly consequential. Study after study demonstrates ways that diversity improves workplaces and fosters innovation and productivity.<sup>48</sup> This tells me that the administration's standards promoted personnel goals. Indicative of this success are: the administration's recruitment and appointment of the first woman to serve as chair of the Federal Reserve Board of Governors; the first African American to serve as Attorney General; the first Latina and Hispanic Supreme Court Justice; the first openly gay Secretary of the Army; the first woman and African American to serve as Librarian of Congress; and the first openly transgender White House staff member, among many other firsts.

Requesting a commitment from candidates that they will follow common-sense ethics rules and not use their prospective positions to enrich themselves is consistent with the aims of the holistic evaluation candidates undergo prior to appointment. The evaluation process looks to confirm that candidates have generally conducted themselves with professionalism, honesty, and integrity. Information from a candidate's personal, professional, and financial life is considered, which generally includes information contained in a financial disclosure and a background investigation. At its core, this process is meant to provide confidence in a candidate's qualifications and abilities, but it is also meant to confirm that a candidate will serve in a manner that is consistent with agency rules and is not likely to bring unnecessary embarrassment or distraction to an administration, which a commitment to government ethics helps ensure.

<sup>46</sup> See Attachment A, "Average Length of Service by Appointees in a Presidential Administration," White House, released Jan. 19, 2017 (based on data from the Office of Personnel Management).

<sup>47</sup> "Obama Ups Diversity in Appointees," *Washington Post*, Sept. 20, 2015, [https://www.washingtonpost.com/politics/obama-ups-diversity-in-appointees/2015/09/20/5b042aac-5ffb-11e5-8e9e-dce8a2a2a679\\_graphic.html?hpid=hp\\_hp-top-table-main-obama-diversity:homepage-link&utm\\_term=.df7e743bb55c](https://www.washingtonpost.com/politics/obama-ups-diversity-in-appointees/2015/09/20/5b042aac-5ffb-11e5-8e9e-dce8a2a2a679_graphic.html?hpid=hp_hp-top-table-main-obama-diversity:homepage-link&utm_term=.df7e743bb55c) (citing data collected by Professor Anne Joseph O'Connell, University of California, Berkeley School of Law).

<sup>48</sup> See, e.g., Sylvia Ann Hewlett, Melinda Marshall, and Laura Sherbin, "How Diversity Can Drive Innovation," *Harvard Business Review*, Dec. 2013, available at <https://hbr.org/2013/12/how-diversity-can-drive-innovation>; Vivian Hunt, Dennis Layton, and Sara Prince, "Why Diversity Matters," *McKinsey*, Jan. 2015, <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>; Roger C. Mayer, Richard S. Warr, and Jing Zhao, "Do Pro-Diversity Policies Improve Corporate Innovation?" *Financial Management* 47 (Fall 2018): 618.

Financial disclosure obligations, “revolving door” prohibitions, and other post-employment restrictions can dissuade some talented candidates from serving. But we should try to solve this problem by means other than allowing existing loopholes and weaknesses in our federal ethics regime to remain. We can reduce the burden of the financial disclosure process and streamline the paperwork and other requirements for presidential nominees. In my experience, the benefits of a strong ethics program far outweigh the potential for it to negatively affect recruitment. I suspect many more talented applicants are dissuaded from serving in an administration without a commitment to government ethics, when scandals plague the headlines and reported violations go unpunished, and there is a real risk of reputational harm to that administration’s appointees. Rather than creating a hurdle for recruitment to government service overall, a strong federal ethics program helps avoid scandal and ensures we are recruiting the right people for these critical roles of public trust.

#### **D. Congress Should Support the Ethics Reforms in the Act**

The ethics reforms set forth in the Act warrant strong bipartisan support from all Members. The values that undergird our system of representative government are being tested like never before. Ethical constraints on self-dealing at the highest levels of government are eroding. To reverse this process, Congress must put forward bold reforms to help ensure that officials act for the public good rather than private gain. The reforms proposed in the Act are a strong first step.

Of particular note, the Brennan Center supports the increases in independence and authority of OGE. With these reforms, OGE will be better positioned to prevent ethics violations before they occur, investigate allegations that harm public trust, and more effectively hold violators accountable to deter future ethical transgressions.<sup>49</sup>

The Brennan Center looks forward to continuing to work with Congress on these and other reforms to promote government ethics. The Brennan Center’s recently-launched bipartisan National Task Force on Rule of Law and Democracy has put forward additional reforms to rein in ethical abuses in government that are ripe for your consideration. These reforms are supported by the Task Force’s co-chairs, former New Jersey Governor and Environmental Protection Agency Administrator Christine Todd Whitman and former U.S. Attorney Preet Bharara, and its diverse members from Republican and Democratic administrations. They include former U.S. attorneys, Members of Congress, Cabinet members, and agency heads who hope their leadership and expertise in developing and supporting concrete, implementable solutions will serve as an impetus for further reform. I include their first report, *Proposals for Reform*, as an attachment to my testimony.<sup>50</sup>

These are not partisan issues. Not long ago, these were issues that members of both parties would have stood behind. And we need bipartisan support for them again now. If we allow these essential ethical guardrails to continue to erode, it will provide a very dangerous precedent for future administrations and potentially threaten the underpinnings of our democracy.

<sup>49</sup> See Daniel I. Weiner, *Strengthening Presidential Ethics Law*, Brennan Center for Justice, 2017, 11-12, available at <http://www.brennancenter.org/publication/strengthening-presidential-ethics-law>.

<sup>50</sup> See Attachment B.

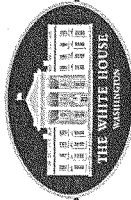
BRENNAN CENTER FOR JUSTICE**III. Voting and Transparency Provisions**

This committee is also considering creating an Election Day holiday as one of myriad provisions designed to increase access to voting. The Brennan Center applauds this Committee for considering measures to make the voting process more convenient and accessible for all Americans. An Election Day holiday will increase the ability of many voters to cast ballots. That said, it will not help many eligible citizens whose employers will not give them time off during a holiday, including citizens who work in the food service industry. We therefore strongly urge Congress to promote other ways to ensure all Americans are able to vote, including nation-wide early voting, which is included in the Act and is flexible enough to make it convenient for all Americans to vote.

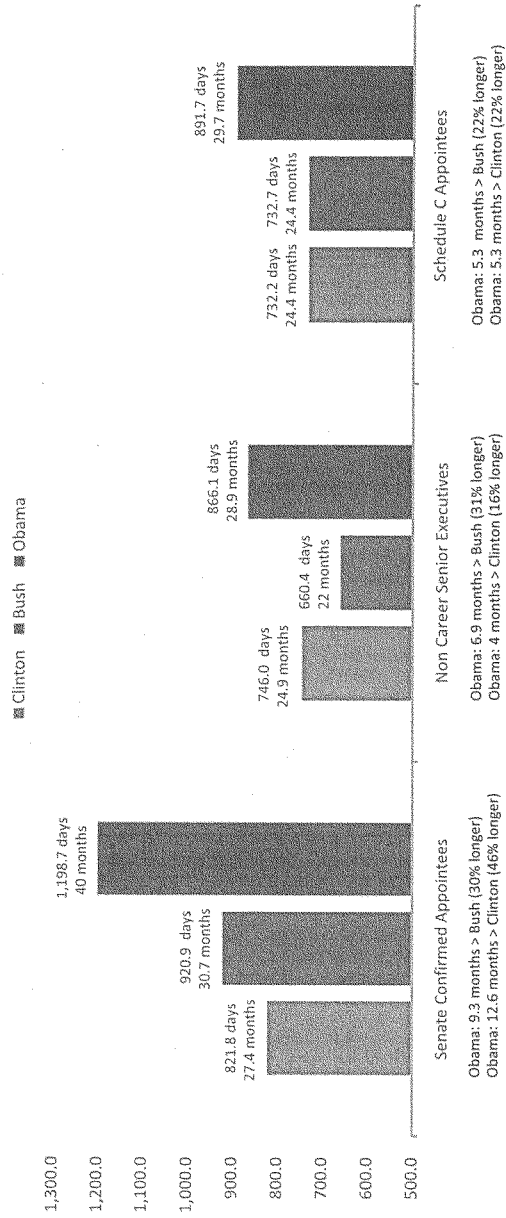
Finally, the Brennan Center supports the public disclosure of congressionally-mandated reports so that the public can more easily access the critical data and information that underpin official policy.



Attachment A



## AVERAGE LENGTH OF SERVICE (DAYS/MONTHS) BY APPOINTEES IN A PRESIDENTIAL ADMINISTRATION

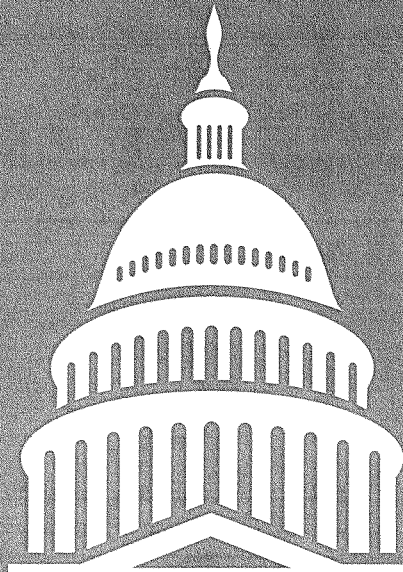


\*Data is through June of Year 8 for each Administration\*

Attachment B

Preet Bharara, Co-Chair  
Christine Todd Whitman, Co-Chair  
Mike Castle  
Christopher Edley, Jr.  
Chuck Hagel  
David Iglesias  
Amy Comstock Rick  
Donald B. Verrilli, Jr.

NATIONAL TASK FORCE ON  
**RULE OF LAW &  
DEMOCRACY**



# Proposals for Reform

The National Task Force on the Rule of Law & Democracy ([www.democracytaskforce.org](http://www.democracytaskforce.org)) is a nonpartisan group of former government officials and policy experts housed at the Brennan Center for Justice at NYU School of Law.

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# Proposals for Reform

FROM THE NATIONAL TASK FORCE ON RULE OF LAW & DEMOCRACY

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**T**he values that undergird American democracy are being tested. As has become increasingly clear, our republic has long relied not just on formal laws and the Constitution, but also on unwritten rules and norms that constrain the behavior of public officials. These guardrails, often invisible, curb abuses of power. They ensure that officials act for the public good, not for personal financial gain. They protect nonpartisan public servants in law enforcement and elsewhere from improper political influence. They protect businesspeople from corrupting favoritism and graft. And they protect citizens from arbitrary and unfair government action. These practices have long held the allegiance of public officials from all political parties. Without them, government becomes a chaotic grab for power and self-interest.

Lately, the nation has learned again just how important those protections are — and how flimsy they can prove to be. For years, many assumed that presidents had to release their tax returns. It turns out they don't. We assumed presidents would refrain from interfering in criminal investigations. In fact, little prevents them from doing so. Respect for expertise, for the role of the free press, for the proper independent role of the judiciary, seemed firmly embedded practices. Until they weren't.

Presidents have overreached before. When they did so, the system reacted. George Washington's decision to limit himself to two terms was as solid a precedent as ever existed in American political life. Then Franklin D. Roosevelt ran for and won a third and then a fourth term. So, we amended the Constitution to formally enshrine the two-term norm. After John F. Kennedy appointed his brother to lead the Justice Department and other elected officials sought patronage positions for their family members, Congress passed an anti-nepotism law. Richard Nixon's many abuses prompted a wide array of new laws, ranging from the special prosecutor law (now expired) to the Budget and Impoundment Control Act and the War Powers Act. Some of these were enacted after he left office. Others, such as the federal campaign finance law, were passed while he was still serving, with broad bipartisan support, over his veto. In the wake of Watergate, a full-fledged accountability system — often unspoken — constrained the executive branch from lawless activity. This held for nearly half a century.

In short, time and again abuse produced a response. Reform follows abuse — but not automatically, and not

always. Today the country is living through another such moment. Once again, it is time to act. It is time to turn soft norms into hard law. A new wave of reform solutions is essential to restore public trust. And as in other eras, the task of advancing reform cannot be for one or another party alone.

Hence the National Task Force on Rule of Law and Democracy. The Task Force is a nonpartisan group of former public servants and policy experts. We have worked at the highest levels in federal and state government, as prosecutors, members of the military, senior advisers in the White House, members of Congress, heads of federal agencies, and state executives. We come from across the country and reflect varying political views. We have come together to develop solutions to repair and revitalize our democracy. Our focus is not on the current political moment but on the future. Our system of government has long depended on leaders following basic norms and ground rules designed to prevent abuse of power. Unless those guardrails are restored, they risk being destroyed permanently — or being replaced with new antidemocratic norms that future leaders can exploit.

We have examined norms and practices surrounding financial conflicts, political interference with law enforcement, the use of government data and science, the appointment of public officials, and many other related issues. We have consulted other experts and former officials from both parties. Despite our differences, we have identified concrete ways to fix what has been broken.

## We begin with those norms. What are they? And why do they matter?

**Checks and balances.** The phrase appears nowhere in the Constitution, but it is central to blunt arbitrary power and the potential for tyranny.<sup>1</sup> It's more than the clockwork mechanism of three separate but coequal branches. Checks have evolved within each branch as well. Congressional ethics committees police improper conduct.<sup>2</sup> Courts operate under a self-imposed code of conduct. Chief judges, circuit judicial councils, or the Judicial Conference investigate allegations of wrongdoing.<sup>3</sup> The executive branch has standards of ethical conduct, as well as inspectors general, internal auditors, and the Justice Department's special counsel regulations. These overlapping safeguards check the conduct of the powerful.

**An evenhanded and unbiased administration of the law.** The awesome power of prosecution must be wielded without consideration of individuals' political or financial status, or their personal relationships. This precept has deep roots. It draws from British law. Its violation formed a chief complaint in the Declaration of Independence. And it was woven into America's Constitution in the Fifth and Fourteenth Amendments, with their promise of "equal protection" and "due process of law."

**Public ethics.** Officials are obliged to seek the public good, not private gain. The Constitution includes key anti-corruption provisions, such as the Emoluments Clauses that prevent a president from receiving funds from foreign governments or states. The Framers had a broad view of corruption. To them, it meant a public official serving some other master — whether pecuniary or political — rather than the public.

**Respect for science and the free flow of information.** In a modern economy, data — whether environmental, demographic, or financial — must be trustworthy. Beginning especially in the 1970s, an expectation of government transparency — and transparency of government data — became standard. And throughout the nation's history, the accountability provided by a sometimes ferocious free press has been regarded as crucial.

**We believe these values are more than fussy political etiquette.** They are, in fact, vital to our democratic institutions and necessary to restore public trust. We hope that the reflexive partisanship of our age does not pose an insurmountable obstacle. At other times of reform, Americans from across the ideological spectrum, includ-

ing members of both parties, have come together to restore and repair public institutions. Despite today's intense partisan polarization, we believe that our great nation can and should similarly achieve consensus for reform. In fact, we believe these values still command deep allegiance from Americans across the political spectrum. Our nonpartisan work has reinforced this view. It is up to patriots from all parties to work together on behalf of what we believe to be core precepts of our democracy.

**"We the People" gave our government its power.** That notion made American democracy, imperfect as it was, truly revolutionary from the start. Restoring these principles is central to the task of revitalizing democracy itself.

With these values in mind, the Task Force examined some of the most significant current areas of concern where our democratic system is most under pressure from official overreach.

## In this report, we put forward specific proposals in support of two basic principles — the rule of law and ethical conduct in government.

In future reports, we will turn to other areas, including issues related to money in politics, congressional reform, government-sponsored research and data, and the process for appointing qualified professionals to critical government positions. Most of our proposals reflect a decision to make previously longstanding practices legally required. They reflect, we believe, an existing consensus across both parties.

### Ethical Conduct and Government Accountability

To ensure transparency in government officials' financial dealings:

- Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for government officials, including closing the loophole for family businesses and privately held companies, and reducing the burdens of disclosure.
- Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.



- Congress should require a confidential national security financial review for incoming presidents, vice presidents, and other senior officials.

To better ensure that government officials put the interests of the American people first:

- Congress should pass a law to enforce the safeguards in the Constitution's Foreign and Domestic Emoluments Clauses, clearly articulating what payments and benefits are and are not prohibited and providing an enforcement scheme for violations.
- Congress should extend federal safeguards against conflicts of interest to the president and vice president, with specific exemptions that recognize the president's unique role.

To ensure that public officials are held accountable for violations of ethics rules where appropriate:

- Congress should reform the Office of Government Ethics (OGE) so that it can better enforce federal ethics laws, including by:
  - granting OGE the power, under certain circumstances, to conduct confidential investigations of ethics violations in the executive branch,
  - creating a separate enforcement division within OGE,
  - allowing OGE to bring civil enforcement actions in federal court,
  - specifying that the OGE director may not be removed during his or her term except for good cause,
  - providing OGE an opportunity to review and object to conflict of interest waivers, and
  - confirming that White House staff must follow federal ethics rules.

### **The Rule of Law and Evenhanded Administration of Justice**

To safeguard against inappropriate interference in law enforcement for political or personal aims:

- Congress should pass legislation requiring the executive branch to articulate clear standards for, and report on how, the White House interacts with law enforcement, including by:
  - requiring the White House and enforcement agencies to publish policies specifying who should and should not participate in discussions about

- specific law enforcement matters,
- requiring law enforcement agencies to maintain a log of covered White House contacts and to provide summary reports to Congress and inspectors general.

- Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

To ensure that no one is above the law:

- Congress should require written justifications from the president for pardons involving close associates.
- Congress should pass a resolution expressly and categorically condemning self-pardons.
- Congress should pass legislation providing that special counsels may only be removed "for cause" and establishing judicial review for removals.

## Ethical Conduct and Government Accountability

Our republic is rooted in the principle that government officials serve the people, not themselves — that government power derives *from* the people and is intended to be used *for* the people.<sup>4</sup>

The Framers recognized that political leaders, being human, will be tempted from time to time to put their own interests ahead of the public's. To restrain abuses of power, they created a system of checks and balances. They also included several provisions in the Constitution to ensure that top public officials are not economically beholden to others. For example, Foreign Emoluments Clause prohibits federal officials from receiving payments or gifts from foreign governments.<sup>5</sup> Its Domestic Emoluments Clause applies a similar rule to the president with respect to U.S. states, and also specifies that Congress may not award the president salary increases during his or her term.<sup>6</sup> And the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit federal and state judges from presiding over cases in which they have a personal interest.<sup>7</sup>

These constitutional provisions provide the foundation and support for a broad range of other rules — written and unwritten — adopted over time to constrain top leaders. Most notably, a set of robust conflict of interest laws, put in place more than a century ago, prohibit many public officials from taking part in government matters involving their own personal financial interests or those of their immediate families. Nearly half a century ago, in the wake of Watergate, Congress strengthened these protections by passing the Ethics in Government Act of 1978. This law created a federal agency, the Office of Government Ethics, dedicated to monitoring government officials' compliance with conflict of interest and other ethics rules. It also requires high-ranking government officials to disclose their financial interests and dealings to the public. (For a summary of ethics and disclosure requirements for elected and appointed officials, please see Appendix on page 28.)

These laws reflect the shared understanding that public officials should not be able to use their power to advance their own personal or financial interests, that transparency is needed to enable the public to identify improper influences, and that some measure of accountability is needed to deter misconduct.

Unfortunately, formal ethics laws exempt most senior government officials — specifically the president and vice president, and, with respect to some laws, members of Congress and federal judges. That the law does not bind

these top officials does not mean, however, that they should not follow its principles.

Elected officeholders have long voluntarily adopted ethics practices to reinforce the public's faith in the integrity of our government. For example, while conflict of interest laws do not apply to the president, vice president, or members of Congress, in recent decades many of these officials — including, until recently, every president and vice president in the last four decades — have voluntarily divested from assets that could potentially pose a conflict with their official duties or kept such investments in a blind trust whose contents were hidden from them.<sup>8</sup> Similarly, although not required by law, all presidents since Richard Nixon, and all major party presidential nominees since Jimmy Carter, had, until recently, voluntarily disclosed their personal tax returns to the public to provide more information about their personal finances and to confirm that they were paying their fair share in taxes.<sup>9</sup>

These longstanding practices, or norms, have come to be understood as a critical component of accountable government for the people. Because our leaders have been committed to the tradition of ethics in public service, including financial transparency and independent oversight, the fact that they have been formally exempted from many ethics laws has not posed a major problem.

Unfortunately, that commitment is eroding. This phenomenon is not entirely new. President Bill Clinton, for instance, notoriously issued pardons during his last day in office to a fugitive investor whose ex-wife had made substantial donations to the Clinton Presidential Library and to Hillary Clinton's Senate campaign,<sup>10</sup> and to a businessman who had retained Mrs. Clinton's brother to advocate for a clemency application.<sup>11</sup> Mrs. Clinton herself was later faulted for her many dealings with individuals and entities who donated to the Clinton Foundation, which was still run by her husband and daughter, while she served as President Obama's secretary of state.<sup>12</sup> Recent decades have seen a number of scandals over congressional conflicts of interest and other alleged misconduct.<sup>13</sup>

What is different today is the pervasiveness of breaches in ethical norms, especially at the highest levels of government. These breaches threaten to undermine public trust not only in particular officials but also in the integrity of bedrock governmental institutions.

The starkest example is President Trump's decision to keep ownership and control of his far-flung business

interests — a major departure from the expectations set by his predecessors.<sup>14</sup> It has produced an ever-expanding list of situations where his decisions as president could directly or indirectly affect his personal financial affairs.<sup>15</sup> That circumstance in turn can make it hard to discern where the public interest ends and the president's self-interest begins.<sup>16</sup>

Take, for example, the administration's recent controversial decision to rescue the Chinese tech giant ZTE, which had been sanctioned for violating U.S. law.<sup>17</sup> Critics have suggested that the decision was motivated by the president's personal gratitude for a loan China made to a Trump project in Indonesia.<sup>18</sup> But the move was also consistent with furthering a legitimate policy objective: building goodwill with the Chinese government ahead of the president's summit with North Korean leader Kim Jong-un.<sup>19</sup> If that was the case, the president's personal dealings with China only served to obscure what his administration was trying to accomplish.

Doubts about presidents' interests can sap their legitimacy and the legitimacy of their actions, even when they are not actually motivated by self-interest. That should concern any president's political supporters as much as his or her opponents.<sup>20</sup>

If the ethics precedents set by President Trump are not addressed now, they could also balloon in future administrations. For example, potential contenders for the Democratic nomination in 2020 include: the founder and chief executive of Facebook, a global social media company with more than 2 billion users around the world;<sup>21</sup> the former CEO of Starbucks, which has locations in dozens of countries;<sup>22</sup> and a former Massachusetts governor who now serves as a managing director at Bain Capital, a global hedge fund with offices in 10 countries.<sup>23</sup>

Disregard for longstanding ethical guidelines is not limited to the presidency. The disregard has also affected other public officials in both the executive branch and Congress. Former Environmental Protection Agency Administrator Scott Pruitt, for instance, attracted bipartisan criticism for his many ethical lapses, like renting a luxury apartment at below-market rates from the wife of an energy lobbyist with business before his agency.<sup>24</sup>

Most Americans would agree that this is not acceptable. Indeed, according to recent polling, more than three-quarters of voters rank corruption in government as a top issue for the 2018 election, with almost a third calling it the most important issue.<sup>25</sup> The principle that government service should not be used to advance one's personal financial interests is one of our political system's

bedrock values.<sup>26</sup> To protect it, we must translate some of the traditions and ground rules to which many of our leaders have voluntarily adhered into legal requirements, while updating and revitalizing existing ethics and anticorruption laws.

### Ensure Transparency in Government Officials' Financial Dealings

Transparency rules are among the most fundamental ethical safeguards to help ensure that ultimate power remains with the people. Without meaningful disclosure of public officials' financial and personal dealings, it is difficult for the public to detect potential sources of bias and to hold its representatives accountable. Disclosure also empowers journalists, legislators, and law enforcement officials to expose official self-dealing and deter corrupt acts. Of course, government officials do not forfeit their privacy completely, and they have legitimate reasons for maintaining privacy in some areas. But sunlight remains the best disinfectant.<sup>27</sup>

#### PROPOSAL 1 Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for public officials.

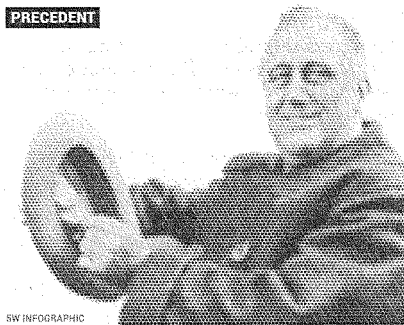
The Ethics in Government Act of 1978, enacted in response to the Watergate scandal, requires high-ranking federal officials — including the president, vice president, members of Congress, and candidates for those offices — to publicly file a report detailing their financial holdings and personal dealings.<sup>28</sup> These reports help ethics regulators and the voting public identify potential biases that could influence how they will govern.

While the Act's disclosure rules are tremendously valuable, they are also sorely in need of an overhaul. In some cases, the Act allows critical information to remain undisclosed. For example, while the law requires candidates and officials to identify family businesses and other private companies in which they have substantial ownership interests, these provisions have not kept pace with changing financial structures. Unlike in the 1970s, today many wealthy individuals hold most of their assets indirectly through networks of limited liability companies (LLCs) and similar entities that were not common when the Ethics in Government Act was passed.<sup>29</sup> Current law does not generally require candidates and officials to disclose critical information about those entities, including their sources of income, debts, or co-owners.<sup>30</sup> Too often, that deprives the public of the information they need to determine potential conflicts of interest.

Take, for example, a family business that derives substantial income from contracts with foreign governments, owes money to a foreign country's state-run bank, or is even co-owned by a foreign official. Under current ethics law, candidates and government officials would have no legal obligation to disclose any such ties.<sup>31</sup>

In other ways, the ethics disclosure rules enacted four decades ago have become unduly burdensome for public officials. Most notably, they require disclosure of very minor sources of income and small assets unlikely to raise significant ethical questions. That is because the requirements are keyed to dollar values that have not changed since the 1970s. These and other outdated rules can make the filing experience onerous even for candidates and officials with relatively simple finances. This creates the opportunity for inadvertent errors and may even deter qualified people from pursuing public service.<sup>32</sup>

#### PRECEDENT



SW INFOGRAPHIC

### Limiting Presidential Terms

#### PRINCIPLE

*Following the example of George Washington, presidents should limit themselves to two terms, in order to ensure that the executive branch doesn't become too powerful.*



#### PROBLEM

In 1940, President Franklin Roosevelt ran for and won his third term as president. Four years later, he was elected to a fourth term.



#### RESPONSE

In 1947, Congress passed an amendment to the Constitution limiting the president to two terms. The amendment was ratified four years later.

The federal ethics disclosure requirements should be updated to address such concerns. To achieve the best outcome, Congress should pass legislation directing the Office of Government Ethics to convene a task force of ethics experts to prepare a detailed proposal for a legislative overhaul of the relevant sections of the Ethics in Government Act. At a minimum, the legislation should require the task force to:

- **Address the disclosure loophole related to family businesses and other privately-held companies.** Specifically, the task force should propose a way to require filers with significant direct or indirect interests in such entities to provide relevant information, including disclosure of the entity's assets, ultimate sources of income, liabilities (including creditors by name), and the identities of other owners.
- **Propose measures to streamline the filer experience and make it less burdensome** by, among other things, substantially raising the monetary thresholds at which particular income and assets need to be disclosed.

Fixing outdated disclosure rules is something on which policymakers on both sides of the aisle should be able to agree. Americans of all ideological stripes overwhelmingly support transparency in politics and governance.<sup>33</sup> Reforming financial disclosure requirements to give the public more information will give the American people greater confidence that our leaders' decisions are guided by the nation's best interests rather than self-dealing or hidden interests. Congress can and should ensure that Americans have the information they need to hold public officials accountable, while reducing unnecessary requirements that burden public service.

#### PROPOSAL 2

**Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.**

A second important reform is to standardize and codify the longstanding practice of sitting presidents, vice presidents, and candidates for those offices disclosing their tax returns.

In 1973, in the wake of scandal and seeking vindication, President Nixon publicly released his personal tax returns because, as he put it, "People have got to know whether or not their president is a crook."<sup>34</sup> Since then, until 2016, every president, vice president, and major party nominee for those offices has publicly disclosed their personal tax information. Most other serious contenders

for the presidency have also done so.<sup>35</sup> With few exceptions, the practice had until recently become routine and noncontroversial.<sup>36</sup>

Presidential or vice presidential candidates' tax returns provide a snapshot of their income and help to confirm that they are following the same rules that apply to everyone by paying their fair share of taxes. This a real concern. Nixon's returns, which showed that he had paid very little in certain years thanks to dubious deductions, helped to undermine his credibility with the public near the height of the Watergate scandal.<sup>37</sup> His first vice president, Spiro Agnew, resigned in the wake of an investigation into tax evasion, to which he pleaded no contest.<sup>38</sup> Tax returns may also shed additional light on specific conflicts of interest and self-dealing, especially those related to tax policy.

For all of these reasons, codifying the longstanding practice of tax return disclosure would complement other public disclosure requirements in the Ethics in Government Act that assist voters and deter corruption.<sup>39</sup> Congress should therefore pass legislation that:

- **Requires the president, vice president, and candidates for those offices to disclose their personal tax returns** and the tax returns of any privately held businesses in which they have a controlling interest at the same time as they make other mandatory ethics disclosures pursuant to the Ethics in Government Act.<sup>40</sup>
- **Requires disclosure of returns for the three years preceding a candidate's declaration** that they are running for president or vice president and returns for every year a sitting president or vice president is in office for any portion of the year.<sup>41</sup>

Similar proposals have been advanced by public officials and advocates of all political stripes. A number of bills are currently pending before Congress, most notably the Presidential Tax Transparency Act,<sup>42</sup> which has bipartisan support. A growing number of states are also considering legislation that would require candidates to disclose their tax returns prior to appearing on a ballot, although a uniform federal rule would be preferable.<sup>43</sup>

Legislation along these lines is plainly within Congress's constitutional powers. Presidents and vice presidents, like other public officials, have long been required to disclose significant financial information, with no suggestion that such requirements interfere with any constitutional rights or responsibilities. Requiring disclosure of tax returns would be no different.

### PROPOSAL 3 Congress should require a national security financial review for incoming presidents, vice presidents, and other senior officials.

Disclosure of financial information is especially vital in the national security arena, where it can help identify potential sources of leverage foreign adversaries or entities might have over our political leaders. In his nuclear treaty negotiations with the Soviet Union, President Reagan famously advised that Americans should "trust, but verify."<sup>44</sup> The same can be said here.

These concerns are particularly resonant in an era when foreign powers are openly seeking to meddle in U.S. elections. As the commander-in-chief of the U.S. military and the face of U.S. foreign policy, the president is a unique target for foreign adversaries. And those efforts are more likely to bear some fruit when a large number of high-ranking officials, including the president and other senior administration officials, have globe-spanning business interests.<sup>45</sup> Indeed, there are already reports that foreign powers sought to use his family's business arrangements around the world as a source of leverage over the president's son-in-law and senior adviser, Jared Kushner.<sup>46</sup> This issue is not unique to the current administration. Several potential future presidential contenders also have wide-ranging international business dealings.<sup>47</sup>

When foreign companies seek to purchase American businesses, the Treasury Department coordinates a government-wide national security review process to examine what effect, if any, the proposed transaction has on U.S. national security.<sup>48</sup> Our political system should have a similar process to evaluate national security vulnerabilities in the portfolios of senior officials, including incoming presidents, vice presidents, and other senior members of the administration who have responsibilities affecting national security.

To that end, Congress should pass legislation to require the following:

- **For incoming presidents, vice presidents, and senior White House staff** who work on national security-related matters, Congress should require the administration of a national security financial risk assessment led by the director of the Office of Government Ethics and the director of National Intelligence. The purpose of the review would be to identify whether an official's financial holdings present potential national security vulnerabilities and

to issue divestment recommendations beyond what may be already required by other laws.

- **Officials subject to the review should be required to provide reviewers with their tax returns and ethics filings**, as well as other information the reviewers request about their holdings (such as business transaction history and records of material holdings or transactions with foreign entities), with a requirement to update filings whenever there is material transaction but at least on a yearly basis. The reviewers should be required to keep any nonpublic information they receive strictly confidential.
- **The reviewers should be empowered to obtain access to all relevant government information** sources and follow-up information from the filers.
- **The review should be undertaken on a confidential basis**, with findings presented to the “Gang of Eight,” the bipartisan group of congressional leaders customarily briefed on classified intelligence matters as part of their oversight role.
- **The official in question should be informed of vulnerabilities the review uncovers**, unless doing so would imperil counterintelligence gathering.

There is broad bipartisan consensus on the need to combat foreign interference in our elections and in the workings of our government.<sup>49</sup> A national security review for incoming leaders, building on an effective interagency program, would provide a way to help ensure that those leaders remain accountable to the American people rather than any foreign power. The process would also benefit the officials themselves, who may often be unaware of potential vulnerabilities.

### **Bolster Safeguards to Ensure Officials Put the Interests of the American People First**

Transparency is important, but it is not enough to ensure that all public officials put the interests of the American people ahead of their own. We also need meaningful guardrails to prevent officials from crossing long-established lines meant to prevent abuse of power for personal gain. This is especially important at the highest levels of government because top officials set the tone for the people working under them. Our laws should embody the expectation that public service be treated as a public trust and not as an opportunity for personal enrichment. This means changing the law to ensure that those at the very top are subject to the same broad legal standards as those under them.

### **PROPOSAL 4**

#### **Congress should pass a law to enforce the safeguards in the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.**

Two provisions in the Constitution are specifically meant to prevent public officials at all levels from being corrupted by conflicting financial incentives: the Foreign and Domestic Emoluments Clauses. Both of these provisions have been generally respected by every administration since the nation’s founding.

The Foreign Emoluments Clause seeks to curb foreign influence by prohibiting federal officials from accepting “any present, emolument, office, or title, of any kind whatsoever, from any king, prince, or foreign state” without the consent of Congress.<sup>50</sup> The Department of Justice has frequently applied this provision, issuing legal opinions on everything from the president’s receipt of the Nobel Peace Prize to government workers performing research stints at foreign universities.<sup>51</sup>

The Domestic Emoluments Clause seeks to prevent undue influence over the president by guaranteeing the payment of a salary “which shall neither be increased nor diminished during the Period for which he shall have been elected” and by prohibiting the president from receiving any other “emolument from the United States or any of them.”<sup>52</sup> There does not appear to be any historical evidence of any president ever seeking compensation that would violate this prohibition.

As it does in many other contexts,<sup>53</sup> Congress has passed laws over the years to codify and implement both clauses in certain circumstances. These range from the Foreign Gifts and Decorations Act (FGDA), governing when officials may or may not keep ceremonial gifts and honors from foreign governments under the Foreign Emoluments Clause<sup>54</sup> to periodic legislation raising the president’s salary as provided by the Domestic Emoluments Clause.<sup>55</sup>

To further reduce the possibility of conflicts and emoluments violations, from the 1970s until 2017, successive presidents and vice presidents voluntarily divested from problematic investments. They generally limited their direct financial holdings to “plain vanilla” assets, like cash and widely distributed mutual funds, and turned any remaining assets over to a blind trust to be sold and replaced by new investments unknown to the beneficiary.<sup>56</sup>

Because public officials have generally adhered to these constitutional safeguards, little attention has been paid to the fact that the law does not specify how they should be

applied in many circumstances. For example, the Constitution says nothing about how either clause should be enforced in the event of a violation. Congress has also not addressed this question except in limited contexts like the FGDA's rules on foreign gifts and decorations. Nor does the Constitution or any federal law specify just how broadly the word "emolument" should be interpreted. For example, does it cover regulatory benefits, as when a foreign government grants a patent to a federal official or a state government awards a tax subsidy to a business owned by the president? Does it cover profits from a business transaction between a federal official and a foreign state?<sup>57</sup>

Some of these questions have come up over the years (though not conclusively resolved) in various House and Senate Ethics Committee investigations of members of Congress for everything from renting property to a foreign diplomat to accepting travel and other gifts from foreign governments beyond what Congress itself has authorized by law.<sup>58</sup> The global reach of President Trump's business holdings (including U.S. hotels that cater to a global client base<sup>59</sup>) — and the prospect that future presidential contenders may have complex business arrangements of their own — has added extra urgency. President Trump has already been sued in three separate lawsuits for alleged violations of both the Foreign and Domestic Emoluments Clauses.<sup>60</sup>

While these lawsuits may set new legal precedent relating to the particulars of the president's business dealings, they will leave many other questions unanswered. But Congress has the authority to implement constitutional safeguards through rules that are more detailed and comprehensive than the bare bones text that the Constitution provides.<sup>61</sup>

To ensure that future public officials adhere to the letter and spirit of the two Emoluments Clauses, Congress should enact legislation that specifies in detail what is and is not prohibited under each clause. The measure should also create a fair and comprehensive scheme for enforcing those expectations. At a minimum, the legislation should:

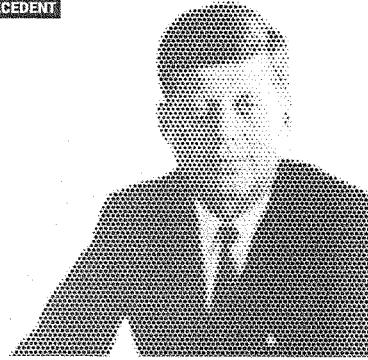
- **Define which benefits constitute prohibited "emoluments."**
- **Establish categories of foreign emoluments** to which Congress expressly withholds consent (e.g., those worth over \$10,000) beyond those covered by existing laws like the FGDA.
- **Create a regulatory scheme for enforcement** of both Emoluments Clauses, which should ideally rely on enforcement agencies like the Department of Justice

and possibly the Office of Government Ethics (for civil violations of the law).

- **Establish statutory remedies for violations**, including disgorgement of illegal emoluments and criminal and civil penalties.

The Emoluments Clauses provide clear constitutional authority for these measures. These constitutional provisions reflect the Framers' fundamental concern that public officials, especially the president, should put the interests of the American people first, which resonates just as strongly today. Codifying them more fully would also benefit current and future public officials, who need clear guidance to help them avoid running afoul of these key

#### PRECEDENT



### Preventing Nepotism in Government

#### PRINCIPLE

*Presidents should avoid appointing close family members to top posts to help ensure that government officials are loyal to the country rather than to the president personally.*



#### PROBLEM

In 1961, President John F. Kennedy nominated his brother, Robert F. Kennedy, to be attorney general. The period also saw members of Congress give jobs to family members.



#### RESPONSE

In 1967, Congress passed, and President Lyndon B. Johnson signed, the "anti-nepotism" statute, prohibiting employment of certain relatives, including brothers, in certain government positions.

constitutional constraints. Congress should ensure that the protections both clauses afford are enforced in a clear, concrete and effective manner.

**PROPOSAL 5**  
**Congress should extend federal safeguards against conflicts of interest to the president and vice president.**

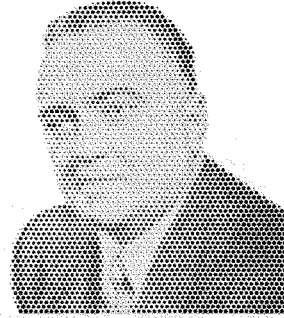
Conflict of interest law bars officers and employees of the federal government from “participating personally and substantially” in specific government matters in which they or their immediate family members have a personal financial interest has existed for more than a century.<sup>62</sup> But those laws do not apply to the president and vice president.<sup>63</sup> They should.

Federal conflict of interest law establishes a *minimum* standard of conduct. The law applies only when government officials are involved in a decision relating to a specific set of persons or entities and only when the decision will have a “direct and predictable” effect on officials’ financial interests (or those of their close family members, business partners, or entities with which they are affiliated).<sup>64</sup> The law does not apply to matters that involve broad policymaking.<sup>65</sup> For instance, regulations issued by the Office of Government Ethics specify that government officials typically cannot award a contract to a company in which they have stock (other than through certain types of mutual funds). On the other hand, the officials usually would be able to work on major legislation, like a tax overhaul that would favorably impact their own bottom line, provided it would affect other Americans in the same way.<sup>66</sup>

Few would say that the president and vice president should not follow the same basic rules.<sup>67</sup> Congress exempted them from the formal conflict of interest law based on potential practical and legal concerns related to the presidency’s unique role in our system of separation of powers (which, as noted below, we do not ultimately find persuasive).<sup>68</sup> Until recently, most also assumed that the public limelight and accountability of the presidency would be sufficient to ensure that its occupants adhere to the same ethics standards that govern other federal employees and officers. It turns out they are not.

The reason these exemptions from ethics law for the president and vice president have received scant attention is that presidents over the last four decades have voluntarily complied with most of their requirements.<sup>69</sup> Especially in the wake of Watergate, it became common wisdom, as President Reagan’s transition team put it, that “even the possibility of an appearance of any conflict of interest in

**PRECEDENT**



**Reining in the FBI**

**PRINCIPLE**

*Law enforcement agencies should operate with effective oversight in order to guard against investigative abuses. And those agencies should not be used to advance solely partisan or personal agendas.*

**PROBLEM**

The late 1960s and early 1970s saw a string of revelations about abuses, culminating in 1976 with the Senate’s Church Committee report. Among the report’s findings was that the FBI wiretapped Martin Luther King, Jr., as part of an effort to portray him as a communist.

**RESPONSE**

In 1976, Congress set a single 10-year term for the FBI director. The reform built off of a 1968 law that had established the post as a presidentially appointed position requiring Senate confirmation under the general authority of the attorney general.

the performance of his duties” could undermine the president’s legitimacy.<sup>70</sup>

And not just the president’s. When an official as powerful as the president has a personal financial interest in government decisions, there is a risk that officials who report up the chain will be tempted to govern with an eye toward the chief executive’s bottom line. Taken to extremes, it can be virtually impossible to discern which decisions have been infected by consideration of a leader’s self-interest. Such doubts undermine the basic integrity of democratic governance.<sup>71</sup>

Now, of course, we have a president who has chosen to keep control of his far-flung businesses, raising the



possibility of numerous conflicts of interest.<sup>72</sup> While voters find this distasteful,<sup>73</sup> his decision may embolden his successors to do the same. As a result, the time has come to extend basic safeguards to the president and vice president by eliminating their exemption from federal conflict of interest law.

This does not mean that we must subject the president and vice president, who occupy a unique constitutional role, to the same legal requirements as other officials. For example, conflict of interest rules can bar an official from working on comparatively narrow legislation, like a bill to regulate a particular industry or to give benefits to a small class of people. But the duties of the chief executive are unique. The Constitution gives the president sole authority to sign or veto legislation passed by Congress,<sup>74</sup> and thousands of measures make their way each year to the president's desk. Rather than impose the unwieldy requirement of an exhaustive conflicts check in each instance, it makes better sense to exempt the president and vice president's participation in the legislative process from conflict of interest regulation. The law should also explicitly exempt any president or vice president who follows the longstanding practice of limiting his or her direct personal holdings to nonconflicting assets and placing remaining investments in a qualified blind trust.<sup>75</sup>

Finally, the law should specify that the only remedy where the president or vice president has a conflict of interest is to sell off his interest in the asset that created the conflict. Typically, an official with a conflict of interest can address the conflict either through such divestiture or through recusal (meaning formally refraining from participation in the matter).<sup>76</sup> But presidential recusal could be disruptive to executive branch operations.<sup>77</sup> A divestiture requirement avoids that risk and is the best approach for addressing the relatively narrow circumstances where the president or vice president have conflicts of interest.<sup>78</sup>

The need for reasonable exemptions does not negate the need for the president and vice president to be subject, broadly speaking, to the same laws as the millions of federal employees who work under them.

To that end, Congress should pass legislation that, at a minimum:

- **Eliminates the blanket exemption to existing federal conflict of interest law** for the president and vice president.
- **Sets forth reasonable and appropriate exemptions,** including for conflicts arising from the president's role

in proposing, signing, or vetoing legislation, and the vice president's role in presiding over and casting tie-breaking votes in the Senate.

- **Exempts any president or vice president whose holdings are limited** to nonconflicting assets or are placed in a qualified blind trust.
- **Specifies that divestment from the relevant asset is the only remedy** in cases where the president or vice president has a conflict of interest.

Several proposals to subject the president and vice president to conflict of interest law are currently pending before Congress.<sup>79</sup> They follow a long tradition of bipartisanship on ethics law<sup>80</sup> as well as a shared understanding that the president and vice president, despite their unique roles in our system of government, are not above the law.

While Congress in the past has taken the view that there are practical and constitutional hurdles to taking such a step, we do not find this view persuasive. The most common objection raised is that the president cannot be subject to conflict of interest law because it is impossible for him to recuse from any matter under his authority as the head of the executive branch.<sup>81</sup> But even if that is true,<sup>82</sup> the proposal here does not require recusal. Sale of assets is also a common means of managing conflicts of interest in the public sector.<sup>83</sup> Already for decades, presidents have voluntarily divested from most of their assets that could give rise to even the appearance of conflicts. And they aren't the only ones: Many other high-ranking federal officials are also required to divest from assets that would create insurmountable conflicts of interest relating to their core responsibilities.<sup>84</sup> Similarly, it is not unreasonable to require the president to divest in situations where there is a clear risk that the unique powers of his office could be used for personal gain.

Such a requirement would not offend the Constitution, which permits Congress to place restrictions on the president where there is "an overriding need to promote objectives within the constitutional authority of Congress."<sup>85</sup> Guarding against official self-dealing, which the Supreme Court has called "an evil which endangers the very fabric of a democratic society,"<sup>86</sup> is surely one such objective. Congress should prevent the use of the presidency for personal gain, just as it prohibits the chief executive from engaging in other kinds of official misconduct.<sup>87</sup>

**Related Issues:** Presidential conflicts of interest are not the only area of ethics law in need of reform. Members of Congress are also exempt from federal conflict of interest

law,<sup>88</sup> and congressional conflicts are also an enduring problem. Members of Congress are bound by certain ethics rules, but those have far fewer teeth than the laws governing most federal officers and employees.<sup>89</sup> Many lawmakers take voluntary steps to limit their personal investments and avoid any appearance of bias, but others do not.<sup>90</sup> In recent years, for instance, there have been many reports of members of Congress engaging in inappropriate stock trading involving industries under the jurisdiction of committees on which those members sit.<sup>91</sup> Others have accepted questionable travel and other gifts from foreign governments.<sup>92</sup> Some members have even gone to prison for bribery and other official misconduct spanning many years.<sup>93</sup>

Such scandals suggest that stronger legal safeguards may be needed. That could include making members of Congress subject to conflict of interest law, requiring them to divest from certain assets, or simply providing for better enforcement of existing House and Senate rules.

Congress should also consider ways to lighten the regulatory burden on the many federal officers and employees who must comply with a much stricter regime of restrictions than elected officials. They must follow rules governing everything from who can take them to lunch to whether they can be paid for teaching a class at their local community center.<sup>94</sup> Moreover, absent a waiver, they are subject to the full force of conflict of interest law even if the actual financial interest in question is negligible, like a single share of stock in a regulated industry. Scholars have criticized such heavy regulation as too strict,<sup>95</sup> with real and substantial burdens on ordinary federal employees. A full ethics reform package should include measures to lighten these burdens for the millions of men and women in the rank-and-file federal workforce, where appropriate.

The Task Force expects to take up these and other related issues in its next report.

### **Ensure that Officials Are Held Accountable Where Appropriate**

Along with changes to actual legal requirements, effective enforcement is necessary to prevent official self-dealing and abuse of power. No rule enacted by Congress will have any effect without meaningful action to ensure legal accountability. Any enforcement mechanism should be even-handed and effective. Enforcement actions must be proportional to the offense, and the rights of those alleged to have committed misconduct must be protected. Unfortunately, our current ethics regime is deficient on both counts: there is no independent body dedicated primarily to ethics enforcement, and those

wrongfully accused of violations outside of the formal process have no way to clear their names. Congress should rectify this.

### **PROPOSAL 6** **Congress should reform the Office of Government Ethics so that it can better enforce federal ethics laws.**

The Office of Government Ethics (OGE) is the only federal agency primarily devoted to government ethics, and the logical choice for an independent body to handle day-to-day enforcement of ethics rules. Created in the wake of Watergate to improve the uniform application of federal ethics rules across the executive branch, OGE's primary function is to interpret and promote compliance with federal conflict of interest laws, gift restrictions, limits on outside employment, and related safeguards.<sup>96</sup> While its director is a presidential appointee, the role has usually been filled by a nonpartisan expert, including under the current administration.<sup>97</sup> No other federal agency similarly combines a tradition of nonpartisanship with comparable expertise in government ethics.

As currently configured, OGE is not equipped to serve as an effective, independent enforcement body. While it has developed an extensive body of regulations and other guidance, its role has been primarily advisory. The office has no authority to investigate alleged violations that come to its attention and very limited ability to compel a remedy for even the most obvious violations.<sup>98</sup>

OGE also is not truly independent. Although its director serves for a fixed five-year term and is usually a nonpartisan expert, there appears to be no statutory safeguard against a president, upset by OGE's pursuit of ethical issues in his or her administration, removing the director without cause.<sup>99</sup> This is less protection than that accorded other important watchdog agencies, including the Securities Exchange Commission and Federal Election Commission, whose leaders the president may generally remove only for good cause (e.g., neglect of duty or misconduct in office).<sup>100</sup> As a further guarantee of independence, such agencies also typically have the ability to communicate directly with Congress, including submitting their own budget requests, rather than going through the White House.<sup>101</sup>

Finally, OGE also lacks the necessary resources to perform an expanded oversight role. With approximately 75 employees and a \$12 million budget, OGE would not have the capacity to hire the qualified attorneys, investigators, and other staff needed to effectively enforce ethics rules across the sprawling executive branch.

These shortcomings have not received the attention they deserve. Until recently, voluntary adherence to OGE's guidance has long been the expectation at the highest levels in both Democratic and Republican administrations. Every president since OGE was created has directed cabinet members and other close aides to follow the agency's instructions to recuse, sell property, or take other steps to avoid conflicts of interest, and to direct their subordinates to do the same.<sup>102</sup> Presidents and vice presidents have also sought OGE approval for their own voluntary asset plans, which set the tone for their administrations.<sup>103</sup>

To be sure, there have always been cracks in this façade. At times, OGE has been unable or unwilling to hold officials who were determined to bend or break the rules accountable.<sup>104</sup> But today, the administration does not even make a show of following OGE's guidance in high-profile cases<sup>105</sup> and has publicly questioned whether most federal ethics rules even apply to White House aides, citing an unpersuasive legal technicality.<sup>106</sup>

This is not sustainable. Like any other set of rules, ethics standards will never be truly effective, especially at the highest levels, unless they have real teeth. That means enforcing them consistently and not just in the most egregious cases.

Currently, enforcement of conflict of interest law and ethics standards is left primarily to the president and thousands of other administration officials who have supervisory authority to reprimand or fire subordinates who break ethics rules. This decentralized system is prone to inconsistency<sup>107</sup> and can break down entirely in an administration that simply does not view compliance with these rules as a priority.

Where a conflict of interest is serious enough to warrant criminal or civil penalties, the Department of Justice has the power to pursue enforcement in federal court (including on a referral from OGE).<sup>108</sup> But the department has rarely made such cases a priority. In 2016, for example, it appears to have secured (according to data collected by OGE) only seven criminal convictions and one civil settlement under the federal conflict of interest statute and laws under OGE's purview.<sup>109</sup>

The existing framework for administering and enforcing federal ethics rules in the executive branch does not provide sufficient accountability. A politically sensitive issue like ethics needs a regulator with some independence who has the power to formulate broad policy through regulations and pursue civil enforcement actions in serious cases that do not rise to the level of criminal misconduct but still need to be addressed in the interest of deterrence.<sup>110</sup>

OGE already has primary rulemaking authority for ethics matters in the executive branch. Its expertise is widely acknowledged. The agency's director, while not protected against removal, customarily serves a term of five years,<sup>111</sup> spanning multiple presidential terms, which helps to foster independence. There is also a tradition of professionalism at OGE, evidenced by the appointment of directors with significant ethics experience and nonpartisan credentials.<sup>112</sup> It therefore makes sense for OGE to take on this critically important enforcement role.

To ensure proper accountability for ethical standards at all levels of the executive branch, Congress should pass legislation giving OGE a measure of formal independence from the president akin to that of other independent regulators. The agency should also have the full range of civil enforcement tools that are at the disposal of other watchdog bodies, along with sufficient safeguards to protect against the politicization of investigations and bureaucratic overreach. Finally, Congress should take other steps to ensure more uniform application of ethical standards across the executive branch.

To insulate rulemaking and civil enforcement processes on ethics matters from undue political interference, legislation passed by Congress should:

- **Specify that the president cannot remove OGE's director during his or her statutory term except for good cause,** such as neglect of duty or misconduct in office. Such limitations on removal are the most important way to ensure agency independence. The process of nominating and confirming new directors and ongoing congressional oversight can be used to ensure that the director remains politically accountable to elected leaders.
- **Empower OGE to communicate directly with Congress.** Most agencies must go through the White House to submit budget requests or otherwise communicate with Congress, limiting their ability to pursue goals that do not align with the priorities of the administration. To ensure a measure of autonomy from the president, OGE should, like other independent agencies, be permitted to submit its own budget estimates, substantive reports, and legislative recommendations without White House approval.<sup>113</sup>

To ensure effective enforcement of ethics rules, this legislation should also:

- **Grant OGE power to initiate and conduct investigations of alleged ethics violations** in the executive branch on referral from another government body or on

## PROPOSAL



## Protecting the Justice Department from Political Interference

### PRINCIPLE

*The White House shouldn't interfere with investigative and law enforcement decisions made by the Justice Department and other enforcement agencies for personal, financial, or partisan purposes. No one is above the law.*

#### ❶ PROBLEM 1

President Richard Nixon's tenure shone a light on the extreme dangers of political interference in law enforcement. In 1969, Nixon appointed his campaign manager, John Mitchell, as attorney general. Two years later, Nixon ordered Mitchell's eventual successor as attorney general, Richard Kleindienst, not to pursue an antitrust suit against a company that had made large political donations to the upcoming Republican National Convention. And in 1973, Nixon ordered the firing of Special Prosecutor Archibald Cox to stop his investigation of the Watergate scandal. In what is known as the "Saturday Night Massacre," Attorney General Elliot Richardson resigned, and Deputy Attorney General William French Smith was fired, after refusing to carry out the order. Solicitor General and then-Acting Attorney General Robert Bork carried out the order to fire Cox.

#### ✔ RESPONSE

In 1975, President Gerald Ford's White House chief of staff issued the first "limited contacts" policy to reduce opportunities for actual or perceived political interference in DOJ matters, creating a precedent followed by all subsequent administrations. Three years later, Congress passed the Independent Counsel Act, which created a way to investigate high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest and insulated the independent counsel from improper firing. Congress also passed the Civil Service Reform Act of 1978, which codified the principle that members of the civil service should be insulated from administrations' political whims.

#### ❷ PROBLEM 2

Three decades later, the pendulum swung back. In 2006, Attorney General Alberto Gonzales relaxed DOJ's "limited contacts" policy, ballooning the number of officials eligible to communicate with the

department about specific cases and investigations. The same year, President George W. Bush took the unprecedented step of dismissing nine U.S. attorneys in the middle of his term. Investigations later revealed evidence that the removals were improper and tied to decisions made in politically sensitive cases. Those moves prompted no significant new laws to combat political interference.

#### ❸ PROBLEM 3

In 2016, Attorney General Loretta Lynch had a brief private meeting with former president Bill Clinton on an airport tarmac in the midst of the FBI's ongoing investigation into Hillary Clinton's use of a private email server while serving as secretary of state. The same year, President Barack Obama stated that Hillary Clinton's use of the email server never endangered national security, despite the FBI's ongoing investigation into the issue.

#### ❹ PROBLEM 4

In 2017 and 2018, President Trump took numerous steps to undermine American law enforcement. He issued a stream of public comments seeking to influence the special counsel's investigation into Russian election interference and suggested the investigation played a role in his decision to fire the FBI director. He urged the Justice Department to investigate his political opponents and lamented his attorney general's perceived lack of personal loyalty. And he demanded that DOJ take action against two companies whose owners also control major media outlets whose reporting President Trump frequently criticizes. "I have the absolute right to do what I want to do with the Justice Department," he declared.

#### ✔ TASK FORCE PROPOSED RESPONSE

Congress should require that the White House publish policies on who can participate in discussions with DOJ or other federal agencies with enforcement authority about specific civil or criminal enforcement matters and that it maintain a log of covered White House contacts. In addition, Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

its own initiative. To prevent abuse in this politically sensitive area, the agency's investigative power should be constrained through best practices used at other independent watchdog bodies. Among other things, the legislation should require the director to sign off on all subpoenas to compel testimony or the production of documents; require agency staff to keep pending investigations strictly confidential (with criminal penalties for violators); and specify that all decisions to investigate must be supported by a written determination approved by the director that there are reasonable grounds to believe a violation may have occurred.<sup>114</sup>

- **Grant the OGE director power to bring civil enforcement actions in federal court and seek other corrective action** where the director has determined in writing that there is probable cause to believe a violation occurred. Almost all independent watchdog agencies have authority to either impose penalties and other sanctions or seek them in court. For an agency to assess major fines or hand out other punishment itself requires the creation of elaborate internal procedures to protect the due process rights of alleged wrongdoers.<sup>115</sup> It makes more sense for an agency of OGE's size to instead bring enforcement actions for civil or injunctive relief in federal court. Cases where the only sanction sought is a personnel action like dismissal could be brought to the Merit Systems Protection Board, the body that adjudicates employment issues for federal workers.
- **Create an OGE Enforcement Division.** Enforcing rules is very different from writing them or providing informal guidance. These functions should not be entrusted to the same staffers. The best approach would be for OGE, like other watchdog agencies, to have a separate enforcement division staffed by lawyers and professional investigators with civil service protection. Given the sensitivity of their role, employees of the new Enforcement Division (and potentially all OGE staff) should be barred under civil service rules from participating in partisan politics.<sup>116</sup> While enforcement staff would do the day-to-day work of investigating alleged violations and pursuing sanctions, major decisions — including whether to launch an investigation or bring an enforcement action once the investigation is done — would require the director's approval.
- **Establish minimum qualifications for the OGE director,** in light of these expanded responsibilities, such as experience in ethics, compliance, law enforcement, or related fields; management experience; and reputation for integrity. This would help guard against abuse and ensure that future directors would meet the

standards that have previously been met in practice. Detailed qualifications are not necessary because the director is subject to confirmation by the Senate, providing an additional check.

- **Direct OGE and DOJ to establish a process for confidential referrals of potential criminal violations.** As noted, OGE can refer potential criminal matters to the Department of Justice for investigation and potential prosecution, but the process is informal and possibly subject to leaks. DOJ has no obligation to respond. Congress should require that referrals be kept confidential and that DOJ respond to referrals within 120 days to allow OGE to determine whether to take other action on its own.

Finally, to ensure more uniform application of ethical standards across the executive branch, legislation passed by Congress should:

- **Give OGE authority to review and raise objections to individual conflict of interest exemptions.** Currently, federal law gives officials the power to exempt their subordinates from conflict of interest law in specific cases where they determine that the potential violation is not sufficiently important to justify recusal or other action.<sup>117</sup> OGE not only should be notified of these waivers (as is already the practice)<sup>118</sup> but also should have the ability to formally object within a reasonable period of time. The official who granted the waiver should, in turn, be obligated to respond to OGE's concerns in writing, and the waiver, along with OGE's objections and the official response, should be made public.
- **Confirm that White House staff must follow federal ethics rules.** White House staff are subject to the prohibition on conflicts of interest and most federal ethics laws, and they have also long followed the guidance OGE promulgated via regulation. As noted, however, administration officials recently questioned whether OGE rules actually bind them, based on a legal technicality.<sup>119</sup> Congress should amend the law to remove this ambiguity and make clear that OGE has authority to promulgate rules for all executive branch officers, including White House staff.

The proposals here are modeled on other successful independent agencies. Many have been advanced for years by nonpartisan reform groups.<sup>120</sup> They represent a balanced framework that will give ethics rules real teeth while also protecting alleged violators who may not have committed any wrongdoing. Congress should revamp our ethics enforcement system along these lines.

## The Rule of Law and Evenhanded Administration of Justice

The Founders established “a government of laws and not of men.”<sup>121</sup> As Thomas Jefferson wrote, “[t]he most sacred of the duties of government [is] to do equal and impartial justice to all its citizens.”<sup>122</sup> But the rule of law does not enforce itself. Those in power will always be tempted to favor friends and allies over adversaries. That is why, over the course of American history, we have built up a robust set of laws, practices, and norms to promote the evenhanded application of the law, without bias or political favor.

Conflict of interest law bars officials from involvement in law enforcement matters where they have an actual or perceived bias. Detailed professional responsibility rules guide most career law enforcement officials and, when followed, ensure different cases and investigations proceed according to similar standards and guidelines. Mechanisms within agencies — internal review processes, inspectors general, and auditors — seek to enforce standards and hold officials accountable.

Informal policies matter even more. Every administration since that of President Ford has limited which officials in the White House may communicate with Department of Justice personnel about active investigations or cases and how they may do so.<sup>123</sup> Another norm discourages senior political officials from making premature declarations about the guilt or innocence of a defendant or the outcome of a trial before it is complete.<sup>124</sup> And yet another discourages law enforcement from issuing indictments or taking other public steps that could affect an election in the period directly before the vote.<sup>125</sup> No law requires these policies, but they reduce the risk that politics distorts vital law enforcement processes.

It wasn't always this way. When American government was far less formal, it was assumed that the attorney general would be a close legal adviser to the president. Theodore Roosevelt saw no problem in minutely directing antitrust prosecutions.<sup>126</sup> Robert F. Kennedy was his brother's chief political adviser and was preparing to resign as attorney general to serve as campaign manager in November 1963.<sup>127</sup> When Richard Nixon appointed his campaign manager, John Mitchell, as attorney general in 1969, few eyebrows were raised.<sup>128</sup>

That all changed nearly five decades ago, when Watergate showed the costs of politicized justice — and spurred a national reckoning with the abuse and politicization of law enforcement.

From the outset, White House lawyers carefully monitored and molded the federal investigation of the break-in at the Democratic National Committee headquarters. Then, in the “Saturday Night Massacre,” Nixon famously ordered his subordinates to fire the special prosecutor. (His attorney general quit and his deputy attorney general was fired rather than carry out this improper order.<sup>129</sup>) In other abuses, Nixon interfered with an antitrust enforcement action on behalf of a large political donor, IT&T,<sup>130</sup> and his White House counsel provided an “enemies list” to the IRS commissioner, asking that hundreds of people be targeted for investigation during the 1972 election (a request that the IRS did not follow).<sup>131</sup>

In the years afterward, Americans learned that the politicization of law enforcement had extended well beyond the Nixon administration. The 1976 Church Committee report documented decades of FBI abuses, especially under the Kennedy and Lyndon Johnson administrations, including the bureau's blackmailing of high officials.<sup>132</sup> Presidents were revealed to have wielded the FBI for political purposes, as when President Johnson had it spy on civil rights protestors at the 1964 Democratic convention.<sup>133</sup>

Nixon's two immediate successors, Presidents Gerald Ford and Jimmy Carter, made rebuilding public confidence in the Department of Justice and other law enforcement institutions a central goal of their administrations.<sup>134</sup> The White House, Justice Department, and others adopted formal and informal practices that aimed to ensure arm's-length dealings — in public and private — between senior political officials and career law enforcement personnel. At the same time, the FBI was reined in by having its director report to the attorney general as well as directly to the White House.<sup>135</sup> The CIA, too, was required to operate under the Foreign Intelligence Surveillance Act.<sup>136</sup> To fill the gap, the White House counsel's office grew in stature and size.<sup>137</sup>

These new rules had an important practical impact. But even more significant, they helped create a new set of expectations — mostly unspoken but nonetheless powerful — that largely constrained political interference in law enforcement.

This system served the country well. It is now under direct attack.

We are still early in the current administration, but already President Trump has taken numerous steps to

undermine American law enforcement. He has issued a steady stream of public comments seeking to influence the special counsel's investigation into Russian election interference.<sup>138</sup> He has urged the Justice Department to investigate his political opponents.<sup>139</sup> He has fired or prompted the resignations of top FBI officials and has lamented his attorney general's perceived lack of personal loyalty.<sup>140</sup> He has demanded that DOJ take action against two companies, Amazon and Time Warner, whose owners also control major media outlets whose reporting frequently angers him.<sup>141</sup> (See, e.g., DOJ's lawsuit to block Time Warner's merger with AT&T, widely condemned as being at odds with decades of antitrust practice,<sup>142</sup> which was rejected in federal court.)<sup>143</sup> He has threatened to tax Harley Davidson "like never before" after the company announced the trade war is forcing some of its operations overseas and has targeted other companies for retribution in response to personal or policy slights.<sup>144</sup> "I have the absolute right to do what I want to do with the Justice Department," he has said.<sup>145</sup>

Other recent administrations also have at times let political considerations influence law enforcement. During President George W. Bush's tenure, the Justice Department inspector general found evidence that nine U.S. attorneys (including Capt. David Iglesias, a member of this Task Force) were removed for their prosecutorial decisions in politically sensitive cases rather than for "underperformance," as DOJ had claimed in congressional testimony at first, and that officials used political affiliation as a factor in hiring, which is prohibited.<sup>146</sup> The scandal resulted in the resignations of senior officials including Attorney General Alberto Gonzales.<sup>147</sup>

During the Obama administration, Attorney General Loretta Lynch was widely criticized for an airport tarmac encounter with former President Bill Clinton, which came while the FBI was investigating the use of a private email server by Hillary Clinton while she was secretary of state.<sup>148</sup> The episode, combined with President Obama's premature statement that Secretary Clinton's actions never endangered national security, raised fears that the administration was inappropriately seeking to influence the probe.<sup>149</sup>

These departures from long-accepted practices have real and lasting consequences. They distort decision-making. They shield wrongdoing by high officials. They risk converting the fearsome power of the prosecutorial machine into a political weapon. They undermine the fundamental notion that the law applies to everyone equally. They corrode public trust. And ultimately, they cast doubt on a crucial premise of any healthy democracy: that the law not be used to favor or punish anyone based on politics.

In the past, the half-century-old system of *de facto* independence for much of law enforcement and respect for the role of independent courts was a norm largely — though not always — honored by those in power. But that norm has eroded, with the result that few explicit rules now constrain executive behavior. It is time to put in place more explicit and enforceable restrictions to ensure a return to the proper balance.

### **Safeguard Against Inappropriate Interference in Law Enforcement for Political or Personal Aims**

First, we need to strengthen the guardrails preventing improper political interference in law enforcement by the White House. There is no question that it is appropriate for the president and his staff to set priorities for law enforcement and to weigh in on key decisions. At the same time, it is entirely inappropriate for them — as it is for all government officials — to interfere in specific law enforcement matters for personal, financial, or partisan political gain.

To prevent abuse, most public officials involved in law enforcement are subject to a range of checks on their powers — from detailed procedures that constrain their actions, to formal supervisory systems that can discipline them, to inspectors general who can investigate them, to designated congressional committees that provide regular oversight of them.<sup>150</sup> The same is not true for the president and other White House officials. The White House is mainly checked by political processes. But those processes do not work unless the public and political actors know what is going on.

Our proposals do not seek to impose restrictions on the White House. They simply seek to reinforce longstanding practices designed to prevent abuse in the executive branch by enhancing transparency of political contacts with law enforcement and allowing for more meaningful oversight of potential problems.

### **PROPOSAL 7 Congress should pass legislation requiring the executive branch to articulate clear standards for and report on how the White House interacts with law enforcement.**

To prevent both intentional and inadvertent political interference with law enforcement, the White House, Justice Department, and other law enforcement agencies have for decades voluntarily limited contact between senior political officials and career law enforcement personnel.

These curbs on White House contacts are not required by law. They are found only in written policies, voluntarily adopted by each administration, limiting who from the White House and who from the Department of Justice and other enforcement agencies can discuss ongoing investigations and cases. Typically, these policies restrict conversations to high-level officials on both sides, with the White House counsel's office playing a central role in managing and monitoring White House contacts.<sup>151</sup> They also include special protocols for cases affecting national security<sup>152</sup> or where the Department of Justice is defending an administration policy.<sup>153</sup>

These policies recognize that political actors are, at least in part, motivated by political concerns that should not affect the application of the law and that law enforcement personnel are better situated to make decisions about specific cases or investigations. They guard against overt direction from the White House, or the use of investigative agencies to punish political foes. They also protect against the inadvertent pressure or bias that may result from a call from a White House official about a specific matter. Even a question about a case can lead an official to presume an interest in its outcome; the official then may try to ensure the desired outcome. As former Attorney General Benjamin Civiletti put it, presidents and other top officials “unintentionally can exert pressure by the very nature of their positions.”<sup>154</sup>

At the same time, the policies recognize that the president has a unique and personal role in executive branch *policy* determinations, including in how our laws are enforced. For example, presidents have, appropriately, told antitrust enforcers to step up enforcement without directing the prosecution of a specific firm.<sup>155</sup> By contrast, White House influence in *individual* cases risks creating the perception — and potentially the reality — that law enforcement is being used as a political or personal tool.<sup>156</sup>

Every administration since Ford has established such “limited contacts” policies between the White House and the Justice Department.<sup>157</sup> Although less consistent, there have also been similar policies covering other agencies with law enforcement responsibilities, such as the Internal Revenue Service and the Department of Labor.<sup>158</sup> Despite their importance, these policies have received scant public notice. Often, they have not been released until well after the end of a presidency. The Obama administration’s most recent internal White House policy still has not been released.

Unfortunately, it has become increasingly clear that these voluntary policies, without formal legal requirements or enforcement mechanisms, cannot prevent political

interference in law enforcement activities. For example, President George W. Bush’s administration dramatically relaxed its own limited contacts policies, ballooning the number of political officials eligible to have contact with law enforcement personnel to more than 800.<sup>159</sup> After the U.S. attorneys’ scandal, Attorney General Michael Mukasey reinvigorated the policy.<sup>160</sup>

The current administration, too, has adopted a limited contacts policy.<sup>161</sup> But reports suggest the policy has not always been followed. For example, the president’s then-Chief of Staff Reince Priebus reportedly asked a top FBI official to publicly disclose alleged facts pertaining to the bureau’s investigation of Russian interference in the 2016 election in order to refute a news report that senior members of the Trump campaign had frequent contacts with Russian agents.<sup>162</sup>

Trump himself, on several occasions, directly contacted the U.S. attorney in the Southern District of New York, who had jurisdiction over a number of matters involving the president’s private and financial interests, ostensibly to develop a personal relationship, before ultimately firing him.<sup>163</sup> (That former U.S. attorney is the co-chair of this Task Force.) Trump also drew criticism for taking the unusual step of personally interviewing candidates for the U.S. attorney’s successor.<sup>164</sup> While there is no evidence that the president made inappropriate requests in these conversations, they make clear that it is possible for a president to put inappropriate pressure on prosecutors.

When longstanding norms governing contacts between the White House and law enforcement officials are violated, even for reasons that are not inappropriate, it creates a troubling precedent for future administrations and opens the door to inappropriate breaches.

While Congress should not itself regulate how the executive branch deals with law enforcement, it can take steps to increase transparency and bolster accountability, thereby deterring misconduct. Specifically, Congress should pass legislation to:

- **Require the White House, the Department of Justice, and other law enforcement agencies to issue and publish a White House contacts policy.** The legislation should require each administration to identify specific officials, in both the White House and the relevant enforcement agencies, who are authorized to communicate about individual law enforcement matters. This will send a strong message that Congress believes limitations on White House influence are critical to impartial law enforcement. The public disclosure requirement will enable the public to assess whether the policies are

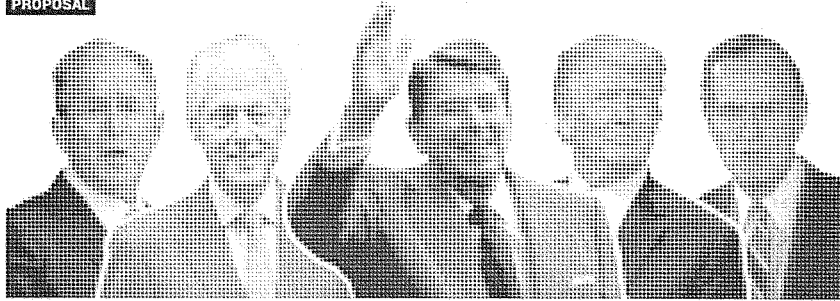


adequate to ensure that law enforcement is not subject to undue political influence.<sup>165</sup> Disclosure also makes it possible for Congress to use hearings and other oversight powers to address any deficiencies.<sup>166</sup>

- **Require law enforcement agencies to maintain a log of contacts** with the White House pertaining to specific civil or criminal enforcement matters under-

taken by the Justice Department or other federal agencies with enforcement authority. The log should be limited to communications about individual cases or investigations, including communications about the litigants, subjects, targets, and witnesses, spelling out the people involved in the communication and the matter discussed.<sup>167</sup> It should not include routine (and necessary) contacts where the White House seeks legal

#### PROPOSAL



### Safeguarding the Pardon Process

#### PRINCIPLE

*Presidents should follow established procedures when using the pardon power and should use it to right clear miscarriages of justice, not to reward political allies.*



#### PROBLEM 1

In 1981, President Ronald Reagan pardoned two FBI officials who had authorized illegal surveillance of the homes of friends of the militant radical organization the Weather Underground. No pardon applications were submitted prior to issuance of the pardons, and the pardons did not go through the pardon attorney's office.



#### PROBLEM 2

In 1992, President George H.W. Bush pardoned six former government officials, including former Defense Secretary Caspar W. Weinberger, who were prosecuted in the Iran-Contra affair. The pardon request was sent directly to the White House, rather than to the pardon attorney's office.



#### PROBLEM 3

In 2001, President Bill Clinton issued pardons on his last day in office to a fugitive investor whose ex-wife made substantial donations to the Clinton Presidential Library and to Hillary Clinton's Senate campaign, as well as to a

Florida businessman who had retained Hillary Clinton's brother to advocate for his clemency application.



#### PROBLEM 4

President George W. Bush commuted the prison sentence of Lewis "Scooter" Libby, a former top aide in the Bush White House. Libby had been convicted of lying to federal investigators probing the leak of the name of a CIA operative.



#### PROBLEM 5

In 2017, President Donald Trump pardoned Joe Arpaio, a former Arizona sheriff and Trump supporter who had been convicted for disobeying a federal judge's order to stop racial profiling in detaining suspected undocumented immigrants. The next year, Trump pardoned Dinesh D'Souza, a conservative pundit who had been convicted of violating campaign finance laws by using a straw donor to contribute to a Republican Senate campaign. Not long afterward, Trump became the first president to publicly declare an absolute right to pardon himself.



#### TASK FORCE PROPOSED RESPONSE

Congress should require written justifications for pardons involving close associates and should pass a resolution expressly disapproving of self-pardons.

advice from the agency or is participating in legal policy issues; contacts relating to a matter in which the United States or one of its subdivisions is a defendant or a matter concerning national security; and other ordinary contacts that do not concern specific cases or investigations.<sup>168</sup>

- **Require relevant agencies to submit reports based on the above logs to relevant House and Senate committees,** the Department of Justice's Inspector General, and covered agencies' inspectors general. Those reports should omit information that could jeopardize confidential witnesses, undercover operations, or the rights of those under scrutiny. Congress and inspectors general could pose follow-up questions about the propriety of particular White House contacts.

These measures, by allowing for oversight of improper communications, will help deter inappropriate White House conduct. If someone knows there will be a record of their contact, they will likely take care to ensure it is appropriate. White House staffers are already accustomed to making similar judgments because White House emails that would otherwise remain confidential risk being publicly released under the Freedom of Information Act<sup>169</sup> if they are sent to agencies.

Based on our experience serving in government, we do not believe a logging and reporting requirement would be overly burdensome. In fact, we expect that reportable White House contacts about a specific pending case or investigation outside of the interagency coordination process would be rare. The White House and Department of Justice already maintain records of similar types of information; indeed, the Department of Justice electronically tracks all of its communications, including with outside parties.<sup>170</sup>

Nor are these measures likely to raise legitimate constitutional concerns. Congress currently regulates White House contacts with the Internal Revenue Service, preventing officials, including the president, from requesting that IRS employees start or stop an audit.<sup>171</sup> It would be on strong constitutional footing to also require the White House and executive branch enforcement agencies to adopt and publish policies to regulate White House-agency contacts, codifying longstanding practice.<sup>172</sup> Congress has passed other laws that require executive branch documents and records of activities to be retained and disclosed in order to further Congress' oversight functions and the public's interest in transparency and accountability.<sup>173</sup> For instance, most White House documents are publicly released after an administration

has concluded, pursuant to the Presidential Records Act.<sup>174</sup> The president does not have an absolute right to protect personal or White House contacts from disclosure.<sup>175</sup>

### **PROPOSAL 8** **Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.**

Congress should establish a clear mechanism within the executive branch for investigating instances of inappropriate interference with law enforcement for political or personal ends.

We recommend that Congress utilize an oversight mechanism that already exists: agency inspectors general.

In 1978, Congress established inspectors general as independent, nonpartisan watchdogs housed within the executive branch.<sup>176</sup> Their traditional areas of authority relate to financial integrity, with a mandate to eradicate fraud, waste, and abuse.<sup>177</sup> They are empowered to conduct investigations and issue reports relating to the administration of their agencies' programs and operations, and they have a staff of investigators.<sup>178</sup> Some inspectors general are nominated by the president and confirmed by the Senate "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations,"<sup>179</sup> while others are appointed by agency heads.<sup>180</sup> All inspectors general report to and submit operating budget requests to agency heads.<sup>181</sup> Inspectors general are subject to removal by the president, with the president required to communicate in writing the reasons for the removal to both houses of Congress within 30 days of that action.<sup>182</sup>

Congress should expand the jurisdiction of agency inspectors general to expressly include investigations into improper interference in law enforcement functions. Inspectors general arguably already have that authority under existing law, which empowers them to investigate "abuse" and violations of agency policies.<sup>183</sup> But a clear mandate, subject to clear standards, is needed for such an important and sensitive function.

Under this proposal the inspectors general would investigate whether improper White House contacts influenced a specific law enforcement matter at their agency; it would not install an inspector general in the White House or empower an inspector general to go on open-ended, and potentially partisan, witch hunts. Inspector general investigations are also constrained by DOJ guidelines,<sup>184</sup>

professional standards published by the Council of Inspectors General for Integrity and Efficiency,<sup>185</sup> and other controls in the Inspector General Act.<sup>186</sup> Congress should also direct the attorney general to issue guidelines outlining the standards and procedures by which inspectors general are to investigate improper interference.

This proposal also has the benefit of efficiency. It does not reinvent the wheel. Inspectors general are already familiar with the roles and missions of their own agencies. They already have investigators. They know their way around the building. Therefore, we can add this important feature of democratic accountability without creating — and paying for — a whole new bureaucracy.<sup>187</sup>

### **Ensure No One Is Above the Law**

Political leaders and their powerful allies present a special challenge to impartial enforcement of the law. When those in charge of law enforcement are the subject of law enforcement, there is a risk of abuse. Abuse sends a message that there are two sets of rules: a lenient one for the politically well-connected and a far more unforgiving one for everyone else. That is why our system has built-in safeguards to ensure that no one is above the law, from recusal rules to special prosecutor laws. But when the president is involved, the system has two vulnerabilities that merit attention: the possibility of abuse of the pardon power and the possibility of political interference into investigations of the president, senior political aides, and close personal associates. The following recommendations would help protect against such abuse.

#### **PROPOSAL 9** **Congress should require written justifications from the president for pardons involving close associates.**

The Constitution endows the president with the “power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.”<sup>188</sup> This power allows a president to ensure that “inflexible adherence” to the law does not itself become a source of injustice.<sup>189</sup> Presidents have also used pardons to heal national wounds, as George Washington did with the first pardons granted to Whiskey Rebellion participants convicted of treason and as Gerald Ford and Jimmy Carter did by issuing amnesties to draft law violators from the Vietnam era.<sup>190</sup>

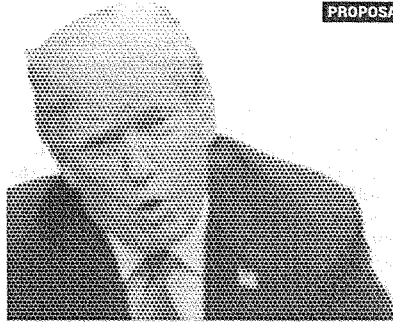
By giving the president exclusive authority to exercise the pardon power, the Founders believed it would “naturally inspire scrupulousness and caution.”<sup>191</sup> To ensure such “scrupulousness and caution,” and to

prevent abuse, for over a century, presidents have voluntarily adhered to an established process for considering prospective pardons, overseen by the Department of Justice’s Office of the Pardon Attorney.<sup>192</sup> Under this process, the pardon attorney reviews pardon applications and makes written recommendations to the president based on published pardon guidelines.<sup>193</sup> The guidelines reflect the values of mercy and justice, and require consideration of factors including the applicant’s post-conviction conduct, the extent to which the applicant accepted responsibility for their crime, how long ago the crime took place, and the seriousness of the offense.<sup>194</sup> Although the president remains free to ignore the pardon attorney’s recommendations, this process ensures that all pardon applications are assessed in the same way without regard for the president’s personal or partisan political interests.

Controversy has arisen primarily when presidents have deviated from this standard process.<sup>195</sup> There are, unfortunately, several recent examples of such controversial pardons. Some pardons were criticized as inappropriate favors to donors or benefactors, like President Clinton’s pardon of financier Marc Rich<sup>196</sup> or President George W. Bush’s pardon of real estate developer Isaac Toussie.<sup>197</sup> In fact, President Bush immediately rescinded the pardon following press reports that Toussie’s father had donated tens of thousands of dollars to Republicans.<sup>198</sup> Other pardons were criticized as favors for former colleagues, like President George W. Bush’s commutation of the prison sentence of Scooter Libby (former chief of staff to his vice president, Dick Cheney),<sup>199</sup> or President George H. W. Bush’s pardon of former officials involved in the Iran-Contra affair.<sup>200</sup>

Reports that President Trump has considered pardons for two former members of his campaign, Michael Flynn and Paul Manafort, have also drawn criticism, not only because these are his former associates.<sup>201</sup> Flynn and Manafort are potential witnesses in an investigation that may implicate the president, and the floating of pardons is seen by some as an attempt to lure positive testimony, thereby obstructing justice.<sup>202</sup>

While it is certainly an abuse of the pardon power to use it to advance one’s self-interest, that does not mean that Congress can or should try to limit the president’s power to make pardon determinations. Nor do we think it wise for Congress to try to restore longstanding safeguards by requiring the president to consult with the pardon attorney before making pardons. Instead, we propose a much more limited measure designed to increase transparency around the exercise of the pardon power in cases raising legitimate questions.



## PROPOSAL

## Limiting Conflicts of Interest

### PRINCIPLE

*Presidents and their spouses should limit their direct holdings to assets that pose no risk of a conflict of interest and should use a blind trust for all other investments — as they've all done since the 1970s. In addition, top executive branch officials should refrain from conduct that could create even the appearance of self-interested decision-making.*



#### PROBLEM 1

In 2009, while serving as Secretary of State, Hillary Clinton had dealings with donors to the Clinton Foundation, which was run by President Bill Clinton and Chelsea Clinton at the time.



#### PROBLEM 2

In 2017, Trump maintained ownership and control of his international business, becoming the first president since Nixon not to comply voluntarily with conflict of interest rules. In addition, the family business of Jared Kushner, Trump's son-in-law and senior adviser, pursued relationships with foreign governments and with foreign companies that have business before the U.S. government. And EPA Administrator Scott Pruitt rented a luxury apartment at below-market rates from the wife of an energy lobbyist with business before the EPA, among other ethical lapses.



#### TASK FORCE PROPOSED RESPONSE

Congress should pass a law to enforce the Constitution's Emoluments Clauses. And it should extend safeguards against conflicts of interest to the president and vice president, with exemptions that recognize the president's unique role. Congress also should revamp the Office of Government Ethics so it's better able to craft and enforce common-sense ethical standards for the executive branch.

Specifically, Congress should pass legislation requiring the president, in a small subset of cases, to explain his or her decision for pardons or grants of clemency in a written report to the House and Senate Judiciary Committees. To minimize any burden on the president, the reporting requirement should apply only in cases where the individual seeking a pardon has a close personal, professional, or financial relationship to the president — a family member, business partner, current or former employee or professional colleague, or political contributor — or to the president's spouse, close family member, or business associate. In courts, similar relationships typically warrant recusal by a judge.<sup>203</sup> The report should address whether and how the president considered the factors historically used by the pardon attorney in evaluating requests.<sup>204</sup>

This legislation would provide the public with some confidence that the pardon power is being used to further justice, rather than to favor presidential allies or to reduce the president's own criminal liability. At the same time, it would create an avenue for political accountability for abuse of an otherwise unchecked authority. And it would provide Congress with an opportunity to respond to abuse if the president flouts the reporting requirement.

There is ample support and precedent for greater transparency in the pardon process.<sup>205</sup> From 1885 to 1932, presidents submitted detailed reports to Congress about pardons and clemencies they had granted, which included, in many (if not most) instances, some explanation for the grants. These reports even noted if there were disagreements between the president and the pardon attorney or the attorney general and whether the applications did not go through "normal channels."<sup>206</sup> Even without a mandatory reporting requirement, some recent presidents have felt compelled to explain their use of the pardon power.<sup>207</sup> Reporting requirements are also in place in at least 14 states, which require governors to provide reasons for each use of their pardon authority.<sup>208</sup> There are currently at least three bills pending in Congress that aim to increase the transparency and prevent abuse of the pardon power.<sup>209</sup>

We do not believe that this limited reporting requirement would unduly burden the executive branch. There have been on average only 193 acts of clemency a year going back to 1900.<sup>210</sup> Only a minute number of these would be subject to the reporting requirement. Indeed, at least one former U.S. pardon attorney has called for a return to the pre-1933 policy of reporting to Congress on *all* grants of clemency,<sup>211</sup> though we do not believe we need to go that far. In short, the risk of added burden is far outweighed by the accountability that further transparency would bring.

Finally, analogizing from other reporting requirements Congress has imposed on the president, such as reporting to Congress the reasons for removing inspectors general (in the Inspector General Act)<sup>212</sup> or making White House documents available to Congress (in the Presidential Records Act),<sup>213</sup> we believe that such a reporting requirement is within Congress's constitutional authority.<sup>214</sup> Requiring a president to state the reasons for granting pardons in limited instances does not control or limit the president's ability to grant a pardon.<sup>215</sup> And it helps Congress enforce other constitutional provisions and better exercise its powers.<sup>216</sup>

**PROPOSAL 10**  
**Congress should pass a resolution expressly and categorically condemning self-pardons.**

In recent months, the president has raised the possibility of using the pardon power to absolve himself of criminal liability — an idea that has gone from politically unthinkable to a presidentially asserted “absolute right.”<sup>217</sup> For a country born in revolt against a king, it is hard to imagine an act more damaging to the principle that no one is above the law than a self-pardon by the president.

No president has ever pardoned himself, but two have now considered it. In 1974, President Nixon explored the possibility of a “self-pardon” before resigning, prompting the Department of Justice's Office of Legal Counsel (OLC) to opine that the president cannot pardon himself, based on the “fundamental rule that no one may be a judge in his own case.”<sup>218</sup>

Rather than waiting to criticize such an act after the fact, Congress should try to prevent this offense to the rule of law by passing a resolution making clear it opposes so-called “self-pardons” and believes they are an unconstitutional exercise of the pardon power. The resolution should also make clear that Congress will initiate impeachment proceedings if the president uses the pardon power to try to pardon himself and could express concern about, and potential responses to, other abuses of the pardon power that suggest public corruption or lack of regard for rule of law and separation of powers principles.<sup>219</sup>

There is precedent for this kind of congressional resolution.<sup>220</sup> At least 33 “sense of” Congress resolutions have been introduced in Congress to disapprove, censure, or condemn a president's actions, with a 1912 resolution condemning President Taft being the latest that was adopted.<sup>221</sup> Some members of Congress have recently argued for a more significant response — like amending the Constitution to expressly limit the president's pardon

power<sup>222</sup> — with three bills pending in the current Congress aiming to do so.<sup>223</sup> In fact, Rep. Karen Bass (D-Calif.) proposed a similar resolution in 2017 disapproving of a self-pardon or a pardon for any member of the president's family, but the resolution has not attracted bipartisan support.<sup>224</sup>

A strong bipartisan resolution would send an important message that Congress will hold the president accountable for any attempt at self-pardon.

**PROPOSAL 11**  
**Congress should pass legislation to protect special counsels from improper removal.**

There is also risk of abuse when a law enforcement investigation implicates high level government officials — especially the president. At minimum, investigators must be secure in the knowledge that their pursuit of justice will not result in their termination. And the American public must be confident that even our highest-ranking officials are subject to the rule of law.

For at least the last several decades, the American public and Congress have consistently supported efforts to insulate prosecutorial decisions from improper partisan or personal considerations. For instance, in the immediate aftermath of the Watergate special prosecutor's firing during the Saturday Night Massacre,<sup>225</sup> public opinion shifted in support of impeaching President Richard Nixon,<sup>226</sup> members of Congress introduced impeachment resolutions,<sup>227</sup> and a federal district court judge ruled that the firing of the special prosecutor was unlawful.<sup>228</sup> A few years later, Congress enacted the now-expired Independent Counsel Law, along with the Civil Service Reform Act of 1978, which codified the principle that federal employees (specifically, members of the civil service) should be insulated from administrations' political whims.<sup>229</sup>

In 1999, after Congress declined to renew the independent counsel stature, the Department of Justice adopted regulations laying out a process for appointing a special counsel to pursue investigations of White House officials or other senior political appointees.<sup>230</sup> The special counsel is appointed by the attorney general and may only be removed for “misconduct, dereliction of duty, incapacity, conflict of interest, or for good cause.”<sup>231</sup> These provisions are meant to protect the special counsel from actual or perceived threats that could otherwise influence or impede his or her investigation, while providing a mechanism to hold the special counsel accountable in the event of misconduct.

To be sure, tenure protections have not kept presidents from bristling at investigations by independent or special counsels. President Clinton, for example, famously sparred with Independent Counsel Kenneth Starr during his investigation.<sup>232</sup> Nevertheless, recent statements and actions by President Trump suggest a far more serious threat to Special Counsel Robert Mueller's investigation, reinforcing the importance of the department's protections against removal, while simultaneously demonstrating why Congress should pass a law to protect the special counsel from removal without cause, rather than relying on executive branch regulations that can be amended or rescinded.

To give a partial review: After President Trump fired FBI Director James Comey, at least in part because of "this Russia thing,"<sup>233</sup> Deputy Attorney General Rod Rosenstein appointed Special Counsel Robert Mueller to continue the investigation. Since then, President Trump has repeatedly accused Mueller and his team of having "conflicts of interest" and has regularly referred to the investigation as a "witch hunt."<sup>234</sup> He reportedly ordered Mueller's firing in June of 2017 but walked back the order after White House Counsel Donald F. McGahn threatened to resign.<sup>235</sup> He has also made statements that appear intended to limit the scope of the investigation, stating that if the investigation veers into a review of his personal finances that would cross a "red line."<sup>236</sup> President Trump has also publicly berated those he holds responsible for appointing the special counsel, including threatening to fire Attorney General Jeff Sessions because of Sessions's decision to follow Department of Justice rules and recuse himself from the investigation<sup>237</sup> and publicly attacking Rosenstein over the Mueller appointment.<sup>238</sup>

Notably, of course, the president has not yet removed the special counsel. The critical Department of Justice regulations forbid him from doing so, but they are hardly a guarantee that he will not eventually do so. Because the current protections are merely regulations created by the Department of Justice rather than law, the executive branch can repeal or modify them without involving Congress.<sup>239</sup>

President Trump's aggressive actions and statements against the Russia investigation, as well as Special Counsel Mueller and his team, have left many to fear that his administration will eventually repeal or modify the current DOJ regulations,<sup>240</sup> or that a future president facing a special counsel he or she deems hostile may be emboldened to do so. It is increasingly clear that special counsel protections need to be enshrined in a statute. For these reasons:

- **Congress should pass legislation to shield special counsel investigations from improper political interference.** The legislation should require that the special counsel may only be removed for cause, and it should establish judicial review of any for-cause determination.

The Task Force recommends supporting the bipartisan Special Counsel Independence and Integrity Act (S. 2644),<sup>241</sup> introduced by Sens. Lindsay Graham (R-S.C.), Thom Tillis (R-N.C.), Chris Coons (D-Del.), and Cory Booker (D-N.J.) amid concerns that Special Counsel Mueller would be fired. The bill, which was voted favorably out of the Senate Judiciary Committee,<sup>242</sup> would only allow the special counsel to be removed for cause, and it limits the removal power to the attorney general or the

#### PROPOSAL



### Making Tax Returns Public

#### PRINCIPLE

*Presidents should release their tax returns — as every president since Nixon has done (Ford released a detailed summary of them) — to ensure that they can be fully vetted by the public and the media.*



#### PROBLEM

In 2017, Trump became the first president not to release his tax returns since Lyndon Johnson.



#### TASK FORCE PROPOSED RESPONSE

Congress should require the president and vice president, and candidates for those offices, to publicly release their personal and business tax returns.

most senior Senate-confirmed Department of Justice official who is not recused from the matter. The bill also allows the special counsel to challenge his or her removal in court, requiring that any such challenge be considered on an expedited basis and that any appeals be directed to the Supreme Court, and provides for the preservation of the special counsel's materials in the event of dismissal. This legislation would not prevent a future president from publicly railing against or even threatening those involved in a special counsel investigation, but it would provide greater assurance that the president cannot unilaterally end an investigation.

Legislation to protect the special counsel from improper removal is within Congress's constitutional authority, as evidenced by similar exercises of its authority in the past that have been found to be constitutional.<sup>243</sup> Congress previously established an independent counsel with jurisdiction to investigate criminal misconduct by high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest.<sup>244</sup> Congress insulated the independent counsel from improper removal by superiors.<sup>245</sup> Congress has also enacted legislation protecting numerous other federal officers from arbitrary removal.<sup>246</sup>

## About the Task Force Members



### Preet Bharara, Co-Chair

Preet Bharara is an American lawyer who served as U.S. Attorney for the Southern District of New York from 2009 to 2017. His office prosecuted cases involving terrorism, narcotics and arms trafficking, financial and healthcare fraud, cybercrime, public

corruption, gang violence, organized crime, and civil rights violations. In 2012, Bharara was featured on TIME's "100 Most Influential People in the World." On April 1, 2017, Mr. Bharara joined the NYU School of Law faculty as a Distinguished Scholar in Residence. He is Executive Vice President at Some Spider Studios where he hosts a CAFE podcast, Stay Tuned, focused on questions of justice and fairness.



### Christine Todd Whitman, Co-Chair

Christine Todd Whitman is president of the Whitman Strategy Group, a consulting firm specializing in environmental and energy issues. She served in the cabinet of President George W. Bush as Administrator of

the Environmental Protection Agency from 2001 to 2003, and was the governor of New Jersey from 1994 to 2001. During her time in government, she gained bipartisan support and was widely praised for championing common-sense environmental improvements. Gov. Whitman is involved in numerous national nonprofit organizations focused on legal and environmental causes, including the American Security Project and the O'Connor Judicial Selection Advisory Committee at the Institute for the Advancement of the American Legal System. She is a graduate of Wheaton College in Norton, Massachusetts.



### Mike Castle

Mike Castle is a former two-term governor, nine-term member of Congress, lieutenant governor, deputy attorney general, and state senator of his home state of Delaware. Currently a partner at the law firm DLA Piper, Gov. Castle served

on the Financial Services, Intelligence, and Education and Workforce Committees during his tenure in the U.S. House of Representatives, and also led a number of Congressional caucuses. Since leaving office in January 2011, he has been honored by the Delaware Chamber of Commerce and the University of Delaware, and politicians of both parties have heralded Gov. Castle as a bipartisan leader. At DLA Piper, he works on financial issues, international trade, legislative affairs, and healthcare. He is the Board Chair for Research!America. He received his B.A. from Hamilton College and his J.D. from Georgetown University.



### Christopher Edley, Jr.

Christopher Edley, Jr. is the Honorable William H. Orrick, Jr. Distinguished Professor of Law at UC Berkeley School of Law, after serving as dean from 2004 through 2013. Before Berkeley, he was a professor at Harvard Law for 23 years and

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Academy of Arts & Sciences; the National Academy of Public Administration; the Council on Foreign Relations; the American Law Institute; the Advisory Board of the Hamilton Project, the Brookings Institution; and the board of Inequality Media; and is a National Associate of the National Research Council.



#### **Chuck Hagel**

Chuck Hagel served as the 24th Secretary of Defense from 2013 to 2015. He is the only Vietnam veteran and enlisted combat veteran to serve as Secretary of Defense. He represented the state of Nebraska in the U.S. Senate from 1997 to 2009. In the Senate, Sec. Hagel was a senior member of the Senate Foreign Relations; Banking, Housing and Urban Affairs; and Intelligence Committees. Previously, Sec. Hagel was Co-Chairman of the President's Intelligence Advisory Board, a Distinguished Professor at Georgetown University, Chairman of the Atlantic Council, Chairman of the United States of America Vietnam War Commemoration Advisory Committee, Co-Chairman of the Vietnam Veterans Memorial Fund Corporate Council, President and CEO of the USO, and Deputy Administrator of the Veterans Administration. He currently serves on the RAND Board of Trustees, PBS Board, Corsair Capital Advisory Board, American Security Project Board, and is a Senior Advisor to Gallup. He is a graduate of the University of Nebraska at Omaha.



#### **David Iglesias**

David Iglesias is Director of the Wheaton Center for Faith, Politics and Economics and is the Jean & E. Floyd Kvamme Associate Professor of Politics and Law at Wheaton College. Previously, Professor Iglesias served as a prosecutor focusing on national security and terrorism cases. He was the U.S. Attorney for the District of New Mexico from 2001 to 2007. Professor Iglesias was recalled to active duty status between 2008 and 2014 in support of Operation Enduring Freedom. He served as a team leader, senior prosecutor, and spokesman with the U.S. Military Commissions, handling war crimes and terrorism cases. He retired from the U.S. Navy as a Captain. He received his bachelor's from Wheaton College and his J.D. from the University of New Mexico School of Law.



#### **Amy Comstock Rick**

Amy Comstock Rick is the President and CEO of the Food and Drug Law Institute, and was previously the CEO of the Parkinson's Action Network. Prior to becoming a nonprofit and health leader, Ms. Rick served as the Director of the U.S. Office of Government Ethics (2000-2003) and as an Associate Counsel to the President in the White House Counsel's Office (1998-2000). She also served as a career attorney at the U.S. Department of Education, including as the Department's Assistant General Counsel for Ethics. Ms. Rick has also served as President of the Coalition for the Advancement of Medical Research, and as a board member of Research!America, the National Health Council, and the American Brain Coalition. She received her bachelor's from Bard College and J.D. from the University of Michigan.



#### **Donald B. Verrilli, Jr.**

Donald B. Verrilli, Jr. is a partner at Munger, Tolles & Olson LLP, and the founder of its Washington, D.C. office. He served as Solicitor General of the United States from June 2011 to June 2016. During that time, he was responsible for representing the U.S. government in all appellate matters before the Supreme Court and in the courts of appeals, and was a legal adviser to President Barack Obama and the Attorney General. Earlier, he served as Deputy White House Counsel and as Associate Deputy Attorney General in the U.S. Department of Justice. He clerked for U.S. Supreme Court Justice William J. Brennan, Jr., and the Honorable J. Skelly Wright on the U.S. Court of Appeals for the D.C. Circuit. He received his B.A. from Yale University and J.D. from Columbia Law School.



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## Acknowledgments

The Brennan Center gratefully acknowledges the Carnegie Corporation of New York, Change Happens Foundation, Democracy Alliance Partners, The William and Flora Hewlett Foundation, The JPB Foundation, The Kohlberg Foundation, Craig Newmark, founder of craigslist and Craig Newmark Philanthropies, Open Society Foundations, Rockefeller Family Fund, and the Bernard and Anne Spitzer Charitable Trust for their generous support of this work.

The Task Force members and its staff would like to thank Michael Waldman, John Kowal, Alicia Bannon, Douglas Keith, Wilfred Codrington, Zachary Roth, Sidni Frederick, and Yuliya Bas of the Brennan Center, and Andrew Wright of Just Security for their invaluable contributions to this report.

## About the Brennan Center for Justice

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving Constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

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## Appendix: Ethics and Disclosure Requirements

Is the official required to:	President and Vice President	Cabinet members and other senior executive branch officials	Members of Congress	Federal judges	Candidates for federal office
Make annual financial disclosures* using OGE Form 278?	Yes	Yes (including nominees)	Yes	Yes	Yes
Follow federal conflict of interest law and regulations, and related rules?	No	Yes	No	No	No
Abide by the insider trading rules and transaction reporting requirements of the STOCK Act?*	Reporting requirements only	Reporting requirements only	Yes	No	No
Follow other rules to prevent conflicts of interest?	No	Some, depending on the agency	Yes (House and Senate ethics rules)	Yes (Code of Judicial Conduct)	No

\* Form 278 requires disclosure of the filer's compensation, investments, assets, gifts, liabilities, certain employment agreements or arrangements, and similar information regarding their spouse and dependent children.

\*\* The STOCK Act forbids members of Congress and their staffs from engaging in insider trading on the basis of information derived from their position. It also requires certain officials to report securities transactions valued above \$1,000.

## Endnotes

- 1 The Federalist No. 51 (James Madison) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.").
- 2 S. Res. 338, 88th Cong. (1964) (establishing a Select Committee on Standards and Conduct in the Senate); "Senate Committee Reorganization," *Congressional Record*, vol. 123, Feb. 1, 1977, p. 2886 (creating a permanent Select Committee on Ethics to replace the Select Committee on Standards and Conduct); H.R. Res. 1013, 89th Cong. (1966) (establishing a Select Committee on Standards and Conduct in the House of Representatives); H.R. Res. 418, 90th Cong. (1967) (establishing a Committee on Standards of Official Conduct in the House of Representatives); H.R. Res. 895, 110th Cong. (2008) (establishing an independent Office of Congressional Ethics in the House of Representatives).
- 3 "Code of Conduct for Judicial Employees," in *Guide to Judiciary Policy*, Administrative Office of the United States Courts, 2013, available at <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees>.
- 4 "Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of Independence para. 2 (U.S. 1776); "We the People of the United States, . . . do ordain and establish this Constitution for the United States of America." U.S. Const. preamble.; "...Government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, the Gettysburg Address (Gettysburg, PA, Nov. 19, 1863).
- 5 U.S. Const. art. I, § 9, cl. 8 ("No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.").
- 6 U.S. Const. art. II, § 1, cl. 7 ("The President shall, at stated times, receive for his service, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.").
- 7 U.S. Const. amends. V, XIV; *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (finding that a West Virginia Supreme Court of Appeals judge should have recused, as a matter of due process, where defendant contributed \$3 million to judge's election campaign).
- 8 See *infra* at 8 (discussing divestment by past presidents and vice presidents).
- 9 See *infra* at 6-7 (discussing public disclosure of tax returns by past presidents and presidential candidates).
- 10 James Grimaldi, "Denise Rich Gave Clinton Library \$450,000," *Washington Post*, Feb. 10, 2001, <https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30>.
- 11 James V. Grimaldi and Peter Slevin, "Hillary Clinton's Brother Was Paid for Role in 2 Pardons," *Washington Post*, Feb. 22, 2001, <https://www.washingtonpost.com/archive/politics/2001/02/22/hillary-clintons-brother-was-paid-for-role-in-2-pardons/c5c94a42-b71c-4fe0-a90e-b6189664a8a4/>.
- 12 Rosalind S. Helderman, Spencer S. Hsu, and Tom Hamburger, "Emails Reveal How Foundation Donors Got Access to Clinton and Her Close Aides at State Dept.," *Washington Post*, Aug. 22, 2016, <http://wapo.st/2bxLDIH>.
- 13 See, e.g., Jane Coaston, "GOP Rep. Chris Collins Was Just Charged with Insider Trading," *Vox*, Aug. 8, 2018, <https://www.vox.com/2018/8/8/17663938/chris-collins-arrested-insider-trading-immunotherapeutics>; Susan Davis, "Senate Ethics Panel Admonishes Sen. Menendez," *NPR*, Apr. 26, 2018, <https://www.npr.org/2018/04/26/606165063/senate-ethics-panel-admonishes-sen-menendez>; Matt Rourke, "Veteran Pa. Congressman Convicted in Racketeering

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- 25 Ashley Kirzinger et al., *Kaiser Health Tracking Poll — Late Summer 2018: The Election, Pre-existing Conditions, and Surprises on Medical Bills*, Sept. 5, 2018, <https://www.kff.org/bca7b93>.
- 26 The Supreme Court called self-dealing of this sort "an evil that endangers the very fabric of a democratic society." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). See also Zephyr Teachout, "The Anti-Corruption Principle," *Cornell Law Review* 94 (2009): 342, 345 (arguing that the Constitution "carries within it an anti-corruption principle" and that "power-and-wealth seeking by representatives and elites is a major and constant threat to our democracy"); Philip B. Heymann, "Democracy and Corruption," *Fordham International Law Journal* 20 (1996): 327–28 (discussing impact of corruption on democracy, citing international examples).
- 27 Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: Frederick A. Stokes Co., 1914), 62.
- 28 Specifically, the OGE 278 requires that officials disclose their personal sources of income, assets, debts, and other financial information, and employment arrangements and agreements, as well as information for spouses and dependent children. 5 C.F.R. § 2634; Office of Government Ethics, Form 278-e, Public Financial Disclosure (2018); see also Table 1.
- 29 Most states did not pass laws permitting LLCs until the late 1980s and early 1990s. See Larry Ribstein, "The Emergence of the Limited Liability Company," *Business Lawyer* 51, no. 1 (1995): 1, 2 (noting that between 1977, when Wyoming enacted first LLC statute, and 1995, all U.S. jurisdictions but Vermont and Hawaii had enacted LLC statutes); see also American Bar Association, "LLCs: Is the Future Here? A History and Prognosis," *Law Trends and News* 1 (Oct. 2004), available at [https://www.americanbar.org/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/llc.html](https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/llc.html) (discussing 1977 Wyoming statute and evolution of other states' LLC statutes). According to the IRS, based on tax returns, the number of LLCs went from 17,335 in 1993 to 1,898,178 in 2008. See "Statistics of Income (SOI) Tax Stats — Integrated Business Data 1980–2008," Internal Revenue Service, <https://www.irs.gov/pub/irs-soi/80or1all.xls>.
- 30 Daniel I. Weiner and Lawrence Norden, *Presidential Transparency: Beyond Tax Returns*, Brennan Center for Justice, 2017, 2–3, available at <https://www.brennancenter.org/sites/default/files/publications/Presidential%20Transparency%20Beyond%20Tax%20Returns.pdf>. Ethics officials can request such information from specific filers as a condition for certifying, but they do not have to do so, and the information is not publicly disclosed. See generally *Guide to Drafting Ethics Agreements for PAS Nominees*, Office of Government Ethics, September 2014, available at [https://www.oge.gov/Web/oge.nsf/Resources/PAS+Nominee+Ethics+Agreement+Guide+\(MS+Word\)](https://www.oge.gov/Web/oge.nsf/Resources/PAS+Nominee+Ethics+Agreement+Guide+(MS+Word)).
- 31 See Ethics in Government Act, 5 U.S.C. App. § 102 (listing disclosure requirements, which do not include reporting for family businesses). In the case of President Trump, for instance, most of his holdings are tied up in a web of approximately 500 LLCs and other closely-held entities, which makes it likely his disclosure reports omit critical information about the president's finances. See Ben Popken, "What Trump's Disclosure of His 500 LLCs Can and Can't Tell Us," *NBC News*, May 16, 2018, <https://www.nbcnews.com/business/taxes/what-trump-s-disclosure-his-500-llcs-can-can-t-n874391>.
- 32 Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining Paperwork for Executive Nominations* (Washington, D.C.: Executive Office of the President of the United States, 2012), 4, 48, [https://www2.oge.gov/Web/OGEnsf/0/2CE9B19C0F0ED82A85257EA600655818/\\$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf](https://www2.oge.gov/Web/OGEnsf/0/2CE9B19C0F0ED82A85257EA600655818/$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf) (finding that the "two areas particularly ripe for reform are: (1) eliminating the requirement to report investment income...and (2) raising and rationalizing minimum reporting thresholds across reporting categories to exclude the disclosure of financial items too insignificant to raise a concern over conflict of interest" and that implementing these

- changes may attract more civic and private-sector leaders to senior government service); Terry Sullivan, "Fabulous Formless Darkness: Presidential Nominees and the Morass of Inquiry," *Brookings*, Mar. 1, 2001, <https://www.brookings.edu/articles/fabulous-formless-darkness-presidential-nominees-and-the-morass-of-inquiry/> (calling for simplification of paperwork nominees are required to complete); Memorandum from O'Melveny and Myers, on behalf of the Partnership for Public Service, to Fred Fielding, White House Counsel, "Proposals to Reform the Presidential Appointments Process" (Apr. 10, 2008): 2, 3, 5, *available at* <http://presidentialtransition.org/publications/viewcontentdetails.php?id=807> (noting that burdensome process and divestiture requirements may deter qualified people from public service, and recommending that nominees' paperwork be streamlined in order to reduce error).
- 33 Ninety-six percent of Americans polled this year said that it is important that government be "open and transparent." *The Public, the Political System and American Democracy*, Pew Research Center, 2018, 23, *available at* <http://assets.pewresearch.org/wp-content/uploads/sites/5/2018/04/15160829/4-26-2018-Democracy-release1.pdf>. Polling shows that large swaths of the American public believe it is possible to "address the problem of political corruption by reforming current ethics and election laws." Jeffrey D. Milyo and David M. Primo, *Public Attitudes and Campaign Finance*, Bipartisan Policy Center, 2017, 17, *available at* <https://bipartisanpolicy.org/wp-content/uploads/2018/01/Public-Attitudes-and-Campaign-Finance-Jeffrey-D.-Milyo-David-M.-Primo.pdf>.
  - 34 James Wieghart, "President Nixon Says, 'I'm Not a Crook,'" on National Television," *New York Daily News*, Nov. 18, 1973, <http://www.nydailynews.com/news/politics/president-nixon-national-television-not-crook-article-1.2876186>.
  - 35 See "Presidential Tax Returns," *Tax History Project*, accessed July 27, 2018, <http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns>; Matt Clary, "DNC Says Presidential Candidates Usually Release Tax Returns but Romney Won't," *Politifact*, Dec. 16, 2011, <https://www.politifact.com/truth-o-meter/statements/2011/dec/16/democratic-national-committee/dnc-says-presidential-candidates-usually-release-t/>. The completeness of these disclosures has varied over the years. For example, President Obama disclosed all his returns from the eight years before he took office, while President Ford disclosed only summary data about his federal taxes from 1966 to 1975. *Id.* In addition, while every major party nominee for president and vice president between 1976 and 2016, and many other top contenders, disclosed tax information for at least the year prior to the election (and in some cases many years), there have been notable exceptions, including Ross Perot, Ralph Nader, and most other third-party candidates. See Karen Yourish, "Clinton Released Her Taxes. Will Trump Follow This Tradition?" *New York Times*, Aug. 12, 2016, <https://www.nytimes.com/interactive/2016/08/05/us/elections/presidential-tax-returns.html>; Emily Schultheis and Maggie Haberman, "Rich Pols Play Taxes Hide-and-Seek," *Politico*, July 20, 2012, <https://www.politico.com/story/2012/07/rich-candidates-play-hide-and-seek-with-taxes-078747>; James Bornemeier, "Candidate Nader Silent on Finances," *L.A. Times*, June 4, 1996, [http://articles.latimes.com/1996-06-04/news/mn-11625\\_1\\_ralph-nader](http://articles.latimes.com/1996-06-04/news/mn-11625_1_ralph-nader); Form SF-278 (Ralph Nader addendum), Public Financial Disclosure Form, June 14, 2000, at 21, *available at* [http://pfd.ospensecrets.org/N00000086\\_99.pdf](http://pfd.ospensecrets.org/N00000086_99.pdf).
  - 36 See, e.g., Stephen Gandel, Shawn Tully, and Stacy Jones, "Here's Why Donald Trump 'Not Releasing' His Taxes Could Be Disastrous for his Candidacy," *Fortune*, July 27, 2016, <http://fortune.com/2016/07/27/donald-trump-not-releasing-taxes/> (reporting that, since 1980, every party nominee produced a tax return, and all but three released their returns before the nominating conventions); Joshua Gillin, "Which Presidential Candidate Has Released the Most Tax Returns in History?" *Politifact*, July 1, 2015, <https://www.politifact.com/florida/statements/2015/jul/01/jeb-bush/which-presidential-candidate-has-released-most-tax/> (reporting on presidential candidates' tax return disclosures). Before President Trump, the last significant controversy over a candidate's tax returns involved Mitt Romney, the 2012 Republican Party nominee. Romney delayed releasing any tax information until after he won the nomination, but bowing to public pressure he eventually disclosed returns for the two prior tax years (2010 and 2011) and summary information for the preceding two decades. See Philip Rucker, Jia Lynn Yang, and Steven Mufson, "Mitt Romney Releases Tax Return for 2011, Showing He Paid 14.1 Percent Tax Rate," *Washington Post*, Sept. 21, 2012, <http://wapo.st/UYpfls>.
  - 37 Mitchell Zuckoff, "Why We Ask to See Candidates' Tax Returns," *New York Times*, Aug. 5, 2016, <https://www.nytimes.com/2016/08/06/opinion/why-we-ask-to-see-candidates-tax-returns.html>.

- 38 James M. Naughton, "Agnew Quits Vice Presidency and Admits to Tax Evasion in '67; Nixon Consults on Successor," *New York Times*, Oct. 10, 1973, <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/1010.html#article>.
- 39 Under current law, candidates are required to file a statement of candidacy once their campaign raises \$5,000, see 5 U.S.C. App. § 101(c); 11 CFR § 101.3; this proposal would add tax returns to the list of required disclosures at that point.
- 40 While disclosure of business tax returns has not been part of the longstanding practice, for the reasons stated above, it makes sense to update our disclosure requirements to include them.
- 41 Three years is the length of time that the IRS already requires taxpayers to keep their returns. This benchmark creates public accountability without overburdening the candidates. See "How long should I keep records?" Internal Revenue Service, last modified Apr. 23, 2018, <https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records>. See generally "Presidential Tax Returns," *Tax History Project*, accessed July 27, 2018, <http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns> (reflecting that many candidates disclosed three prior years or more).
- 42 Presidential Tax Transparency Act, S. 26, 115th Cong. (2017); H.R. 305, 115th Cong. (2017).
- 43 Legislators have introduced bills to require tax return disclosure as a condition for access to the ballot in at least 28 states. Max Rieper, "States Continue to Pursue Legislation on Presidential Tax Return Disclosure," *Multistate Insider*, Sept. 20, 2017, <https://www.multistate.us/blog/updated-on-presidential-candidates-to-disclose-tax-returns>. See also Alexi McCammond, "The Big Picture: The State Efforts to Keep Trump Off the 2020 Ballot," *Axios*, June 24, 2018, <https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html>. None of the bills has passed into law, but in some states like New Jersey and California, the legislation passed both legislative bodies before being vetoed. See Matt Friedman, "Christie Vetoes Trump-Inspired Bill to Require Tax Returns From Presidential Candidates," *Politico*, May 1, 2017, <https://www.politico.com/states/new-jersey/story/2017/05/01/christie-vetoes-bill-to-require-tax-returns-from-presidential-candidates-111677>; David Siders, "Jerry Brown Vetoes Bill to Pry Loose Trump's Tax Returns," *Politico*, Oct. 16, 2017, <https://www.politico.com/story/2017/10/16/jerry-brown-trump-tax-returns-bill-243799>.
- 44 Ronald Reagan, "Remarks on Signing the Intermediate-Range Nuclear Forces Treaty" (speech, The White House, Washington, D.C., Dec. 8, 1987), available at <http://www.presidency.ucsb.edu/ws/?pid=33795>.
- 45 See, e.g., James Hill, "A Look Inside Trump's Global Business Interests," *ABC News*, Jan. 10, 2017, <https://abcnews.go.com/Politics/inside-trumps-global-business-interests/story?id=44416694>; Jesse Drucker and Kate Kelly, "Kushner's Firm Deepens Ties to Those with Business in Washington," *New York Times*, July 11, 2018, <https://www.nytimes.com/2018/07/11/business/jared-kushner-business-washington.html>; Emma Brown and Danielle Douglas-Gabriel, "Betsy DeVos's Ethics Review Raises Further Questions for Democrats and Watchdogs," *Washington Post*, Jan. 24, 2017, <https://wapo.st/2ko1c2M>; Dan Alexander, "Lies, China and Putin: Solving the Mystery of Wilbur Ross' Missing Fortune," *Forbes*, June 18, 2018, <https://www.forbes.com/sites/danalexander/2018/06/18/lies-china-and-putin-solving-the-mystery-of-wilbur-ross-missing-fortune-trump-commerce-secretary-cabinet-conflicts-of-interest/#61d760a7e879>.
- 46 See Shane Harris et al., "Kushner's Overseas Contacts Raise Concerns as Foreign Officials Seek Leverage," *Washington Post*, Feb. 27, 2018, <http://wapo.st/2EVqm3q>.
- 47 See *supra* at 5 (discussing reported contenders for presidential nomination in 2020). See also Shawn Carter, "More Signs Point to Mark Zuckerberg Possibly Running for President in 2020," *CNBC*, Aug. 15, 2017, <https://www.cnn.com/2017/08/15/mark-zuckerberg-could-be-running-for-president-in-2020.html>; Benjamin Hart, "Report: Michael Bloomberg Is, Once Again, Thinking of Running for President," *New York Magazine*, June 26, 2018, <http://nymag.com/daily/intelligencer/2018/06/report-bloomberg-is-again-thinking-of-running-for-president.html>; Lauren

- Dezenski, "Patrick Plans 2020 Decision by End of the Year," *Politico*, June 4, 2018, <https://www.politico.com/story/2018/06/04/deval-patrick-2020-elections-622825>.
- 48 The Committee on Foreign Investment in the United States (CFIUS) reviews certain transactions involving foreign investments ("covered transactions") in order to determine the effect of such transactions on the national security of the United States. See Defense Production Act of 1950, 50 U.S.C. § 2170.
- 49 See, e.g., Secure Elections Act, S. 2261, 115th Cong. (2017) (bipartisan bill that would increase federal support for state and municipal election cybersecurity initiatives with the goal of preventing foreign interference, introduced by Sen. James Lankford (R-Okla.), with three Democratic and two Republican co-sponsors). Seventy-two percent of Americans say they are alarmed about foreign interference in U.S. elections, including 90 percent of Democrats, 68 percent of Independents, and 53 percent of Republicans. Emily Stewart, "Most Americans Are Worried about Russian Election Meddling — And Think Trump Isn't Taking It Seriously," *Vox*, Feb. 27, 2018, <https://www.vox.com/policy-and-politics/2018/2/27/17057764/poll-trump-election-meddling-russia-interference> (citing a CNN poll conducted by SSRS between February 20 and 23, 2018, among a sample of 1,016 respondents, available at <http://cdn.cnn.com/cnn/2018/images/02/26/rel3c.-russia.pdf>).
- 50 U.S. Const. art. I, § 9, cl. 8.
- 51 See *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1 (2009), available at [https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace_0.pdf) (finding that President Obama's receipt of Nobel Peace Prize did not implicate the Foreign Emoluments Clause because Nobel Committee was not an instrumentality of a foreign government); *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13 (1994), available at <https://www.justice.gov/file/20391/download> (concluding that two scientists on leave from the National Aeronautics and Space Administration could be employed by a public university in Canada without violating the Foreign Emoluments Clause because the public university did not constitute an instrumentality of a foreign government).
- 52 U.S. Const. art. II, § 1, cl. 7.
- 53 For example, the Voting Rights Act codifies and implements the protections for voting rights in the Fourteenth and Fifteenth Amendments. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Similarly, the Religious Freedom Restoration Act (RFRA) was passed to codify and expand upon the First Amendment's protections for religious liberty. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2767 (2014).
- 54 5 U.S.C. § 7342 (defining statutory terms "gift," "decoration," and "minimal value," and establishing categories of gifts and decorations to federal employees, the receipt of which Congress consents).
- 55 See, e.g., Treasury and General Government Appropriations Act of 2000, 3 U.S.C. § 102 (1999) (increasing the president's salary from \$200,000 to \$400,000, effective at noon on January 20, 2001).
- 56 Matt O'Brien, "Donald Trump Won't Do What Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush Did," *Washington Post*, Nov. 15, 2016, <https://wapo.st/2gcbaMH>; Roger Parloff, "Why Aren't Donald Trump's Epic Conflicts of Interest Illegal?" *Fortune*, Nov. 15, 2016, <http://fortune.com/2016/11/15/donald-trump-conflicts-interest-ethics/>; Laura Lee, "What Is a Blind Trust? And Why It May Be Donald Trump's Best Option," *Fox Business*, Dec. 13, 2016, <https://www.foxbusiness.com/politics/what-is-a-blind-trust-and-why-it-may-be-donald-trumps-best-option>.
- 57 For the first time this year, a federal court interpreted the definition of "emolument" and held that the term "extends to any profit, gain, or advantage, of more than *de minimis* value, received by [the president], directly or indirectly, from foreign, the federal, or domestic governments." *D.C. v. Trump*, No. 17-1596, 2018 WL 3559027, at 23 (D. Md. July 25, 2018).



- 58 See Elise Viebeck, "Guam Delegate May Have Violated Emoluments Clause with Lease, Ethics Office Says," *Washington Post*, Sept. 11, 2017, <http://wapo.st/2vQQowg>; John Bresnahan, "Report: Azerbaijani Oil Company Secretly Funded 2013 Lawmaker Trip," *Politico*, May 13, 2015, <https://www.politico.com/story/2015/05/congress-2013-trip-azerbaijan-house-ethics-committee-117907>; John Bresnahan, "Taiwan Trip Center of Roskam Probe," *Politico*, July 26, 2013, <https://www.politico.com/story/2013/07/peter-roskam-ethics-investigation-taiwan-trip-094808>; Scott Armstrong and Charles R. Babcock, "Ex-Director Informs on KCIA Action," *Washington Post*, June 6, 1977, <http://www.washingtonpost.com/archive/politics/1977/06/06/ex-director-informs-on-kcia-action/de45d7d6-db72-45d0-a817-5234901db8b8/>; Associated Press, "Rangel and Four Others in House Investigated over Caribbean Travel," *New York Times*, Jun. 26, 2009, <https://www.nytimes.com/2009/06/26/us/politics/26inquiry.html>.
- 59 For instance, foreign diplomats now frequently stay at the president's Washington, D.C., hotel, raising questions about whether they are hoping to curry influence or favor with the president. Jonathan O'Connell and Mary Jordan, "For Foreign Diplomats, Trump Hotel Is Place to Be," *Washington Post*, Nov. 18, 2016, <http://wapo.st/2fNSW6E>.
- 60 See *supra* n. 57 (denying President Trump's motion to dismiss Foreign Emoluments Clause suit filed by District of Columbia and Maryland); *Citizens for Responsibility & Ethics in Washington (CREW) v. Trump*, No. 1:17-cv-00458 (S.D.N.Y. Dec. 21, 2017) (dismissing Foreign Emoluments Clause case due to lack of standing); Richard Blumenthal, et al. v. Donald J. Trump, No. 1:17-cv-01154 (D.D.C. 2017) (pending). See also Peter Overby, "Emoluments Lawsuit against President Trump Allowed to Proceed," *NPR*, Mar. 28, 2018, <https://n.pr/2GhzbFL>. Task Force member Amy Comstock Rick joined an amicus brief filed on behalf of ten former federal government ethics officers in *CREW v. Trump*.
- 61 *Hobby Lobby*, 134 S. Ct. at 2760 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."); Cf. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003) (recognizing that Congress can go beyond the narrow requirements of the 14th Amendment to enforce that amendment).
- 62 See 18 U.S.C. § 208(a) (barring most "officers" and "employees" of the federal government from participating "personally and substantially" in specific matters in which they, their spouse or minor child, business partners, or organizations with which they are affiliated have a "financial interest"); see also "18 USC § 208: Acts affecting a personal financial interest," Office of Government Ethics, accessed Nov. 16, 2017, <https://www.oge.gov/Web/OGEnsf/Resoures/18+U.S.C.+%C2%A7+208:+Acts+affecting+a+personal+financial+interest> (explaining that, under Section 208, an employee has "a disqualifying financial interest . . . if there is a close causal link between a particular Government matter . . . and any effect on the asset or other interest (direct effect) and if there is a real possibility of gain or loss as a result of . . . that matter (predictable effect)").
- 63 See 18 U.S.C. § 202(c) (exempting the president, vice president, members of Congress and federal judges from the definition of "officer" or "employee" in the conflict of interest statute). Members of Congress and federal judges are also exempt, although they have their own ethics codes that prohibit some of the same conduct. See, e.g., "Code of Conduct for Judicial Employees," at 6–9 (defining conflicts of interest); "Rule XXIII – Code of Official Conduct," included in *Rules of the House of Representatives*, H.R. Doc. No. 114-192 (2017) (regulating, inter alia, receipt of gifts and honoraria); "Rule XXXVII – Conflict of Interest," included in *The Standing Rules of the Senate*, S. Doc. No. 113-18 (2013) (defining conflicts of interest and regulating, inter alia, outside compensation).
- 64 See 5 C.F.R. § 2635.402(b) note ("If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect[] . . . on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock."); Jack Maskell, *Financial Assets and Conflict of Interest Regulation in the Executive Branch*, CRS Report No. R43365 (Washington, D.C.: Congressional Research Service, 2014), 6–7 (discussing recusal process and waivers).
- 65 5 C.F.R. § 2635.402(b)(3).
- 66 See 5 C.F.R. § 2635.402(b)(3) example 1 ("The Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants.").

- 67 For example, then future Supreme Court Justice Antonin Scalia, during his time at the Department of Justice, wrote in a memo on the applicability of an Executive Order on conflicts of interest, that “it would obviously be undesirable as a matter of policy for the President or Vice President to engage in conduct proscribed by” conflict of interest rules even if they did not technically apply. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, “Applicability of 3 C.F.R. Part 100 to the President and Vice President” (official memorandum, Washington, D.C.: Department of Justice, 1974), <https://fas.org/irp/agency/doj/olc/121674.pdf>. See also Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017) (requiring presidents and vice presidents, as well as their spouses and minor children, to put any potentially conflicting assets into a blind trust).
- 68 The Department of Justice opined in 1974 that such concerns weighed against finding that Congress had intended to include the president and vice president in the most recent version of the conflict of interest statute, which dates back to 1962. See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (Sept. 20, 1974), [available at https://fas.org/irp/agency/doj/olc/092074.pdf](https://fas.org/irp/agency/doj/olc/092074.pdf) (“[T]he conflict of interest problems of the President and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch.” (quoting Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, Association of the Bar of the City of New York (1960): 16–17)). Congress formally codified the exemption in 1989. 18 U.S.C. § 202(c) (amending 18 U.S.C. § 202 (1989)).
- 69 Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (remarks, Brookings Institution, Washington, D.C., Jan. 11, 2017), [available at https://www.brookings.edu/wp-content/uploads/2017/01/20170111\\_oge\\_shaub\\_remarks.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf) (“[E]very President in modern times has taken the strong medicine of divestiture. This means OGE Directors could always point to the President as a model. They could also rely on the President’s implicit assurance of support if anyone balked at doing what OGE asked them to do.”).
- 70 “Announcement of the Formation of a Blind Trust to Manage the President’s Personal Assets,” Jan. 30, 1981, in Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=44168>.
- 71 See Christopher T. Anderson and Yuliya V. Tverdova, “Corruption, Political Allegiances, and Attitudes toward Government in Contemporary Democracies,” *American Journal of Political Science* 47 (2003): 91–92 (using survey data and statistical analysis, authors demonstrate that “high levels of corruption reduce citizen support for democratic political institutions across mature and newly established democracies around the globe”); Weiner, *Strengthening Presidential Ethics Law*, 5–6.
- 72 “Donald Trump’s Many, Many Business Dealings in 1 Map,” *Time*, Jan. 10, 2017, <http://time.com/4629308/donald-trump-business-deals-world-map/>; David A. Fahrenthold and Jonathan O’Connell, “Nine Questions about President Trump’s Businesses and Possible Conflicts of Interest,” *Washington Post*, March 28, 2018, <http://wapo.st/2DLYv5f>; Emily Stewart, “Trump Is ‘Definitely Still Involved’ in his Hotel Business, a New Report Says,” *Vox*, Dec. 30, 2017, <https://www.vox.com/2017/12/30/16832964/trump-business-washington-hotel>.
- 73 For instance, 66 percent of respondents to a Quinnipiac poll said that Donald Trump should place all of his business holdings into a blind trust. Tim Malloy et al., *U.S. Voters Approve of Obama, Disapprove of Trump, Quinnipiac University National Poll Finds; Trump Should Stop Tweeting, Voters Say 2-1*, Quinnipiac University, Jan. 10, 2017, 12, [available at https://poll.qu.edu/images/polling/us/us01102017\\_Utb35mky.pdf](https://poll.qu.edu/images/polling/us/us01102017_Utb35mky.pdf).
- 74 U.S. Const. art. I, § 7.
- 75 Under OGE rules, mutual funds that track major U.S. indices like the Dow and S&P 500 are not deemed to pose any conflict risk. See 5 C.F.R. § 2634.310. President Barack Obama, for instance, kept much of his wealth in such assets during his time in office, and it makes sense to allow future presidents to do the same. See Michael Galvis, “Barack Obama’s Net Worth on his 55th Birthday,” *Time*, Aug. 4, 2016, <http://time.com/money/4439729/barack-obama-net-worth-55th-birthday/>.
- 76 Typically, recusal is documented in a memo or other communication to an agency’s Designated Agency Ethics Official (DAEO) or, for White House staff, a memo to the White House counsel.

- 77 See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing view that applying conflict of interest statute to the president would “disable him from performing some of the functions prescribed by the Constitution”).
- 78 As a practical matter, one way for the president or vice president to avoid having to divest would be to refrain from involvement in matters where they have a financial interest. Under this proposal, the decision as to whether to do so would remain up to them. In the event a president chooses to avoid participation in a matter that raises a possible conflict, divestiture would remain an option if his participation later proved necessary.
- 79 See, e.g., Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017); Presidential Conflicts of Interest Act of 2017, H.R.371, 115th Cong. (2017); We the People Democracy Reform Act of 2017, S. 1880, 115th Cong. (2017).
- 80 Both the Ethics in Government Act of 1978 and the criminal conflicts of interest statute, 18 U.S.C. § 208, passed with strong bipartisan support. Senate Vote #245, “To Pass S. 555,” 95th Cong. (1978), *available at* <https://www.govtrack.us/congress/votes/95-1977/s245>; House Vote #1500, “To Agree to the Conference Report on S. 555, The Ethics in Government Act of 1978,” 95th Cong. (1978), *available at* <https://www.govtrack.us/congress/votes/95-1978/h1500>. See also “Congress Amends Conflict-of-Interest Laws,” *CQ Almanac*, 18th ed. (Washington, D.C.: Congressional Quarterly, 1962) (the Kennedy and Eisenhower administrations both supporting a criminal conflict of interest statute).
- 81 See Letter from Laurence H. Silberman, Acting Attorney General to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing the view that applying conflict of interest statute to the president would “disable him from performing some of the functions prescribed by the Constitution”). The other objection that is sometimes raised is that making the president and vice president subject to conflict of interest law would amount to an unconstitutional qualification on their offices. See *id.* The Constitution sets forth specific qualifications for these offices (natural born citizens at least 35 years old), U.S. Const. art. II, § 1, cl. 5, as it does for Congress, U.S. Const. art. I, § 2, cl. 2 (House of Representatives); U.S. Const. art. I, § 3, cl. 3 (Senate); other qualifications are disallowed absent a separate constitutional amendment. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that state constitutional prohibition of the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot, if that candidate has already served three terms in the House of Representatives or two terms in the Senate, violates the Qualifications Clause of the Constitution for members of the House of Representatives). But making the president and vice president subject to the same ethical rules as other officials does not amount to imposition of an additional “qualification” on either office any more than subjecting him or her to other laws barring egregious official misconduct like bribery or obstruction of justice does.
- 82 There is reason to believe that a president can indeed recuse himself from a particular matter. Recusal means refraining from active involvement in the matter, not giving up all legal responsibility. Stephen D. Potts, Director, “Recusal Obligation and Screening Arrangements” (official memorandum, Washington, D.C.: Office of Government Ethics, 1999), [http://webapp1.dlib.indiana.edu/virtual\\_disk\\_library/index.cgi/4248912/FID265/DAEOGRAM/99/Do99018.pdf](http://webapp1.dlib.indiana.edu/virtual_disk_library/index.cgi/4248912/FID265/DAEOGRAM/99/Do99018.pdf). Given that the president already does not actually participate in the vast majority of executive branch matters, some have argued that there is no constitutional bar to requiring him to recuse in many instances. See, e.g., Weiner, *Strengthening Presidential Ethics Law*; see also Daphna Renan, “Presidential Norms and Article II,” *Harvard Law Review* 131 (2018): 2210–15, *available at* [https://harvardlawreview.org/wp-content/uploads/2018/06/2187-2282\\_Online.pdf](https://harvardlawreview.org/wp-content/uploads/2018/06/2187-2282_Online.pdf) (discussing practices and norms to which presidents and executive branch agencies have conformed to prevent the president’s direct involvement in specific enforcement matters).
- 83 See *Managing Conflict of Interest in the Public Sector: A Toolkit*, Organization for Economic Cooperation and Development, 2005, *available at* <https://www.oecd.org/gov/ethics/49107986.pdf>
- 84 See, e.g., 5 C.F.R § 7501.104(a) (detailing certain prohibited assets and transactions for even high-ranking Department of Housing and Urban Development employees). See also 5 C.F.R § 3501.103(b) (detailing certain prohibited land or natural resource interests and transactions for high-ranking officials in the Department of the Interior).

- 85 *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).
- 86 *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961).
- 87 For example, most commentators agree that the president can be punished for obstruction of justice, at least once he or she leaves office. See Daniel J. Hemel and Eric A. Posner, “Presidential Obstruction of Justice,” *Public Law and Legal Theory Working Papers* 665 (2017): 5, available at [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2115&context=public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2115&context=public_law_and_legal_theory) (“[I]f the president interferes with an investigation because he worries that it might bring to light criminal activity by himself, his family, or his top aides—and not for reasons related to national security or faithful execution of federal law—then he acts corruptly, and thus criminally.”); Sean Illing, “Trump’s Lawyer: The President Can’t Obstruct Justice. 13 Legal Experts: Yes, He Can,” *Vox*, Jan. 5, 2018, <https://www.vox.com/2017/12/4/16733422/donald-trump-new-york-times-sessions-russia-mueller-probe>; Benjamin Wittes, “The Flaw in Trump’s Obstruction-of-Justice Defense,” *The Atlantic*, June 4, 2018, <https://www.theatlantic.com/politics/archive/2018/06/even-the-president-can-obstruct-justice/561935/> (arguing that where president’s “allegedly obstructive action was taken provably outside the contours of the president’s oath office and his take-care clause obligations,” obstruction statutes should apply).
- 88 18 U.S.C. § 202(c)
- 89 Meredith McGehee and Willian Gray, *The Ethics Blind Spot*, Issue One, 2018, available at <https://www.issueone.org/wp-content/uploads/2018/02/Ethics-Blind-Spot-Final.pdf> (explaining that the Office of Congressional Ethics lacks subpoena power and requires reauthorization every new Congress).
- 90 Maggie Severns, “Reckless Stock Trading Leaves Congress Rife with Conflicts,” *Politico*, May 14, 2017, <https://www.politico.com/story/2017/05/14/congress-stock-trading-conflict-of-interest-rules-238033>.
- 91 *Id.* (reporting that 28 House members and six senators each traded more than 100 stocks in the past two years).
- 92 See Viebeck, “Guam Delegate May Have Violated Emoluments Clause with Lease, Ethics Office Says”; Bresnahan, “Report: Azerbaijani Oil Company Secretly Funded 2013 Lawmaker Trip”; Bresnahan, “Taiwan Trip Center of Roskam Probe”; Armstrong and Babcock, “Ex-Director Informs on KCIA Action”; Associated Press, “Rangel and Four Others in House Investigated Over Caribbean Travel.”
- 93 See, e.g., Jerry Markon, “Ex-Rep Jefferson (D-La.) Gets 13 Years in Freezer Cash Case,” *Washington Post*, Nov. 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111301266.html>; “Former Ohio Congressman Sentenced to Eight Years in Prison,” *PBS News Hour*, July 30, 2002, [https://www.pbs.org/news-hour/politics/politics-july-dec02-trafficant\\_07-30](https://www.pbs.org/news-hour/politics/politics-july-dec02-trafficant_07-30); Associated Press, “3-year prison term for Rick Renzi,” *Politico*, Oct. 28, 2013, <https://www.politico.com/story/2013/10/rick-renzi-prison-sentence-098963>.
- 94 See 5 C.F.R. § 2635.807 (preventing federal employees from receiving outside compensation for teaching, speaking or writing that relates to the employee’s official duties). See also “Gifts from Outside Sources,” Office of Government Ethics, last modified Apr. 11, 2017, accessed Aug. 12, 2018, <https://www.oge.gov/web/oge.nsf/Gifts%20and%20Payments/8CEAAC03A29FDE9C85257E96006364F8?opendocument>.
- 95 See, e.g., Kathleen Clark, “Do We Have Enough Ethics in Government Yet? An Answer from the Fiduciary Theory,” *University of Illinois Law Review* 57 (1996): 63, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2054648](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2054648) (concluding that “many executive branch restrictions are too strict”); Alfred S. Neely IV, *Ethics-In-Government Laws: Are They Too “Ethical”?*, American Enterprise Institute, 1984, available at <http://www.aei.org/publication/ethics-in-government-laws-are-they-too-ethical/> (calling for reforms to, inter alia, rules regarding financial disclosure, divestment, and outside compensation); Thomas D. Morgan, “Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency,” *Duke Law Journal* 1980, no. 1 (1980), available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2730&context=dlj> (discussing difficulties and disincentives created by federal employee ethics laws).

- 96 Ethics in Government Act, 5 U.S.C. App. §§ 401–08 (1978).
- 97 See Peter Overby, “Trump’s Choice for Ethics Chief Wins Praise as ‘Somebody Who Plays it by the Book,’” *NPR*, Feb. 9, 2018, <https://www.npr.org/2018/02/09/584394977/trumps-choice-for-new-ethics-chief-wins-praise-somebody-who-plays-it-by-the-book>. This was a continuation of a long tradition. See, e.g., John A. Rohr, “Bureaucratic Morality in the United States,” *International Political Science Review* 9 (1988): 174 (noting that Ronald Reagan kept on his Democratic predecessor’s OGE Director to avoid the appearance of political influence).
- 98 The Ethics in Government Act does give OGE the power to “order corrective action” when it discovers an ethical violation but does not explain what that might look like or how OGE can enforce its own orders. 5 U.S.C. App. § 402(b)(9). There is no record of the agency exercising this authority. See Alex Guillén, “Ethics Office Weighs ‘Corrective Action’ for Pruitt,” *Politico*, June 15, 2018, <https://www.politico.com/story/2018/06/15/ethics-office-investigation-scott-pruitt-scandals-1425413>.
- 99 5 U.S.C. App. § 401 (containing appointment procedure and term length for director, but no for-cause removal provision).
- 100 See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010) (“The parties agree that the Commissioners cannot themselves be removed by the President except [for] . . . ‘inefficiency, neglect of duty, or malfeasance in office,’ . . . and we decide the case with that understanding.”) (internal citations omitted); *Federal Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (“The [Federal Election] Commission suggests that the President can remove the commissioners only for good cause, which limitation is implied by the Commission’s structure and mission as well as the commissioners’ terms. We think the Commission is likely correct[] . . .”).
- 101 See Jim Jukes, Assistant Director for Legislative Reference, “Agencies with Legislative and Budget ‘Bypass’ Authorities – Information,” (official memorandum, Washington, D.C.: Office of Management and Budget, 2001), <https://www.citizen.org/sites/default/files/ombdocument1.pdf>.
- 102 *Supra* n. 69.
- 103 *Id.*
- 104 See, e.g., Clifford D. May, “Washington Talk: Office of Government Ethics; Taking Lots of Heat from and about Meese,” *New York Times*, July 8, 1987, available at <https://www.nytimes.com/1987/07/08/us/washington-talk-office-government-ethics-taking-lots-heat-about-meese.html> (OGE came under fire in past decades for its failure to sufficiently scrutinize Attorney General Edwin Meese’s financial disclosures, which contained several notable omissions; critics argued that greater scrutiny and stronger enforcement of the rules could have avoided the Wedtech scandal, in which Meese was accused of bringing improper influence to bear on behalf of a contractor to which he had financial ties).
- 105 In one notable example, after presidential counselor Kellyanne Conway urged Americans to purchase Ivanka Trump-branded products, she was merely “counseled,” though the OGE Director recommended more forceful disciplinary action consistent with the norm under prior administrations. Matt Ford, “Ethics Office: ‘Disciplinary Action Is Warranted’ Against Kellyanne Conway,” *The Atlantic*, Feb. 14, 2017, <https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-ethics-discipline/516729/>; see also Matea Gold, “Power Struggle Intensifies between White House and Ethics Office,” *Washington Post*, May 22, 2017, <http://wapo.st/2qloGBW>.
- 106 See Letter from Stefan Passantino, Deputy Counsel to the President, Compliance and Ethics, to Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (Feb. 28, 2017), 1, available at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Oversight%20Response%20to%20Shaub%20re%20KAC.PDF>. The Passantino letter notes the OGE is statutorily authorized to issue regulations and other guidance with respect to “agency” employees, and that the Executive Office of the President is not technically an agency.

- 107 See Letter from Campaign Legal Center, Common Cause, Democracy 21, Public Citizen, U.S. PIRG, to Richard M. Thomas, Associate General Counsel, Office of Government Ethics (Nov. 14, 2011), 5, *available at* <https://www.citizen.org/sites/default/files/oge-gift-comments.pdf> (discussing inconsistent application of the gift rule throughout the ranks of the civil service).
- 108 See 18 U.S.C. § 216(b). For a recent example, see “Acting Ethics Chief Flags Trump Financial Disclosure Form for Rod Rosenstein,” *CBS News*, May 16, 2018, <https://www.cbsnews.com/news/trumps-financial-disclosure-form-released-by-ethics-office-live-updates/>.
- 109 See David J. Apol, “2016 Conflict of Interest Prosecution Survey” (official memorandum, Washington, D.C.: Office of Government Ethics, 2017), [https://www.oge.gov/web/OGEnsf/0/FEB69F94825247F2852581750045FE2B/\\$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf](https://www.oge.gov/web/OGEnsf/0/FEB69F94825247F2852581750045FE2B/$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf) (detailing conflict of interest enforcement actions taken against federal employees in 2016). In 2015 and 2016 combined, there were only 12 prosecutions for violations of the federal conflict of interest statute at all. *Id.* Walter M. Shaub, “2015 Conflict of Interest Prosecution Survey” (official memorandum, Washington, D.C.: Office of Government Ethics, 2016), [https://www.oge.gov/Web/OGEnsf/0/42DCFE53F8D2211F85257FFD0058DB04/\\$FILE/Clean%20FINAL%202015%20Prosecution%20Survey%207\\_26\\_16.pdf](https://www.oge.gov/Web/OGEnsf/0/42DCFE53F8D2211F85257FFD0058DB04/$FILE/Clean%20FINAL%202015%20Prosecution%20Survey%207_26_16.pdf).
- 110 See Nuno Garoupa and Fernando Gomez-Pomar, “Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties,” *American Law and Economics Review* 6 (2004): 415 (civil enforcement is often more effective than criminal enforcement given the lower burden of proof and greater likelihood of a sanction); see also Celena Vinson and Julie Countiss, “The Power of Civil Enforcement,” *American Journal of Criminal Law* 43 (2015) (discussing the utility of civil injunctions and other enforcement mechanisms to prevent gang activity, prostitution, and the illegal sale of alcohol); V.S. Khanna, “Corporate Criminal Liability: What Purpose Does It Serve?” *Harvard Law Review* 109 (1996): 1532 – 33 (finding that there are very limited circumstances in which corporate criminal liability is more socially desirable than civil liability). Even with OGE as the primary civil enforcer of ethics laws, the Department of Justice would continue to have sole jurisdiction over criminal matters. Overlapping responsibilities of this sort are common in the federal government. Agencies will typically resolve any conflicts (such as between ongoing criminal and civil investigations) through informal communications or by drafting a formal cooperation agreement, either of which could be used here.
- 111 5 U.S.C. App. § 401.
- 112 *Supra* n. 97.
- 113 For instance, the Federal Election Commission submits its budget to Congress and OMB concurrently, rather than using OMB as an intermediary. See *Fiscal Year 2018 Congressional Budget Justification* (Washington, D.C.: Federal Election Commission, 2017), [https://www.fec.gov/resources/cms-content/documents/FEC\\_FY\\_2018\\_Congressional\\_Budget\\_Justification.pdf](https://www.fec.gov/resources/cms-content/documents/FEC_FY_2018_Congressional_Budget_Justification.pdf).
- 114 Similar requirements are contained in the statute authorizing the Federal Election Commission to investigate potential violations of campaign finance law. See 52 U.S.C. §§ 30107(a)(3), 30109(a)(2), 30109(a)(12). Of course, the FEC is an evenly-divided commission that is prone to gridlock. These safeguards would be far more important at a watchdog agency headed by a single director.
- 115 See 5 U.S.C. § 556(d) (outlining the procedural protections in place for those facing sanction in an agency adjudication); see also *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (“[P]rocedural due process is applicable to the adjudicative administrative proceeding involving ‘the differing rules of fair play, which through the years, have become associated with different types of proceedings.’”); *Muset v. Ishimaru*, 783 F. Supp. 2d 360 (E.D.N.Y. 2011) (holding that due process requires that an agency adjudicator give those being punished notice and an opportunity to be heard before enforcing the punishment).
- 116 See 5 U.S.C. § 7323(B)(1) (preventing employees of certain agencies from taking an active part in political management or political campaigns).

- 117 18 U.S.C. § 208(b)(1). One recent waiver, for example, allowed a senior White House economic adviser to work on matters affecting companies whose stock was still in his portfolio (the White House claims he has since divested). See Peter Overby, “Ethics Documents Suggest Conflict of Interest by Trump Adviser,” *NPR*, March 14, 2017, <https://www.npr.org/sections/thetwo-way/2017/03/14/520121822/ethics-documents-suggest-conflict-of-interest-by-trump-adviser>. However, the waiver problem is not new. In one notorious example from the George W. Bush administration, the administration’s Medicare chief, Thomas A. Scully, was granted a waiver to seek employment representing private healthcare clients even as he was helping to craft the administration’s proposal to expand Medicare coverage to prescription drugs. See Amy Goldstein, “Administration Alters Rules on Ethics Waivers,” *Washington Post*, Jan. 14, 2004, [https://www.washingtonpost.com/archive/politics/2004/01/14/administration-alters-rules-on-ethics-waivers/b92bb516-b3a0-483f-8e11-58f989318999/?utm\\_term=.25f4a0a9616f](https://www.washingtonpost.com/archive/politics/2004/01/14/administration-alters-rules-on-ethics-waivers/b92bb516-b3a0-483f-8e11-58f989318999/?utm_term=.25f4a0a9616f).
- 118 For a discussion of OGE’s various statutory authorities, see Letter from Walter M. Shaub, Director, Office of Government Ethics, to John M. Mulvaney, Director, Office of Management and Budget (May 22, 2017), available at <https://assets.documentcloud.org/documents/3728657/OGE-Letter-to-OMB-Director-Mulvaney.pdf>.
- 119 See *supra* n. 106.
- 120 See, e.g., Memorandum from Issue One to Editorial Boards (May 23, 2017), available at <https://www.issueone.org/wp-content/uploads/2017/08/IO-OGE-Edit-Memo-2017.pdf> (“RE: Time to Revisit the Office of Government Ethics (OGE)”); Letter from Liz Hempowicz, Project on Government Oversight, to Honorable Jason Chaffetz, Chairman, and Honorable Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform (Feb. 14, 2017), available at <https://www.pogo.org/letter/2017/02/suggested-ethics-reforms-for-2017/> (“Suggested Ethics Reforms for 2017”); *Executive Branch Reform Act of 2007: Hearings on H.R. 984, Before the House Comm. on Oversight and Government Reform*, 110th Cong. 6 (2007) (testimony of Craig Holman, Ph.D., Legislative Representative for Public Citizen), available at <https://fas.org/sgp/congress/2007/021307holman.pdf>.
- 121 Mass. Const. art. XXX (1780) (John Adams).
- 122 Thomas Jefferson, “Note,” in Antoine Louis Claude Destutt de Tracy, *Treatise on Political Economy*, ed. Thomas Jefferson (1817), 202.
- 123 See *infra* n. 151.
- 124 See *infra* 17–21. A generally; see also Andrew McCauley Wright, “Justice Department Independence and White House Control” (Feb. 18, 2018): 51 available at <http://dx.doi.org/10.2139/ssrn.3125848> (“The White House has traditionally avoided comment on pending criminal investigations because of the perception of presidential control.”); Luke M. Milligan, “The ‘Ongoing Criminal Investigation’ Constraint: Getting away with Silence,” *William & Mary Bill of Rights Journal* (2008): 756, available at <https://scholarship.law.wm.edu/wmboj/vol16/iss3/4/> (“The White House has historically behaved as though it were constrained from commenting on the merits, progress, or information gathered during ongoing federal criminal investigations or prosecutions of which the President is perceived to be at least nominally in control.”).
- 125 In its examination of conduct at the FBI during the 2016 Presidential election, the Department of Justice’s Office of the Inspector General conducted interviews with several current and former law enforcement officials who described the existence of an unwritten “Sixty Day Rule,” under which prosecutors avoid public disclosure of investigative steps related to electoral matters or the return of indictments against a candidate for office within 60 days of a primary or general election. See Department of Justice Office of the Inspector General, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* (Washington, D.C.: U.S. Department of Justice, 2018), 17–18, [https://www.oversight.gov/sites/default/files/oig-reports/2016\\_election\\_final\\_report\\_06-14-18\\_0.pdf](https://www.oversight.gov/sites/default/files/oig-reports/2016_election_final_report_06-14-18_0.pdf).
- 126 Roosevelt directed his attorney general to produce a memo analyzing the legality of J.P. Morgan’s Northern Securities Trust and had a hand in choosing the venue for bringing the government’s suit to enjoin the combination. Later, he

- provided his assurances that other combinations would not be subject to anti-trust complaints. James F. Rill and Stacy L. Turner, "Presidents Practicing Antitrust: Where to Draw the Line?" *Antitrust Law Journal* 79 (2017).
- 127 "Bobby Kennedy: Is He the 'Assistant President'?" *U.S. News & World Report*, Feb. 19, 1962, <https://www.usnews.com/news/articles/2015/06/05/bobby-kennedy-is-he-the-assistant-president>.
- 128 Gerald Caplan, "The Making of the Attorney General: John Mitchell and the Crimes of Watergate Reconsidered," *McGeorge Law Review* 41 (2010).
- 129 Eventually, Solicitor General and then-Acting Attorney General Robert Bork carried out Nixon's order to fire Watergate Special Prosecutor Archibald Cox. Carroll Kilpatrick, "Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit," *Washington Post*, Oct. 21, 1973, <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.
- 130 While the Justice Department evaluated its merger case against IT&T, the corporation donated hundreds of thousands of dollars to the Republican National Convention. White House tapes recorded President Nixon ordering Attorney General Richard Kleindienst to tell the Department's lead antitrust lawyer to "stay the hell out" of "the IT&T thing" or risk being fired. See Impeachment Inquiry Staff for the House Judiciary Committee, 93d Cong., *Transcript of a Recording of a Meeting Among the President, John Ehrlichman and George Shultz on April 19, 1971 from 3:30 to 3:34 P.M.* (1974), available at [https://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/watergate/wspfl/482-017\\_482-018.pdf](https://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/watergate/wspfl/482-017_482-018.pdf); see also J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* (New York: Viking Press, 1976): 132–34.
- 131 White House Counsel John Dean gave Commissioner of Internal Revenue Johnnie Mac Walters an "enemies list" of hundreds of prominent Democrats the White House wanted "investigated and some put in jail" during the 1972 election season. Walters and Treasury Secretary George Shultz agreed that neither Treasury nor the IRS would fulfill the White House's request. Walters eventually turned the list over to the executive director of the Joint Tax Committee. Select Committee on Presidential Campaign Activities ("Watergate Committee"), Final Report, S. Rep. No. 93-981, at 130–33 (1974). See also David Dykes, "Former IRS Chief Recalls Defying Nixon," *USA Today*, May 26, 2013, <https://www.usatoday.com/story/news/nation/2013/05/26/irs-chief-defied-nixon/2360951/>.
- 132 Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee"), Final Report, S. Rep. No. 94-755 (1976), available at <https://www.intelligence.senate.gov/resources/intelligence-related-commissions>.
- 133 "Johnson Reported to Have Used F.B.I. to Spy on the Democrats," *New York Times*, Aug. 16, 1973, <https://www.nytimes.com/1973/08/16/archives/johnson-reported-to-have-used-fbi-to-spy-on-the-democrats.html>.
- 134 Cornell W. Clayton, *The Politics of Justice: The Attorney General and the Making of Government Legal Policy* (New York: Routledge, 2015), 5, 143; David Leonhardt, "The Sense of Justice That We're Losing," *New York Times*, Apr. 29, 2018, <https://www.nytimes.com/2018/04/29/opinion/the-sense-of-justice-that-were-losing.html> (discussing role Attorneys General Edward Levi and Griffin Bell played in changing the rules for FBI investigations and instituting strict protocols for communication between the White House and the Department of Justice). President Ford later recalled his words to Attorney General Levi upon offering him the post of attorney general in 1975: "I was in no position to offer job security. But I could and did promise Ed that no politician would encroach on the Department. I wanted him to protect the rights of American citizens, not the President who appointed him." Gerald Ford, "In Memoriam: Edward H. Levi (1912–2000)," *University of Chicago Law Review* 67 (2000): 976.
- 135 Henry B. Hogue, *Nomination and Confirmation of the FBI Director: Process and Recent History*, CRS Report No. RS20963, (Washington, D.C.: Congressional Research Service, 2005), <https://fas.org/sgp/crs/natsec/RS20963.pdf>.
- 136 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (1978).



- 137 Maryanne Borrelli, Karen Hult, and Nancy Kassop, "The White House Counsel's Office," *Presidential Studies Quarterly* 31 (2001): 576–77 (describing the role and growth of the White House counsel's office over time and naming potential reasons for its expansion).
- 138 See, e.g., Donald J. Trump (@realDonaldTrump), "Attorney General Jeff Sessions should stop this Rigged Witch Hunt right now, before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!" Twitter, Aug. 1, 2018, 9:24 a.m., <https://twitter.com/realDonaldTrump/status/1024646945640525826>; Donald J. Trump (@realDonaldTrump), "Looking back on history, who was treated worse, Alphonse Capone, legendary mob boss, killer and 'Public Enemy Number One,' or Paul Manafort, political operative & Reagan/Dole darling, now serving solitary confinement - although convicted of nothing?" Twitter, Aug. 1, 2018, 8:35 a.m., <https://twitter.com/realDonaldTrump/status/1024680095343108097>.
- 139 See, e.g., Donald J. Trump (@realDonaldTrump), "Everybody is asking why the Justice Department (and the FBI) isn't looking into all of the dishonesty going on with Crooked Hillary & the Dems..[sic]" Twitter, Nov. 3, 2017, 3:57 a.m., <https://twitter.com/realDonaldTrump/status/926403023861141504>.
- 140 Devlin Barrett, John Wagner, and Seung Min Kim, "Trump and Sessions Feud over the Direction of the Justice Department," *Washington Post*, Aug. 23, 2018, <https://wapo.st/2PyCljF>; Aaron Rupa, "In Unhinged Tweetstorm, Trump Admits McCabe Firing Was about Politics," *Think Progress*, Mar. 17, 2018, <https://thinkprogress.org/trump-unhinged-tweets-about-mccabe-firing-88cb9da60335/> ("Trump . . . repeatedly publicly pressured Sessions to fire McCabe[] . . ."); Michael D. Shear and Matt Apuzzo, "F.B.I. Director James Comey Is Fired by Trump," *New York Times*, May 9, 2017, <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.
- 141 See, e.g., Donald J. Trump (@realDonaldTrump), "In my opinion the Washington Post is nothing more than an expensive (the paper loses a fortune) lobbyist for Amazon. Is it used as protection against antitrust claims which many feel should be brought?" Twitter, July 23, 2018, 6:35 a.m., <https://twitter.com/realDonaldTrump/status/1021388295618682881>. President Trump stated on the campaign trail, "AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration . . ." Ryan Knutson, "Trump Says He Would Block AT&T-Time Warner Deal," *Wall Street Journal*, Oct. 22, 2016, <https://www.wsj.com/articles/trump-says-he-would-block-at-time-warner-deal-1477162214>.
- 142 The Department of Justice's suit to block the merger was a sharp departure from how the Department has treated such "vertical mergers" for decades. See J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement" (prepared remarks, Fordham Competition Law Institute, 34th Annual Conference on International Anti-Trust Law and Policy, Sept. 2007), 11–12, available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/challenge-non-horizontal-merger-enforcement/070927-28non-horizontalmerger\\_1.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/challenge-non-horizontal-merger-enforcement/070927-28non-horizontalmerger_1.pdf); James Hohmann, "Analysis: 7 Reasons to Be Suspicious of the DOJ Lawsuit to Stop AT&T from Buying CNN," *Chicago Tribune*, Nov. 21, 2017, <http://www.chicagotribune.com/business/ct-biz-doj-lawsit-time-warner-att-20171121-story.html>.
- 143 *United States v. AT&T, Inc.*, No. 17-2511 (D.D.C. June 12, 2018) (denying Department of Justice's request to enjoin the merger), *appeal pending*.
- 144 Danielle Wiener-Bronner and Julia Horowitz, "Amazon and 16 Other Companies Trump Has Attacked Since his Election," *CNN Money*, Apr. 4, 2018, <https://money.cnn.com/2018/04/04/news/companies/trump-companies-attacks/index.html>.
- 145 Michael S. Schmidt and Michael D. Shear, "Trump Says Russia Inquiry Makes U.S. 'Look Very Bad,'" *New York Times*, Dec. 28, 2017, [https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html?\\_r=0](https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html?_r=0) (The President asserting that, although he would be within his rights to fire the special counsel, he was choosing not to do so.).
- 146 U.S. Department of Justice Office of Inspector General and Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Washington, D.C.: Department of Justice Office of the Inspector General

and Office of Professional Responsibility, 2008): 356–58, <https://oig.justice.gov/special/s0809a/final.pdf> (concluding that the process used to remove the U.S. Attorneys was “fundamentally flawed”); U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (Washington, D.C.: Department of Justice Office of the Inspector General and Office of Professional Responsibility, 2009): 64, <https://oig.justice.gov/special/s0901/final.pdf> (concluding that Bradley Schlozman, the political official overseeing the Civil Rights Division at the Department of Justice, “considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division”).

- 147 Dan Eggen and Michael A. Fletcher, “Embattled Gonzales Resigns,” *Washington Post*, Aug. 28, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/27/AR2007082700372.html> (recounting the difficult last months of Attorney General Gonzales’ tenure and his eventual resignation).
- 148 For a summary of bipartisan criticism, see Paula Reid, “AG Loretta Lynch Faces Storm of Criticism over Bill Clinton Meeting,” *CBS News*, June 30, 2016, <https://www.cbsnews.com/news/loretta-lynch-bill-clinton-meeting-storm-of-criticism/>; see also Mark Landler, Matt Apuzzo and Amy Chozick, “Loretta Lynch to Accept F.B.I. Recommendations in Clinton Email Inquiry,” *New York Times*, July 1, 2016, <https://www.nytimes.com/2016/07/02/us/politics/loretta-lynch-hillary-clinton-email-server.html>.
- 149 Matt Apuzzo and Michael Schmidt, “Obama’s Comments about Clinton’s Emails Rattle Some in the F.B.I.,” *New York Times*, Oct. 16, 2015, <https://www.nytimes.com/2015/10/17/us/politics/obamas-comments-on-clinton-emails-collide-with-fbi-inquiry.html>.
- 150 Such checks on prosecutors’ power are critical because, as Attorney General Robert H. Jackson explained, “The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent force in our society, when he acts from malice or other base motives, he is one of the worst.” Attorney General Robert H. Jackson, “The Federal Prosecutor: Address to the Second Annual Conference of the United States Attorneys,” *Journal of the American Judicature Society* 24 (1940): 18, [https://www.roberthjackson.org/wp-content/uploads/2015/01/The\\_Federal\\_Prosecutor.pdf](https://www.roberthjackson.org/wp-content/uploads/2015/01/The_Federal_Prosecutor.pdf).
- 151 See, e.g., Jack Quinn, Counsel to the President, “Contacts with Agencies” (official memorandum, Washington, D.C.: The White House, Jan. 16, 1996), 1 (“Unless you are certain that a particular contact is permissible, you should take care before making the contact to consult with the Counsel’s Office.”); Donald F. McGahn II, Counsel to the President, “Communications Restrictions with Personnel at the Department of Justice” (official memorandum, Washington, D.C.: The White House, Jan. 27, 2017), 1 (“Communications with DOJ about individual cases or investigations should be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General, unless the Counsel’s Office approves different procedures for the specific case at issue.”).
- 152 See, e.g., Eric Holder, Attorney General, “Communications with the White House and Congress” (official memorandum, Washington, D.C.: Department of Justice, May 11, 2009), 2, [https://www.justice.gov/oip/foia-library/communications\\_with\\_the\\_white\\_house\\_and\\_congress\\_2009.pdf/download](https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download) (exempting communications relating to national security from limited contacts policies because “[i]t is critically important to have frequent and expeditious communications relating to national security matters”).
- 153 See, e.g., Benjamin Civiletti, Attorney General, “Communication from the White House and Congress” (official memorandum, Washington, D.C.: Department of Justice, Oct. 18, 1979), 2 (“White House or Congressional inquiries concerning policy decisions or legislation are different from those directed at specific investigations and cases. The positions of the Administration on those kinds of matters often must be coordinated. Additionally, there is less chance for improper influences in this area. Consequently, different considerations for communication result.”); Quinn, “Contacts with Agencies,” 2; Holder, “Communications with the White House and Congress,” 3 (allowing for “distinctive arrangements” for “[m]atters in which the Solicitor General’s Office is involved” because those “often raise questions about which contact with the Office of the Counsel to the President is appropriate”).

- 154 Civiletti, "Communication from the White House and Congress," 1 (outlining Department of Justice policy limiting contacts with the White House).
- 155 For instance, in 2009, Christine Varney, head of the Antitrust Division at the Department of Justice, stated publicly, "The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected." Cecilia Kang, "U.S. Clears the Way for Antitrust Crackdown," *Washington Post*, May 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051101189.html>. The White House could also direct the Department of Justice to crack down on white collar crime, even on bankers, but it is generally frowned upon for the White House to direct the prosecution of an individual controversial CEO. A recent example of the White House setting enforcement policy is when the Obama administration announced a policy to no longer initiate the deportation of young undocumented immigrants meeting certain qualifications. In response, Homeland Security Secretary Janet Napolitano instructed immigration enforcement agents to "immediately exercise their discretion, on an individual basis, in order to prevent low-priority individuals from being placed into removal proceedings." Julia Preston and John H. Cushman, Jr., "Obama to Permit Young Migrants to Remain in U.S.," *New York Times*, June 15, 2012, <https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html>.
- 156 See, e.g., Renan, "Presidential Norms and Article II," 2207 (discussing "the norm of investigatory independence" for the presidency, which "prohibits presidential direction in individual investigatory matters"), 2236–39 (discussing the president's political control over policymaking through the administrative process).
- 157 See, e.g., Donald Rumsfeld, White House Chief of Staff, "Standards of Conduct: Contacts with Regulatory Agencies and Procurement Officers" (official memorandum, Washington, D.C.: The White House, Oct. 10, 1975); Fred F. Fielding, Counsel to the President, "Communications with the Department of Justice" (official memorandum, Washington, D.C.: The White House, Feb. 10, 1981); C. Boyden Gray, Counsel to the President, "Prohibited Contacts with Agencies" (official memorandum, Washington, D.C.: The White House, Feb. 1989); Quinn, "Contacts with Agencies"; Michael Mukasey, Attorney General, "Communications with the White House" (official memorandum, Washington, D.C.: Department of Justice, Dec. 19, 2007), available at <https://www.justsecurity.org/wp-content/uploads/2017/06/AG-2007-Memo-Communications-with-White-House.pdf>; Holder, "Communications with the White House and Congress"; McGahn, "Communications Restrictions with Personnel at the Department of Justice."
- 158 See, e.g., Quinn, "Contacts with Agencies" (Clinton Administration); Kathryn Ruemmler, Counsel to the President, "Prohibited Contacts with Agencies and Departments" (official memorandum, Washington, D.C.: The White House, Mar. 23, 2012).
- 159 See *supra* n. 157; see also *Report: The Security from Political Interference in Justice Act of 2007*, S. Rep. No. 110-203, at 3 (2007), available at <https://www.congress.gov/110/crpt/srpt203/CRPT-110srpt203.pdf> (stating that Attorney General Gonzales implemented a limited contacts policy permitting "at least 895 people in the executive branch to communicate with at least 42 people at the Department of Justice on non-national security related matters."). The policy shift was opposed by members of Congress and became a key focus of the nomination process of Gonzales' successor, Attorney General Michael Mukasey. Dan Eggen, "Mukasey Limits Agency's Contacts with White House," *Washington Post*, Dec. 20, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121902303.html>.
- 160 Mukasey committed to reinstating a more stringent limited contacts policy at his nomination hearing, and upon confirmation, he restricted allowable contacts about pending criminal and civil cases to the attorney general and his deputy and to the White House counsel and deputy counsel, with a provision that civil enforcement matters could also be discussed with the associate attorney general. Jeannie Shawl, "Mukasey Memo Limits DOJ Case Discussions with White House," *Jurist*, Dec. 20, 2007, <http://www.jurist.org/paperchase/2007/12/mukasey-memo-limits-doj-case.php>; Mukasey, "Communications with the White House."
- 161 Donald F. McGahn II, Counsel to the President, "Communications Restrictions with Personnel at the Department of Justice," (official memorandum, Washington, D.C.: White House, Jan. 27, 2017), available at <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfe4d530000>.

- 162 Brooke Seipel, "Priebus Could Have Violated WH Policy by Speaking to FBI: Report," *The Hill*, Mar. 17, 2017, <http://thehill.com/blogs/blog-briefing-room/news/324596-priebus-could-have-violated-wh-policy-by-speaking-to-fbi-report>.
- 163 Matt Ford, "Why Trump's Dismissal of Preet Bharara Matters," *Atlantic*, Mar. 12, 2017, <https://www.theatlantic.com/politics/archive/2017/03/trump-bharara/519318/>.
- 164 Trump personally interviewed Geoffrey Berman, then a partner at Rudy Giuliani's former law firm, for the U.S. Attorney position for the Southern District of New York; Ed McNally, a partner at the law firm founded by Trump's former personal attorney Marc Kasowitz, for the U.S. Attorney position for the Eastern District of New York; and Jessie Liu for the U.S. Attorney position for the District of Columbia. Seung Min Kim and John Bresnahan, "Trump Personally Interviewed U.S. Attorney Candidates," *Politico*, Oct. 19, 2017, <https://www.politico.com/story/2017/10/19/trump-us-attorney-interviews-243962>.
- 165 While all administrations since the 1970s have enacted policies, many of them have not been released until long after they were issued, and some have yet to be publicly released. For example, a White House contacts policy memorandum issued by President Obama's White House counsel has not been released publicly as of the publication of this report. Ruemmler, "Prohibited Contacts with Agencies and Departments."
- 166 The story of the changes to the limited contact policy during George W. Bush's administration provides an illustration of how congressional scrutiny of contacts policies can make a difference. See *supra*, nn. 159–60.
- 167 This proposal builds on existing DOJ guidance for particular contacts with outside parties. The U.S. Attorneys Manual directs U.S. Attorneys and staff to report contacts with Members of Congress, their staffs, or the media. See Office of the United States Attorneys, *U.S. Attorneys' Manual* (Washington, D.C.: United States Department of Justice, 2018), §§ 1-7.000, 1-8.000, <https://www.justice.gov/usam/united-states-attorneys-manual>. Law enforcement officers are already required to record certain information regarding their activities and communications; intra-agency structure already exists to manage any additional required disclosures. See Freedom of Information Act, 5 U.S.C. § 552.
- 168 To reduce duplication (or any perceived burden), Congress could make clear that once the log indicates the subject and individuals involved in communications about a particular matter, subsequent log entries for each communication on the same matter are not required.
- 169 5 U.S.C. § 552.
- 170 Pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a, the Department of Justice has procedures and rules in place to electronically track Department communications, including with outside parties. See 66 Fed. Reg. 41445 (Aug. 8, 2001) (implementing new Department-wide correspondence-tracking system proposed on June 4, 2001, 66 Fed. Reg. 29992); "DOJ Systems of Records," *Department of Justice*, last accessed Sept. 4, 2018, <https://www.justice.gov/opcl/doj-systems-records>. The White House also maintains its records pursuant to the Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2209; see also Julie Hirschfeld Davis, "White House to Keep Its Visitor Logs Secret," *New York Times*, Apr. 14, 2017, <https://www.nytimes.com/2017/04/14/us/politics/visitor-log-white-house-trump.html> (noting that White House records are maintained pursuant to law and that disclosure practices vary from one administration to the next).
- 171 Internal Revenue Service Restructuring and Reform Act of 1998, 26 U.S.C. §§ 6654, 7217 (1998). This legislation has not been challenged as unconstitutional.
- 172 See *supra* n. 157.
- 173 See Federal Records Act, 44 U.S.C. §§ 2101–2118, 2901–2910, 3101–3107, and 3301–3324 (requiring creation and retention of agency records); Freedom of Information Act, 5 U.S.C. § 552.

- 174 The Presidential Records Act, 44 U.S.C. §§ 2201–2207. Presidents have consistently conformed to the Presidential Records Act (PRA) without questioning its constitutionality. See Jonathan Turley, “Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records,” *Cornell Law Review* 88 (2003): 666–72. While the PRA has not faced a significant constitutional challenge, the Supreme Court upheld the constitutionality of a PRA predecessor, the Presidential Recordings and Materials Preservation Act, in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (holding that requiring the publication of presidential records in no way “prevents the Executive Branch from accomplishing its constitutionally assigned functions,” and discussing the “abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch”). See also *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (noting that, when enacting the Presidential Records Act, “Congress was . . . keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President’s daily operations”).
- 175 See *United States v. Nixon*, 418 U.S. 683, 706–07.
- 176 Inspector General Act of 1978, 5 U.S.C. App. § 1 et seq. (1978). Special inspectors general can also be appointed to oversee the administration of temporary government initiatives, such as the Troubled Asset Relief Program in the Treasury Department. See Vanessa K. Burrows, *The Special Inspector General for the Troubled Asset Relief Program (SIG-TARP)*, CRS Report No. R40099 (Washington, D.C.: Congressional Research Service, 2009), <https://fas.org/sgp/crs/misc/RS22981.pdf>.
- 177 5 U.S.C. App. § 5.
- 178 *Id.* § 6(a).
- 179 5 U.S.C. App. 3 § 3(a). Inspectors general are subject to removal by the president, with the president required to communicate the reasons for the removal to both houses of Congress within 30 days of that action. *Id.* § 3(b).
- 180 *Id.* § 8G. See also “The Inspectors General,” *Council of the Inspectors General on Integrity and Efficiency*, 2014, available at [https://www.ignet.gov/sites/default/files/files/IG\\_Authorities\\_Paper\\_-\\_Final\\_6-11-14.pdf](https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf).
- 181 5 U.S.C. App. 3 §§ 3(a), 6(f)(1). Agency heads transmit the budget proposals to the president, who submits them to Congress. *Id.* §§ 6(f)(2) – (3).
- 182 *Id.* § 3(b).
- 183 Inspectors general do not currently have express statutory authority to investigate political interference. When the Department of Justice Inspector General and Office of Professional Responsibility investigated political interference during the Bush administration’s U.S. Attorney firing scandal, the report the Offices co-authored explained that each of the two Offices had jurisdiction to investigate certain aspects of U.S. Attorney and Department of Justice misconduct, and did not reference improper White House interference in law enforcement. *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, 10 n. 12 (“OPR has jurisdiction to investigate allegations against U.S. Attorneys that involve the exercise of their authority ‘to investigate, litigate, or provide legal advice.’ The OIG has jurisdiction to investigate all other allegations against U.S. Attorneys. See 5 U.S.C. App. 3 § 8E.”). The report also noted that, in the midst of congressional and media scrutiny of the U.S. Attorney firings, Deputy Attorney General Paul McNulty recommended to Attorney General Alberto Gonzales that he direct OPR to conduct an investigation into the removals of the U.S. Attorneys. *Id.* at 92–93.
- 184 5 U.S.C. App. 6 § 6(e)(4) (“[t]he Attorney General shall promulgate, and revise as appropriate, guidelines which shall govern the exercise of [inspectors general’s] law enforcement powers”); John Ashcroft, Attorney General, “Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority” (official memorandum, Washington, D.C.: Department of Justice, 2003) (requiring, inter alia, adherence to attorney general guidelines applicable to criminal investigative practices and completion of law enforcement training program, and establishing special procedures for investigations involving senior executive branch officials and other sensitive targets).

- 185 The Council of Inspectors General for Integrity and Efficiency publishes professional standards pursuant to the Inspector General Reform Act of 2008, 5 U.S.C. App. § 11(c)(2)(A) (2008), which require that investigations be conducted ethically, with impartiality and objectivity, and in accordance with all applicable laws, rules, and regulations, guidelines from the Department of Justice and other prosecuting authorities, and internal agency policies and procedures, with due respect for the rights and privacy of those involved. *Quality Standards for Investigations*, Council of the Inspectors General for Integrity and Efficiency, 2011, available at <https://www.ignet.gov/sites/default/files/files/invpgr1211appi.pdf>.
- 186 See, e.g., 5 U.S.C. App. 6 § 4(b) (requiring reviews to ensure compliance with standards established by the comptroller general of the United States for audits and that internal quality controls are in place and operating); *Id.* § 6(c)(7) (requiring establishment of external review process, in consultation with the attorney general, to ensure that adequate internal safeguards and management procedures exist for exercise of law enforcement powers).
- 187 See Kathleen Clark, “Toward More Ethical Government: An Inspector General for the White House,” *Mercer Law Review* 49 (1998): 553, 555–56, 564 (discussing downsides of independent counsel investigations, which included expense, increased political use of ethics allegations, and decreased public trust in government, and arguing that inspector general mechanism helps promote ethical environment); Letter from Walter M. Shaub, Senior Director for Ethics, Campaign Legal Center, to Trey Gowdy, Chairman, and Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform, United States House of Representatives (Nov. 9, 2017): 13–15, available at <https://www.politico.com/f/?id=0000015f-a141-dc5e-abff-bfd5436b0001> (advocating for establishment of inspector general with regular jurisdiction over small agencies and limited special jurisdiction to conduct ethics investigations throughout executive branch).
- 188 U.S. CONST. ART. II, § 2, CL. 1.
- 189 Margaret Colgate Love, “Reinventing the President’s Pardon Power,” *Federal Sentencing Reporter* 20 (2007): 6, available at <http://pardonlaw.com/wp-content/uploads/pardonlawimport/FSR.Pardon.2007.final.pdf> (quoting Alexander Hamilton in *Federalist* No. 74 (“the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel”) and James Iredell, Address in the North Carolina Ratifying Convention (“It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.”)).
- 190 Margaret Colgate Love, “Reinventing the President’s Pardon Power,” 6, n. 6; Proclamation 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977) (President Carter granting pardon for violations of the Selective Service Act, August 4, 1964 to March 28, 1973); Proclamation 4313, 39 Fed. Reg. 34511 (Sept. 16, 1974) (President Ford creating “amnesty discharge,” 32 C.F.R. § 724.112); see also *The Federalist* No. 74 (Alexander Hamilton) (“in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall”).
- 191 *The Federalist* No. 74 (Alexander Hamilton) (“The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution.”). James Madison believed that the threat of impeachment would serve as a check on abuse of the pardon power: “There is one security in this case [a misuse of the pardon power by the president] to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President.” Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J.B. Lippincott & co.; Washington, D.C.: Taylor & Maury, 1836–1859), 3:498, available at [https://memory.loc.gov/cgi-bin/ampage?collId=llcd&fileName=003/llcd003.db&recNum=509&itemLink=r?amem/hlaw:@field\(DOCLID+@lit\(ed00318\)\)%25230030509&linkText=1](https://memory.loc.gov/cgi-bin/ampage?collId=llcd&fileName=003/llcd003.db&recNum=509&itemLink=r?amem/hlaw:@field(DOCLID+@lit(ed00318))%25230030509&linkText=1).
- 192 Presidents began to rely on the attorney general for advice on pardons in 1854, though it was not until 1865 that the Office of the Clerk of Pardons was established in the Office of the Attorney General. See Margaret Colgate Love, “Reinventing the President’s Pardon Power,” 6; see also “Department of Justice, Office of the Pardon Attorney. 1894

- Organization Authority Record,” National Archives Catalog, accessed Sept. 10, 2018, *available at* <https://catalog.archives.gov/id/10451179> (noting the administrative history of the Pardon Attorney office).
- 193 The Pardon Attorney submits recommendations to the president through the deputy attorney general. 28 C.F.R. Part 1.6 (procedure for reviewing petitions and submitting recommendations to the president); 28 C.F.R. Part 0, Subpart G (delegating authority to the Pardon Attorney and specifying that pardon recommendations to the president are submitted through the deputy attorney general).
- 194 Office of the United States Attorneys, *U.S. Attorneys’ Manual* (Washington, D.C.: Department of Justice, 2018), § 9-140.000 (“Pardon Attorney”), *available at* <https://www.justice.gov/usam/usam-9-140000-pardon-attorney#9-140.112>.
- 195 See Margaret Colgate Love, “Reinventing the President’s Pardon Power,” 6 (citing only three occasions between 1953 and 1999 where the Department of Justice’s process was not followed: President Ford’s pardon of President Nixon in 1974, President Reagan’s 1981 pardon of two FBI officials who had authorized illegal surveillance of the homes of friends of the Weather Underground, and President Bush’s 1992 pardon of six Iran-Contra defendants.); Samuel T. Morison, “The Politics of Grace: On the Moral Justification of Executive Clemency,” *Buffalo Criminal Law Review* 9 (2005): 45 n. 85 (citing pardons of President Nixon, FBI officials, and Iran-Contra defendants as among those constituting “roughly one percent of th[e] total” cases granted between March 1945 and January 2001 for which there was no prior Justice Department review).
- 196 President Clinton pardoned fugitive billionaire Marc Rich hours before leaving office in 2001 after a carefully orchestrated lobbying campaign that included Rich’s ex-wife, Denise Rich, who was a prominent donor to Democratic Party committees, Hillary Clinton’s senatorial campaign, and the Clinton Foundation. Josh Getlin, “Clinton Pardons a Billionaire Fugitive, and Questions Abound,” *Los Angeles Times*, Jan. 24, 2001, <http://articles.latimes.com/2001/jan/24/news/mn-16268>; Jackie Judd and David Ruppe, “Denise Rich Gave \$450,000 to Clinton Library,” *ABC News*, Feb. 9, 2001, <https://abcnews.go.com/Politics/story?id=121846&page=1>. The pardon was the subject of congressional and criminal investigations for alleged bribery. The pardon was the subject of congressional and criminal investigations for alleged bribery. Joe Conason, “What Sessions Should Tell Trump about Pardons—Before It’s Too Late,” *National Memo*, July 27, 2017, <http://www.nationalmemo.com/sessions-tell-trump-pardons/>.
- 197 Isaac Toussie pleaded guilty in 2001 to using false documents to have mortgages insured by the Department of Housing and Urban Development, and in 2002 to mail fraud. Ken Belson and Eric Lichtblau, “A Father, A Son, and a Short-Lived Presidential Pardon,” *New York Times*, Dec. 25, 2008, <https://www.nytimes.com/2008/12/26/us/26pardon.html>. The White House maintained that when President Bush granted the pardon, neither he nor his advisers were aware that Toussie’s father had recently donated a total of \$30,800 to Republicans. *Id.*
- 198 *Id.*
- 199 Proclamation 8159, 72 Fed. Reg. 37095 (July 2, 2007), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2007-07-06/pdf/07-3328.pdf>; see also Amy Goldstein, “Bush Commutes Libby’s Prison Sentence,” *Washington Post*, July 3, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800858.html> (reviewing the facts and summarizing contemporary criticism of the commutation).
- 200 Proclamation 6518, 57 Fed. Reg. 62145 (Dec. 24, 1992) (granting clemency to Caspar Weinberger, Elliott Abrams, Duane Clarridge, Alan Fiers, Clair George, and Robert McFarlane), *available at* <http://www.presidency.ucsb.edu/ws/?pid=20265>; see also Walter Pincus, “Bush Pardons Weinberger in Iran-Contra Affair,” *Washington Post*, Dec. 25, 1992, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800858.html> (including independent counsel’s objection that the pardons constituted a “coverup”).
- 201 Flynn and Manafort are potential witnesses in the special counsel investigation into whether Russia interfered in the 2016 election, contributing to the condemnation of the reports. Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman, and Adam Goldman, “Trump’s Lawyer Raised Prospect of Pardons for Flynn and Manafort,” *New*

*York Times*, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html>.

- 202 See, e.g., Alex Whiting, “Why Dangling a Pardon Could Be an Obstruction of Justice—Even If the Pardon Power Is Absolute,” *Just Security*, Mar. 28, 2018, <https://www.justsecurity.org/54356/dangling-pardon-obstruction-justice-even-pardon-power-absolute/>; Sean Illing, “I Asked 11 Legal Experts If Trump’s Lawyer Obstructed Justice,” *Vox*, Mar. 29, 2018, <https://www.vox.com/2018/3/29/17174042/trump-pardons-in Manafort-flynn-mueller-probe>.
- 203 Model Code of Judicial Conduct R. 2.11.
- 204 The factors considered by the Pardon Attorney include: (1) the perspectives of the prosecutors and sentencing judge; (2) the gravity of the offense; (3) the recipient’s acceptance of responsibility; (4) the petitioner’s criminal rehabilitation record; and (5) the need for relief. See *U.S. Attorneys’ Manual* § 9-140.000.
- 205 Many scholars and writers on the pardon power have expressed support for greater pardon transparency, through increased congressional involvement or otherwise. See Glenn H. Reynolds, “Congressional Control of Presidential Pardons,” *Nevada Law Journal Forum* 2 (2018) (Congress could require that the president submit pardon explanations to Congress, that pardons be recorded and preserved by the National Archives, or that the archivist maintain an index of pardons organized by crimes and circumstances); Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1989) (pardons should be accompanied by a written explanation of the reasons); Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, American Constitution Society, 2013, 9–10, available at [https://www.acslaw.org/wp-content/uploads/2018/04/Love\\_-\\_Reinvigorating\\_the\\_Federal\\_Pardon\\_Process\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2018/04/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf) (the president should publicly announce a pardoning policy and publish an annual report setting forth the reasons for each grant of clemency); P.S. Ruckman, Jr., “Preparing the Pardon Power for the 21st Century,” *University of St. Thomas Law Journal*, 12 (2016): 472–75, available at <http://www.rvc.cc.il.us/facilink/pruckman/pardoncharts/JEdit.htm> (proposing that a clemency board publish data on the efficiency of processing pardon applications, and further proposing a return to the pre-1933 practice of presidents submitting detailed annual reports on pardons to Congress); Brendan Koerner, “It’s Time to Make the Clemency System Less Opaque,” *Wired*, Oct. 7, 2016, <https://www.wired.com/2016/10/time-make-clemency-system-less-opaque/> (proposing an “online clemency-monitoring system,” essentially a digital version of the pre-1933 report).
- 206 Ruckman, “Preparing the Pardon Power for the 21st Century,” 475–76. It is unclear why this process was abandoned. According to one reporter, the process was initially stopped as part of a broader cost-cutting measure to eliminate printing during the Great Depression, and it was not resumed to prevent embarrassment to those whose crimes were being pardoned. Koerner, “It’s Time to Make the Clemency System Less Opaque.”
- 207 See, e.g., William Jefferson Clinton, “My Reasons for the Pardons,” *New York Times*, Feb. 18, 2001, <https://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html>; Andrew Novak, “Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States,” *Michigan Journal of Legal Reform* 49 (2016): 842 (citing remarks by President Ford on granting a pardon to President Nixon, and a proclamation by President Bush on granting clemency to former Secretary of Defense Caspar Weinberger and others). See Robert Pear, “President Reagan Pardons 2 Ex-F.B.I. Officials in 1970’s Break-Ins,” *New York Times*, Apr. 16, 1981, available at <https://www.nytimes.com/1981/04/16/us/president-reagan-pardons-2-ex-fbi-officials-in-1970-s-break-ins.html> (citing President Reagan’s statement on pardoning two former FBI officials).
- 208 Colo. Const. art. IV, § 7; Ind. Const. art. V, § 17; Iowa Const. art. IV, § 16; Ky. Const. § 77; Md. Const. art. II, § 20; Ohio Const. art. III, § 11; N.J. Stat. Ann. § 2A:167-3.1; Or. Rev. Stat. § 144.660; Tenn. Code Ann. §§ 40-27-101, 107; Va. Const. art. V, § 12; Wash. Const. art. III, § 11; W. Va. Const. art. 7, § 11; Wis. Const. art. V, § 6; Wyo. Const. art. 4, § 5. See generally Margaret Colgate Love, “Reinvigorating the Federal Pardon Process: What the President Can Learn from the States,” *University of St. Thomas Law Journal* 9 (2013): 743–51. For a discussion of the benefits and drawbacks of instating a reasons requirement, see Daniel T. Kobil, “Should Clemency Decisions Be Subject to a Reasons Requirement?” *Federal Sentencing Reporter* 13 (2000): 150.



- 209 See Presidential Pardon Transparency Act of 2017, H.R. 3489, 115th Cong. (2017) (requiring that the name of the person pardoned, the full text of the reprieve, and the date of issue is published in the Federal Register); Abuse of the Pardon Prevention Act, H.R. 5551 & S.2770, 115th Cong. (2018) (directing the attorney general to produce investigative materials to Congress in the event of certain pardons granted by the president).
- 210 We calculated this average from the yearly figures provided by the Pardon Attorney, “Clemency Statistics,” U.S. Department of Justice, Office of the Pardon Attorney, accessed Aug. 23, 2018, <https://www.justice.gov/pardon/clemency-statistics>. In 2014, President Obama announced an initiative for federal inmates to have their sentences commuted or reduced if they met certain factors. The initiative resulted in 583 and 1,043 commutations in 2015 and 2016, respectively. Without these two years, the average drops further.
- 211 Former Pardon Attorney Margaret Colgate Love argues that President Roosevelt’s 1933 “decision to stop publishing reasons for grants deprived the public of the factual predicate necessary to hold pardon decision-makers accountable and reinforced the impression that pardoning was mysterious, capricious, and possibly corrupt. It also encouraged both the president and the Justice Department to think that they did not need to be accountable to the public for pardoning.” Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, American Constitution Society, 2013, 9–10, available at [https://www.acslaw.org/wp-content/uploads/2018/04/Love\\_-\\_Reinvigorating\\_the\\_Federal\\_Pardon\\_Process\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2018/04/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf).
- 212 5 U.S.C. App. 3 § 3(b).
- 213 44 U.S.C. § 2201–2209.
- 214 Congress also requires disclosure of foreign intelligence information to congressional intelligence committees despite the president bearing “primary responsibility for the scope and conduct of foreign intelligence activities” and acting as “the sole organ of the nation in foreign relations.” Philip A. Lacovara, “Presidential Power to Gather Intelligence: The Tension between Article II and Amendment IV,” *Law & Contemporary Problems* 40, no. 3 (1976): 107. See National Security Act of 1947, 50 U.S.C. §§ 3001, 3043(a)(1), 3091(a)(1), 3093(c) (requiring the president to transmit to Congress an annual report on the national security strategy of the United States; to keep congressional intelligence committees fully and currently informed of intelligence activities; to provide congressional intelligence committees written findings that covert actions are necessary, and, in instances when such findings are not reported to the committees, to provide a statement of the reasons for not giving prior notice, with an obligation to disclose the finding or provide an explanation for its continued withholding within 180 days); Intelligence Authorization Act for Fiscal Year 2015, Pub. L. No. 113-293, 128 Stat. 3990–4008.
- 215 The Supreme Court has held that, in some circumstances, the president can be required to disclose information without violating the separation of powers doctrine. *United States v. Nixon*, 418 U.S. 683, 706–07 (1974); see also Reynolds, “Congressional Control of Presidential Pardons,” 33–34 (“Although Congress cannot tie the president’s hands, it seems likely that it could take substantial steps to ensure that, under certain circumstances, those hands perform their actions in the open—and if not open to the entire public, then at least behind closed doors to Congress. Rules providing for such transparency would very likely withstand constitutional scrutiny given that a pardon is, by its nature, a public act.”).
- 216 For instance, transparency can help Congress hold the president accountable, where appropriate, pursuant to its impeachment power. The Supreme Court has also recognized that the pardon power is appropriately limited by other constitutional provisions, such as the Spending Clause, *Hart v. United States*, 118 U.S. 62, 67 (1886) (explaining that pardons cannot have the effect of authorizing a governmental payment not authorized by Congress), the Fifth Amendment privilege against self-incrimination, *Burdick v. United States*, 236 U.S. 79, 93–94 (1915) (“[T]he power of the President under the Constitution to grant pardons and the right of a witness [against self-incrimination] must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both, to leave to each its proper place.”), and the Fifth Amendment’s Due Process Clause, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (J. O’Connor, concurring) (“some minimal procedural safeguards apply to clemency proceedings”).

- 217 Donald J. Trump (@realDonaldTrump), "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending [sic] Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!" Twitter, June 4, 2018, 5:35 a.m., <https://twitter.com/realdonaldtrump/status/1003616210922147841>.
- 218 *Presidential or Legislative Pardon of the President*, 1 Op. O.L.C. Supp. 370 (1974), available at [https://www.justice.gov/sites/default/files/olc/opinions/1974/08/31/op-olc-supp-v001-p0370\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/1974/08/31/op-olc-supp-v001-p0370_0.pdf).
- 219 Those potential abuses include pardons of family members or political supporters that would undermine the public's confidence in equal justice, or pardons of public officials who have violated the public's trust or their fundamental rights, signaling to other officials that they may do the same with impunity. Such a resolution would also respond to the recent pardon of former Arizona sheriff Joe Arpaio, who was convicted of criminal contempt for ignoring a court order to stop unconstitutional conduct, and recent speculation that President Trump could issue pardons to his son and son-in-law. See, e.g., Carol Leonnig, Ashley Parker, Rosalind Helderman, and Tom Hamburger, "Trump Team Seeks to Control, Block Mueller's Russia Investigation," *Washington Post*, July 21, 2017, <http://wapo.st/2uH7sqO> (reporting that Trump has asked his advisers about his power to pardon aides, family members, and even himself). President Trump is also considering pardoning former Illinois Governor Rod Blagojevich, who is serving a prison sentence following convictions for public corruption. Jason Meisne, "Trump Says He's Considering Commuting Sentence of Imprisoned Former Gov. Rod Blagojevich," *Chicago Tribune*, May 31, 2018, <http://www.chicagotribune.com/news/local/breaking/ct-met-illinois-governor-bлагоjevich-trump-20180531-story.html>.
- 220 See, e.g., H. Con. Res. 107, 112th Cong. (2012) (expressing the sense of Congress that use of military force without prior congressional authorization is an impeachable offense).
- 221 Jane A. Hudiberg and Christopher M. Davis, *Resolutions to Censure the President: Procedure and History*, CRS Report No. R45087 (Washington, D.C.: Congressional Research Service, 2018), <https://fas.org/sgp/crs/misc/R45087.pdf>.
- 222 Representatives Al Green and Steve Cohen have proposed amendments to the Constitution to expressly prohibit self-pardons. H.J. Res. 115, 115th Cong. (2017) ("The President shall have no power to grant to himself a reprieve or pardon for an offense against the United States"); H.J. Res. 120, 115th Cong. (2017) (prohibiting self-pardons and pardons for the president's family members, current or former members of the president's administration, or staff from the president's campaigns).
- 223 See *supra* nn. 209, 222. Members of Congress have introduced several other proposals to amend the pardon power over the years, including a 1974 proposal to give a two-thirds majority of Congress the power to reject pardons, resolutions in the 1990s to prohibit pre-conviction pardons, a 2001 proposal to prohibit pardons during lame-duck presidencies, and a 2009 resolution disapproving of pardons during the final 90 days of a president's term. Kristen H. Fowler, "Limiting the Federal Pardon Power," *Indiana Law Journal* 83 (2008): 1660–61; H Res. 9, 111th Cong. (2009).
- 224 H. Res. 523, 115th Cong. (2017).
- 225 See *infra* at 16 (discussing the Saturday Night Massacre).
- 226 One poll found that support for President Nixon's impeachment nearly doubled, from 23 percent to 44 percent in favor, after the episode. Associated Press, "Poll Shows Many for Impeachment," *Spokane Daily Chronicle*, Oct. 23, 1973, available at <https://news.google.com/newspapers?id=kJNYAAAIBAJ&sjid=VvgDAAAIBAJ&pg=2407.2360158&cdq=oliver-quayle&hl=en>. Gallup polls showed a steady increase in support for President Nixon's impeachment after the firings. Andrew Kohut, "How the Watergate Crisis Eroded Public Support for Richard Nixon," *Pew Research Center*, Aug. 8, 2014, <http://www.pewresearch.org/fact-tank/2014/08/08/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/>.

- 227 Twenty-one members of Congress introduced resolutions calling for President Nixon's impeachment. Allen McDuffee, "The Saturday Night Massacre Actually Sped up Nixon's Political Demise," *Timeline*, May 10, 2017, <https://timeline.com/saturday-night-massacre-nixon-1f7c2565c0d8>.
- 228 *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973) ("[I]n the absence of a finding of extraordinary impropriety[,] [the firing] was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.").
- 229 5 U.S.C. § 2301(b)(2) (mandating that employees and applicants for employment receive fair and equitable treatment without regard to political affiliation); 5 U.S.C. § 2301(b)(8)(A) (protecting employees from coercion for partisan political purposes).
- 230 28 C.F.R. § 600.1. Special counsel regulations were implemented after the expiration of the independent counsel statute that same year. The Office of Independent Counsel was created pursuant to the Ethics in Government Act of 1978. The statute empowered the attorney general to petition a special three-judge panel of the U.S. Court of Appeals for the District of Columbia to name an independent counsel upon the receipt of credible allegations of criminal misconduct by certain high-level executive branch personnel whose prosecution by the administration might give rise to an appearance of a conflict of interest. The attorney general could remove the independent counsel for "good cause, physical or mental disability."
- 231 28 C.F.R. § 600.7(d).
- 232 See, e.g., Darren Samuelsohn, "Trump's War against Mueller Borrows from Bill Clinton's Playbook," *Politico*, June 21, 2018, <https://www.politico.com/story/2018/06/21/trump-mueller-clinton-independent-counsel-660491>; Don Van Natta, Jr., "White House's All-Out Attack on Starr Is Paying Off, with his Help," *New York Times*, Mar. 2, 1998, <https://www.nytimes.com/1998/03/02/us/white-house-s-all-out-attack-on-starr-is-paying-off-with-his-help.html>.
- 233 David Smith, Julian Borger and Lauren Gambino, "Donald Trump Admits 'This Russia Thing' Part of Reasoning for Firing Comey," *The Guardian*, May 12, 2017, <https://www.theguardian.com/us-news/2017/may/11/donald-trump-james-comey-firing-russia-investigation>.
- 234 The President has sought to undermine Special Counsel Mueller's fitness to lead an independent investigation of Russian interference in the 2016 election, accusing Special Counsel Mueller and his team of having conflicts of interest. See, e.g., Karoun Demirjian, "Conservative Republicans Demand Mueller Recuse Himself over Uranium Deal," *Washington Post*, Nov. 3, 2017, <http://wapo.st/2zhDdsP>; Adam Edelman, "Trump Slams Mueller Russia Probe, Accuses Team of Having 'Unrevealed Conflicts of Interest,'" *NBC*, May 7, 2018, <https://www.nbcnews.com/politics/donald-trump/trump-slams-mueller-russia-probe-accuses-team-having-unrevealed-conflicts-n871866>.
- 235 Michael S. Schmidt and Maggie Haberman, "Trump Ordered Mueller Fired, but Backed off When White House Counsel Threatened to Quit," *New York Times*, Jan. 25, 2018, <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html>; Neal Katyal, "Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules," *Washington Post*, May 19, 2017, <http://wapo.st/2qHggce>.
- 236 "Excerpts From the Times's Interview With Trump," *New York Times*, July 19, 2017, [https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?\\_r=1](https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?_r=1).
- 237 Max Greenwood, "Trump: Sessions Recusal 'Unfair' to Me," *The Hill*, July 19, 2017, <http://thehill.com/homenews/administration/342843-trump-sessions-recusal-unfair-to-me>.
- 238 Michael Shear, Charlie Savage and Maggie Haberman, "Trump Attacks Rosenstein in Latest Rebuke of Justice Department," *New York Times*, June 16, 2017, <https://www.nytimes.com/2017/06/16/us/politics/trump-investigation-comey-russia.html>.

- 239 Though it is not clear whether the regulations are subject to the Administrative Procedure Act's "notice-and-comment" rulemaking process (indeed, the regulations were promulgated by former Attorney General Reno without going through that process), legal scholars agree there is an avenue for the executive to rescind the regulations, either through the APA's rulemaking procedure or more expeditiously. See, e.g., Katyal, "Trump or Congress Can Still Block Mueller" ("Trump could order the special counsel regulations repealed. . ."); Josh Blackman, "Can the Special Counsel Regulations Be Unilaterally Revoked?" *Lawfare*, July 5, 2018, <https://www.lawfareblog.com/can-special-counsel-regulations-be-unilaterally-revoked> (though the regulations could be revoked, the special counsel may have standing to challenge a rescission that is "arbitrary and capricious"). Cf. *Nader*, 366 F. Supp. at 108 ("An agency's power to revoke its regulations is not unlimited—such action must be neither arbitrary nor unreasonable.") citing *Kelly v. U.S. Dep't of Interior*, 339 F. Supp. 1095 (E.D. Cal 1972).
- 240 See, e.g., Alexi McCammond, "Democrats Worry Trump Will Fire Mueller," *Axios*, Oct. 30, 2018, <https://www.axios.com/democrats-worry-trump-will-fire-mueller-1513306540-8e68256f-94a7-4c3c-9d7c-0c3af1386e59.html>; Nicholas Kristof, "The Nation Will Pay If Trump Fires Mueller," *New York Times*, Apr. 11, 2018, <https://www.nytimes.com/2018/04/11/opinion/fire-mueller-trump.html>; Mark Warner, "Congress Must Draw 'Red Line' to Protect Mueller, Warn Trump against Firing and Pardons: Mark Warner," *USA Today*, Mar. 18, 2018, <https://www.usatoday.com/story/opinion/2018/03/18/congress-protect-robert-mueller-warn-donald-trump-no-firing-no-pardons-senator-mark-warner-column/435883002/>.
- 241 Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2018), available at <https://www.congress.gov/115/bills/s2644/BILLS-115s2644rs.pdf>.
- 242 Nicholas Fandos, "In Warning to Trump, Senators Advance Bill to Protect Mueller," *New York Times*, Apr. 26, 2018, <https://www.nytimes.com/2018/04/26/us/politics/senate-mueller-protection-bill.html>. The bill would not open the door for Congress to politicize investigations by imposing real-time reporting requirements on the special counsel, as one contemplated amendment to the bill while it was considered in committee would have done. Mary Clare Jalonick, "As Trump Fumes, Senators Bid to Protect the Special Counsel," *Associated Press*, Apr. 11, 2018, <https://www.apnews.com/9a5a0ba245814a9b8259c6290b698ff5> (reporting that Senator Charles Grassley was preparing an amendment requiring new reports to Congress if the scope of the special counsel's investigation changed and a final report on the investigation with a detailed explanation of any charges).
- 243 Letter from Eric Posner, Professor of Law, University of Chicago Law School, and Stephen I. Vladeck, Professor in Law, University of Texas School of Law, to Senator Charles Grassley, Chairman, and Senator Dianne Feinstein, Ranking Member, Senate Judiciary Committee (Apr. 24, 2018), available at <https://www.justsecurity.org/wp-content/uploads/2018/04/Posner-Vladeck-Letter-on-S2644.pdf>.
- 244 28 U.S.C. § 591 et seq.
- 245 28 U.S.C. § 596 (requiring "good cause, physical or mental disability" for removal).
- 246 12 U.S.C. § 5491 (c)(3) (Consumer Financial Protection Bureau); 42 U.S.C. § 7412(r) (6)(B) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. § 1975(e) (Commission on Civil Rights); 15 U.S.C. § 2053(a) (Consumer Product Safety Commission); 42 U.S.C. § 7171 (b) (1) (Federal Energy Regulatory Commission); 12 U.S.C. § 4512(b)(2) (Federal Housing Finance Agency); 5 U.S.C. § 7104(b) (Federal Labor Relations Authority); 46 U.S.C. § 301(b)(5) (Federal Maritime Commission); 12 U.S.C. § 242 (Federal Reserve); 15 U.S.C. § 41 (Federal Trade Commission); 5 U.S.C. § 1202(d) (Merit Systems Protection Board); 30 U.S.C. § 823(b) (1) (Mine Safety and Health Review Commission); 29 U.S.C. § 153(a) (National Labor Relations Board); 45 U.S.C. § 154 (National Mediation Board); 49 U.S.C. § 1111(c) (National Transportation Safety Board); 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); 29 U.S.C. § 661(b) (Occupational Safety and Health Review Commission); 5 U.S.C. § 1211(b) (Office of Special Counsel); 39 U.S.C. § 502(a) (Postal Regulatory Commission); 42 U.S.C. § 902(a)(3) (Social Security Administration); 49 U.S.C. § 1301(b)(3) (Surface Transportation Board).

Chairman CUMMINGS. Mr. Shaub.

**STATEMENT OF WALTER M. SHAUB, JR., SENIOR ADVISOR,  
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON**

Mr. SHAUB. Chairman Cummings, Ranking Member Jordan, and members of the committee, thank you for inviting me to talk about the ethics reforms in H.R. 1. I served in the Office of Government Ethics as director, and before that, as a career ethics official. In my 14 years there, I have been intimately involved in protecting the principle that public service is a public trust.

Based on this experience, I know how urgently we need reform, and that's why I support H.R. 1. The executive branch ethics program focuses on prevention. OGE has no real enforcement authority. In theory, OGE can order officials to cease ongoing violations, but statutory limitations prevent an effective use of this authority. OGE can ask agencies to conduct investigations and can request copies of records, but it has no power to do anything if they ignore these requests.

Lacking enforcement tools, OGE relies on the director's ability to persuade or shame officials into doing the right thing. This was never ideal, but it worked fairly well for four decades. During my time in government, Presidents Bush and Obama were reliable supporters of OGE. They showed that government ethics is not a partisan issue.

We now find ourselves in an ethics crisis. The trigger was President Trump's refusal to divest his conflicting financial interests. This radical departure from ethical norms leaves the public with no way of knowing how personal interests are affecting public policy. What we do know only raises questions.

For example, questions surround President Trump's response when individuals associated with the Saudi Government murdered a Washington Post journalist, a resident of my home State. We can only wonder if President Trump's financial interests influenced the handling of sanctions on certain Russian businesses. Did they affect his decision to help Chinese telecom giant ZTE? Why did the administration scrap the plan to move FBI's headquarters? Was it because President Trump didn't want a competitor moving in so close to his D.C. hotel? These are just a few examples.

And the President's disinterest in ethics has infected his appointees. The heads of six agencies have stepped down under a cloud of ethics issues. At least seven other appointees resigned under the taint of an investigation, ethics issues, or security clearance concerns. The Office of Special Counsel has found that nine of his appointees violated the Hatch Act, and there are dozens of pending ethics-related investigations.

H.R. 1 kicks off what I hope will be a wave of reform. It focuses not just on the current crisis, but also issues that predate this administration. For example, H.R. 1 addresses big payouts to incoming officials. These golden parachutes raise concerns about an employee appointee's loyalty to a former employer.

When former Treasury Secretary Jack Lew left Wall Street to join the State Department, he received a large bonus. His employment agreement let him keep that bonus specifically because he landed a high-level government job. I'm glad to see a provision in

H.R. 1 addressing this issue, and my written testimony offers a suggestion for strengthening it further.

H.R. 1 would also make OGE more independent. Like the heads of MSPB and OSC, OGE's director would be allowed to communicate directly with Congress and would be removable only for cause. Rather than depending on other agencies, OGE would be able to conduct meaningful inquiries by issuing subpoenas. H.R. 1 would increase the transparency of waivers which can undermine the ethics program if granted improperly. The public needs to know about waivers.

Before leaving OGE, I exposed questionable practices involving the issuance of undated, unsigned, and retroactive waivers, some of which seemed designed to paper over ethics violations.

I'll close by emphasizing that what's at stake is the very integrity of government. The Supreme Court has warned one that a conflict of interest is an evil that endangers the very fabric of a democratic society. The Court explained that democracy is effective only if people have faith in those who govern. We need ethics reform before the public's trust in government is shattered beyond repair. I urge you to pass H.R. 1.

Thank you again for inviting me, and I'm happy to answer any questions the committee may have today.

[Prepared Statement of Mr. Shaub follows:]

## HEARING BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND REFORM

FEBRUARY 6, 2019

TESTIMONY OF WALTER M. SHAUB, JR.  
FORMER DIRECTOR, U.S. OFFICE OF GOVERNMENT ETHICS  
SENIOR ADVISOR, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

Chairman Cummings, Ranking Member Jordan, and members of the Committee, thank you for the invitation to appear before the committee to talk about the framework for government ethics in the executive branch and the reforms proposed in H.R. 1, the For the People Act. I applaud the members of this committee and other members of Congress for putting together this thoughtful piece of legislation and moving it quickly into the legislative process. This is an important bill that proposes necessary reforms to restore government integrity.

Before leaving government in July 2017, I served as Director of the Office of Government Ethics ("OGE"). I spent almost 14 years of my life working for OGE, having come up through the ranks as a career public servant. In that time, I worked closely with the Bush, Obama and Trump White Houses. Between my time at OGE and my work related to federal employment law, I have devoted my entire professional career to government ethics and the merit systems principles. I have first-hand experience implementing government ethics reforms and am intimately familiar with the limitations of the existing executive branch ethics program. Based on this experience, I know how urgently the ethics program needs reform. I am here today to endorse H.R. 1 and offer a few suggestions for refining it. First, I would like to tell you about the program OGE administers and the ethics crisis in the executive branch.

*I. The Office of Government Ethics*

Although its roots date back much further, the current framework for ethics in government was born out of the Watergate scandal in the 1970s. The betrayal of American values by a sitting President profoundly shook the public's trust in government. Congress responded by enacting sweeping government reforms that included the Ethics in Government Act of 1978, the Inspector General Act of 1978, and the Civil Service Reform Act of 1978.

Among other things, the Ethics in Government Act established a special prosecutor position, new financial disclosure requirements, a blind trust program and a number of new substantive restrictions on federal officials. The Ethics in Government Act also created OGE, initially establishing it as a component of the Office of Personnel Management ("OPM"). Nothing in that law would have directly prevented the events that set into motion the demise of the Nixon presidency, nor would the law have prevented the conduct described in the Nixon articles of impeachment. Nevertheless, the law provided the executive branch with what President Jimmy Carter called "added tools to ensure that the Government is open, honest, and is free from conflicts of interest." More broadly, the law aimed to foster an ethical culture in government that might earn back some of the public's trust. President Carter spoke of restoring "public confidence in the integrity of our Government." A little over two decades later, Senator

Susan Collins (R-ME) would echo this sentiment, explaining that “the whole purpose of our ethics laws is to assure the public that federal officials are making decisions that are free from conflicts of interest, the purpose of the laws, thus, is to promote public confidence in the decisions of government officials.”

In pursuit of this aim, the Ethics in Government Act, as amended, declares OGE the “supervising ethics office” for the federal executive branch. The law grants OGE responsibility for providing “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” As this statutory language makes clear, the primary objective of the executive branch ethics program is one of *prevention*.

The mission of prevention is distinct from enforcement. The Ethics in Government Act severely restricts OGE’s authority to do much more than offer advice and, when necessary, sound the alarm. Its language includes discussion of investigative and corrective action, but in practice it gives OGE no real power to conduct investigations or take corrective action against executive branch officials.

In 1988, Congress passed a law that would move OGE out of OPM and make it a separate agency, as well as upgrade the Director position by designating it as an Executive Schedule Level III position. As part of this reorganization, Congress imposed new procedural restrictions on OGE’s limited authority to order an official to cease an ongoing violation. The next year, Congress passed the Ethics Reform Act of 1989, which, among other things, gave OGE authority to “notify” financial disclosure filers of steps that would be “appropriate” to resolve conflicts of interest and disclosure issues identified through its review of their financial disclosure reports.

The Ethics Reform Act did not, however, give OGE any significant new investigative or enforcement authority. If a filer were to disregard OGE’s notification of appropriate steps needed to resolve ethics issues, OGE could only notify the head of the filer’s agency or the President. In deciding not to give OGE investigative authority, Congress may have concluded that the investigative authority of the special prosecutor position, which was renamed the Independent Counsel in 1983, sufficiently protected the executive branch. But Congress later let the authorizing provisions for the Independent Counsel position expire in 1999.

As a result, OGE lacks any real enforcement authority and there is an investigative gap in the executive branch. OGE can request records and information from agencies, can ask them to conduct investigations, and can recommend disciplinary action; however, OGE is powerless if they ignore its requests and recommendations. In theory, OGE can also order employees to cease ongoing ethics violations, but the statutory restrictions imposed in 1988 render this authority unusable. OGE cannot use this authority to order employees to cease ongoing violations of the various criminal conflict of interest laws because OGE is statutorily prohibited from making any finding related to criminal law. Even as to noncriminal matters, such as ongoing violations of the misuse of position and gift regulations, the amended Ethics in Government Act gives a suspected violator the power to decide whether OGE may conduct a fact-finding hearing. The Department of Justice (“DOJ”) has interpreted the law as requiring an



Administrative Law Judge (“ALJ”) – rather than OGE’s Director – to preside over any such hearing and has forced OGE to incorporate this requirement in its corrective action regulation.

Thus, any attempt by OGE to order an employee to cease an ongoing noncriminal violation would follow a tortured route to a likely futile end. The process begins with OGE asking the employee to stop a suspected ongoing violation. If the employee refuses, OGE next asks the administration to put a stop to the employee’s suspected violation. If the administration also refuses, OGE can invoke its corrective action procedure. But if the employee requests a fact-finding hearing, OGE must then request assignment of an ALJ by the same administration that previously refused to stop the violation. If the administration refuses to assign an ALJ, OGE’s process grinds to a halt. If, on the other hand, the administration assigns an ALJ, OGE bears the burden of proving to the ALJ that a violation has occurred and is ongoing. OGE will find it difficult to meet its burden of proof because, as a practical matter, it has no real means to gather evidence from an uncooperative administration before the hearing. If, despite all these obstacles, OGE completes this process and is able to issue an order directing the employee to stop the violation, OGE will be powerless in the event that the employee and the administration choose to ignore its order.

In contrast to OGE, other executive branch entities have investigative authority and enforcement authority. The public is now well familiar with DOJ’s special counsel position, currently held by Robert S. Mueller III, which is a lineal descendent of the Ethics in Government Act’s Independent Counsel position, though with reduced independence. (The final rule noticing the special counsel regulations in 1999 explained that, “The Attorney General is promulgating these regulations to replace the procedures set out in the Independent Counsel Reauthorization Act of 1994.”) There is also the Office of Special Counsel (“OSC”), a separate agency unrelated to DOJ’s special counsel. OSC was created by the same wave of reforms that created OGE, but Congress gave OSC investigative authority over violations of the Hatch Act, an ethics law that prohibits misuse of official position to influence a partisan election, and certain prohibited personnel practices. OSC can also initiate disciplinary proceedings against career-level officials. In addition, Inspectors General have authority to conduct investigations in the major executive branch agencies, but they lack jurisdiction over dozens of small agencies and the White House.

In the absence of the enforcement tools possessed by other government entities, OGE possesses only the soft power that comes from the ability of its Director to persuade or shame officials into doing the right thing. In reality, the ethics program rests delicately on a set of ethical norms that depend on the President to set an ethical example and make ethics a priority for his administration. Tone from the top is everything. The program works reasonably well if the President is committed to government ethics or is sensitive to public opinion. The program is destined to fail if the President lacks a commitment to government ethics and is impervious to shame.

This arrangement was never ideal, but it worked fairly well in many respects for nearly four decades. My own experiences working closely with the administrations of George W. Bush and Barack Obama convinced me that government ethics is not a partisan issue. Both of those administrations were enthusiastic supporters of OGE. In fact, one of OGE’s biggest sources of leverage was the willingness of the White House Counsel’s office to intervene if an agency or

senior official ignored the guidance of ethics officials. A second source of leverage was OGE's ability to withhold certification of the financial disclosure reports of presidential nominees until they committed to resolve their conflicts of interest, inasmuch as the Senate traditionally would not schedule a confirmation hearing until a nominee obtained this certification. OGE's only other source of leverage was its ability to object publicly if government officials strayed from the ethical norms undergirding the ethics program. In a report accompanying OGE's first reauthorization in 1983, the Senate Committee on Governmental Affairs emphasized the importance of OGE being able to go public with its concerns. Traditionally, OGE found that the mere possibility that it could go public was generally enough to prevent problems. That was certainly my experience in the Bush and Obama administrations, but not in the Trump administration.

## *II. The Ethics Crisis*

We now find ourselves in an ethics crisis that jeopardizes not only public trust in government but also national security. This crisis has exposed the fragility of the framework for executive branch ethics. The trigger was the government's departure from ethical norms.

The point of departure was January 11, 2017. On that date, then President-elect Donald Trump held a press conference in which he broke with the norm that had been followed by every president elected since the enactment of the Ethics in Government Act. During the press conference, President-elect Trump's private attorney explained that he would not be divesting any part of his sprawling empire of conflicting financial interests. Instead, President-elect Trump took the meaningless step of placing his assets in a revocable trust. The trust is not blind, he has not diminished his financial interest in its assets, and two of his sons serve as trustees of the trust. From a conflicts of interest perspective, the trust serves absolutely no purpose whatsoever.

As a result of this departure from a critical ethical norm, the citizens of this nation have no way of knowing how the President's personal financial interests may be influencing public policy. We do not even know the full scope of his financial interests. The applicable financial disclosure requirements do not require him to disclose needed information about his privately held companies, such as the nature of their business activities, the extent of their liabilities, the identities of their lenders or business partners, and their sources and amounts of income. President Trump has compounded the problem by breaking with the related tradition of past Presidents and presidential candidates releasing their tax returns.

Despite his decision to retain conflicting assets, President Trump has not even tried to mitigate his conflicts of interest. He has not, for instance, directed his high-level appointees to refrain from visiting his properties or even chosen to refrain from visiting them himself. To the contrary, he and members of his administration are frequently seen at his properties, including at events sponsored by outside organizations. In addition, he has not chosen to provide the public with supplemental disclosures of information regarding the activities and liabilities of his businesses. As a result, we know little about how President Trump's conflicting financial interests are influencing his conduct in office.

What we do know about his conduct has only raised more questions. Did his financial interests influence his response to the recent brutal murder of a Washington Post journalist – a resident of my home state – by individuals associated with the Saudi government? Did they influence his administration’s foot-dragging with respect to the imposition of sanctions on certain Russian businesses? Did they influence the announcement in December that his administration would seek to lift sanctions on the business interests of Russian oligarch Oleg Deripaska? Did they influence his decision to help Chinese telecommunications giant ZTE after China lent money to a project in Indonesia that may benefit the Trump Organization and after China granted his daughter trademarks? Did they influence the decision to scrap the roughly decade-long planning for the relocation of the FBI headquarters, which could have created an opening for a competitor to move in near his Washington, D.C. hotel? What other policies might have been influenced by President Trump’s vast portfolio of retained financial interests?

The truth is that we have no way of knowing at this point, but the burden of proof is not on the people. The people have entrusted the President with great power; it is his responsibility to demonstrate that he is using that power solely to advance their interests and not his or his family’s interests. Instead, what he has shown us is his willingness to misuse public office for private gain. President Trump has visited his own properties on about 30% of his days in office, and each one of these visits has the appearance of an advertisement for those properties. He often touts his properties, as he did just this past weekend when he tweeted: “Great morning at Trump National Golf Club in Jupiter, Florida with @JackNicklaus and @TigerWoods!” Money appears to have flowed from the federal government, his presidential campaign and his inaugural fund to the Trump Organization or individuals associated, directly or indirectly, with the Trump Organization. Foreign governments, state governments, businesses, political organizations, candidates, charities and others who seek to influence the federal government also appear to be funneling money to him through his properties.

The government’s ethical norms have included an expectation that modern presidents and other executive branch officials will seek to avoid even the appearance of a conflict. But, at a time when the Trump administration was expanding its reliance on private prisons, GEO Group, a government contractor that operates private prisons, hosted an event at one of his properties. For three dues-paying members of Mar-a-Lago, the perks of membership at the President’s club appear to have included the opportunity to help oversee the Department of Veterans Affairs. Some of his nominees and appointees appear to be dues paying members of his clubs. Last October, the Washington Post ran a piece titled, *How \$100,000 of pay-for-play access changed U.S. Syria policy*, describing what may have been instances of an individual effectively buying access to the President and seeming to influence policy as a result. Another Trump associate, Sheldon Adelson, reportedly gave \$5 million to President Trump’s inauguration, and Adelson and his wife gifted half a million dollars to a secretive legal defense fund for members of President Trump’s campaign and administration who are caught up in investigations related to the 2016 election. Mr. Adelson appears to have influenced Trump administration policies, and his wife even received a presidential medal. At a minimum, there is a strong appearance of pay-to-play in the Trump administration. President Trump has chosen to do nothing to allay this concern, and the reality may be worse than anything we fear.

This bad tone from the top has infected appointees of this administration. As of this hearing, four cabinet secretaries have stepped down under the cloud of ethics issues: Secretaries Tom Price, Scott Pruitt, David Shulkin, and Ryan Zinke. The Director of the Centers for Disease Control, Brenda Fitzgerald, and the Director of the Bureau of Indian Affairs, Bryan Rice, resigned amid ethics concerns. Several presidential appointees and advisors appear to have resigned under the cloud of an investigation, ethics or conduct issues, or security clearance concerns, including Michael Flynn, Sebastian Gorka, Carl Higbie, John McEntee, Rob Porter, Elizabeth Walsh, Taylor Weyeneth and possibly others. OSC has determined that several Trump appointees violated the Hatch Act, including Jessica Ditto, Nikki Haley, Dan Scavino, Raj Shah, Madeleine Westerhout, Helen Aguirre Ferre, Alyssa Farah, and Jacob Wood. Counselor to the President Kellyanne Conway has the rare distinction of being a presidential appointee who has violated both the ethical standards of conduct and, on not one but two occasions, the Hatch Act. Secretary Elaine Chao did a series of interviews with her father that seemed to promote his personal business interests. In addition, there are dozens of pending ethics-related investigations of Trump administration officials, including investigations that involve agency heads.

In the midst of this crisis, OGE is conducting exactly zero investigations – because OGE has no real investigative authority and no practical ability to impose corrective action on any executive branch official. The Trump administration has simply ignored OSC’s Hatch Act findings. The administration also continues to ignore the guidance of career ethics officials, a fact made evident by acting Attorney General Matthew Whitaker, who has admitted to ignoring his agency’s ethics officials, and Attorney General nominee William Barr, who has admitted that he plans to ignore agency ethics officials whenever he disagrees with them. In short, the ethics crisis in the executive branch is spreading, and reform is desperately needed.

### *III. House Bill H.R. 1 – the For The People Act*

The bill under consideration, H.R. 1, the For The People Act, does much to kick off what I hope will be a wave of ethics reform. I like that H.R. 1 increases OGE’s independence, gives OGE some needed teeth, strengthens ethics laws, and increases transparency. The bill is not merely focused on the current crisis but also addresses longstanding issues with the executive branch ethics program. Far from focusing only on the current administration, this bill proposes new integrity measures that would apply to all future Presidents regardless of party affiliation. I urge Congress to pass this bill.

Parts of H.R. 1 address issues that predate the current administration, and I’m glad to see this committee begin to address these issues with some long-overdue reforms. For example, when former Treasury Secretary Jack Lew initially left Wall Street to join the State Department in 2009, he received a large bonus from his employer. His employment contract let him keep this bonus specifically because he landed a high-level position in the new Obama administration. Big payouts for people going into government raise questions about their continuing loyalty to former employers, and I’m glad to see a provision in H.R. 1 addressing this issue. I would recommend expanding this provision to include a four-year recusal obligation on the part of any appointee who received a discretionary payment *before or after* entering government. Language could be added to 18 U.S.C. § 208 prohibiting an individual from participating personally and substantially as a government official in any particular matter affecting the financial interests of a

person or entity that made a discretionary payment exceeding \$10,000 after learning the individual was being considered for a position in, or was employed by, the United States government. An exception could apply if the payment would have been made even if the individual had gone to work for a nongovernmental employer.

H.R. 1 would establish a number of other helpful restrictions. I especially like that this bill would lengthen the post-employment restriction for senior employees from the current period of one year to a period of two years after they leave government. I think the bill also goes far toward ensuring the integrity of government operations by requiring recusal from certain matters involving former employers and clients. The bill would also increase transparency by requiring disclosure of certain information about a political appointee's prior work soliciting donations for political organizations. The bill would remove a number of the procedural restrictions, at 5 U.S.C. app. § 402(f), that have prevented OGE from using its authority to take corrective action. I'm also pleased to see that this bill enhances the continuity of OGE's operations by granting a one-year extension of the Director's five-year term until a replacement can be appointed. Another key provision would make OGE's Director removable only for cause, which would help insulate the ethics program from political pressure.

Significantly, H.R. 1 would also give OGE the ability to communicate directly with Congress on matters of importance to the government ethics program. Inspectors General, OSC and the Merit Systems Protection Board ("MSPB") can communicate directly with Congress, but OGE currently needs to clear communications with Congress through the Office of Management and Budget ("OMB"). This political review is an institutional weakness in the ethics program that deprives OGE of needed independence and Congress of needed information. There is no good reason for treating OGE differently than other parts of the government integrity system.

Along the same lines, I think it would strengthen OGE's independence if you would consider eliminating a requirement, at 5 U.S.C. app. § 402(a) - (b), that OGE must consult OPM before issuing or amending its own regulations. This unnecessary requirement, which OGE has asked the Committee to eliminate, is a holdover from OGE's time as a component of OPM that is completely unnecessary. OMB's regulatory review process affords all agencies, including OPM, ample opportunity to negotiate changes to OGE's draft regulations before OGE is permitted to publish a notice of proposed rulemaking. Requiring OGE to consult separately with OPM before initiating OMB's regulatory review process only serves to give the administration an additional opportunity to slow or stop OGE's regulatory efforts quietly.

Another important feature of H.R. 1 that may not get a lot of attention is its requirement of increased transparency for ethics records, including waivers of ethics requirements. The bill would require the executive branch to post many of these records online for public viewing. In section 8034, I would recommend eliminating the language "made available by agencies" in the proposed 5 U.S.C. app. § 402(f)(5)(A) to make online posting of all covered records mandatory. I would also recommend revising the description of covered records to read: "all approvals, authorizations, certifications, compliance reviews, determinations, directed divestitures, evidence of compliance with ethics agreements, noncareer public financial disclosure reports, notices of deficiency, program reviews, records regarding the approval or acceptance of gifts, recusals, regulatory or statutory advisory opinions, and waivers, as well as other categories of records

designated by the Director, that are issued or collected by executive branch officials under government ethics laws, executive orders, regulations or policies, except for classified records.” I would further recommend explicitly requiring that agencies, including the White House, create all of these types of written records in all cases and provide them to OGE.

The proposal in section 8034 to give OGE authority to impose disciplinary action would strengthen the ethics program. It would help to clarify in a committee report or in the bill that this language is not intended to override due process protections for career officials. Because the Constitution would prevent OGE from terminating a presidential appointee, I would recommend that you consider an additional enforcement provision applicable to presidential appointees. You could consider granting OGE authority to assess significant fines from presidential appointees or to pursue civil monetary penalties against them in court. The Ethics in Government Act already contains a provision, at 5 U.S.C. app. § 104, that authorizes OGE to assess modest late fees for tardy financial disclosure filings. You could establish large fines or monetary penalties in the event that a presidential appointee violates OGE’s standards of conduct regulations. You could similarly increase OSC’s authority with respect to Hatch Act violations by presidential appointees.

Another important provision of H.R. 1 would grant OGE subpoena authority. This provision would improve OGE’s ability to obtain records and information. You could also consider more broadly filling the investigative gap in the executive branch by creating an executive branch-wide Inspector General position, something I proposed in 2017 to the then Chair and Ranking Member of this committee. My proposal was that this special Inspector General would have ordinary investigative jurisdiction over career and noncareer appointees serving in the dozens of agencies that lack Inspectors General. The special Inspector General would also have supplemental jurisdiction over any presidential appointee serving anywhere in the executive branch, but only upon receipt of a referral indicating that OGE suspects a possible ethics violation.

In the section addressing the presidential transition, there is a commendable proposal that would require each President-elect to release a written ethics plan. This transparency measure would strengthen public confidence in presidential transitions because it would require the President-elect to disclose in detail how the presidential transition team manages ethics issues. In addition, this section would require disclosure of the steps that the President-elect will take to resolve personal conflicts of interest. I would encourage you to consider making this personal conflict of interest disclosure a component of the public financial disclosure reports that presidential candidates must file shortly after declaring their candidacy. I would also recommend adding a substantive requirement that the candidate must identify with specificity each financial interest that the candidate, if elected, would divest. Including this information in the candidates’ financial disclosures would empower voters to factor ethics into their evaluation of the candidates vying for their parties’ nominations. The competition among candidates might even produce a bidding war, with candidates who receive negative feedback from voters opting to amend their ethics plans to add more stringent ethics commitments.

Relatedly, I think the bill’s language expressing the sense of Congress that a President should divest conflicting assets is a positive step toward reestablishing the critical ethical norm

that existed prior to this administration. I would have found such statutory language helpful when I served as OGE's Director. I would also like to see Congress go further and require the President-elect to divest all assets that pose a substantial risk of conflicts of interest. Citizens for Responsibility and Ethics in Washington (CREW) and Public Citizen have issued a joint report proposing this requirement. With appropriate exceptions for minor or low-risk holdings and the availability of OGE's qualified blind and diversified trust process, Presidents can *and should* be held to ethical standards that are comparable to those that apply to their cabinet appointees.

I'll close by emphasizing that the integrity of a nation is at stake. The momentum of four decades of ethics reform came to an abrupt halt on January 11, 2017. The destruction of governmental norms did not stop with the ethics program, but the ethics program was the proverbial canary in the coal mine. Congress must act before the poisonous fumes of self-interest destroy what is left of the public's trust in government. Strengthening the ethics program is a good place to start. The Supreme Court has written that a conflict of interest is "an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of . . . corruption."

Thank you for the opportunity to address the committee today. I respectfully request that this written testimony be entered into the record of this hearing. I am also happy to answer any questions members of the committee may have.

Walter M. Shaub, Jr.

Walter M. Shaub Jr. is an expert on government ethics, who served as the Senate-confirmed Director of the U.S. Office of Government Ethics (OGE) from January 2013 until July 2017. As OGE's Director, Shaub led both OGE's staff and the executive branch-wide ethics program. At the time, OGE was a 75-employee organization with a \$16 million annual budget, and the executive branch ethics program comprised approximately 4,500 agency ethics officials supporting a federal workforce of millions. The position also entailed *ex officio* roles on the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and CIGIE's Integrity Committee.

Shaub served at OGE for a total of nearly 14 years as a staff attorney, a supervisory attorney, Deputy General Counsel and, finally, Director. Shaub also served in the General Counsel offices of the U.S. Department of Health and Human Services and the U.S. Department of Veterans Affairs. Outside the government, Shaub has worked at Citizens for Responsibility and Ethics in Washington, the Campaign Legal Center, and the law firm of Shaw, Bransford, Veilleux & Roth, P.C. Since September 2017, Shaub has also been a CNN contributor. He has devoted his professional career to the subjects of government ethics, the merit systems principles, prohibited personnel practices, and federal labor and employment law.

Shaub received the 2018 Nesta Gallas Award for Exemplary Professional Service in Public Service from the American Society for Public Administration, as well as a 2018 Distinguished Alumni Award from James Madison University. He testified before the then House Oversight and Government Reform Committee at a December 2015 hearing on OGE's reauthorization.

Shaub is licensed to practice law in the Commonwealth of Virginia and the District of Columbia. He graduated with a J.D. from American University's Washington College of Law in 1996 and a B.A. in History from James Madison University in 1993.



### Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)\*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

**Committee:** House Committee on Oversight and Reform

**Subcommittee:** n/a (full committee)

**Hearing Date:** February 6, 2019

**Hearing Subject:**

The hearing will examine H.R. 1, the For the People Act, introduced by Rep. John Sarbanes on January 3, 2019. The Committee on Oversight and Reform will evaluate the proposals of H.R. 1 in the Committee's jurisdiction, including Title VIII of the bill, the Access to Congressionally Mandated Reports Act, and the Election Day Holiday Act. My testimony will focus primarily on government ethics provisions of H.R. 1.

**Witness Name:** Walter M. Shaub, Jr.

**Position/Title:** Senior Advisor, Citizens for Responsibility and Ethics in Washington

**Witness Type:** ☐ Governmental ☒ Non-governmental

**Are you representing yourself or an organization?** ☐ Self ☒ Organization

**If you are representing an organization, please list what entity or entities you are representing:**

Citizens for Responsibility and Ethics in Washington (CREW) in Washington, D.C.  
(I will be representing CREW. In addition, I will be testifying based on my own personal experience as a former Director of the U.S. Office of Government Ethics.)

**If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.***

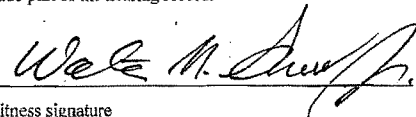
none

**If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.***

none

**False Statements Certification**

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

  
 \_\_\_\_\_  
 Witness signature

February 4, 2019  
 \_\_\_\_\_

Date

If you are a non-governmental witness, please ensure that you attach the following documents to this disclosure. Check both boxes to acknowledge that you have done so.

☒ Written statement of proposed testimony

☒ Curriculum vitae

\*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

Chairman CUMMINGS. Mr. Smith.

**STATEMENT OF BRADLEY A. SMITH, CHAIRMAN, INSTITUTE  
FOR FREE SPEECH**

Mr. SMITH. Thank you, Chairman Cummings, Mr. Jordan, and members of the committee. The Institute for Free Speech has been producing detailed analyses of the many sections of this, the chairman called it a sweeping bill, 570 pages, some of those are available here today.

I'm going to focus very briefly on two aspects of this bill, with which I have particular expertise as former chairman of the Federal Election Commission, and as the author of the leading academic analysis of super-PAC and coordinated spending, and the author of many of the FEC's current coordination rules.

Since its inception, the Federal Election Commission has been a bipartisan agency. This is at the insistence of people such as Democratic Representative Wayne Hayes and Democratic Senator Alan Cranston, who warned, we must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate.

Subtitle A of Title VI of H.R. 1 would replace the six-member bipartisan FEC, with a five-member panel subject to partisan control. In theory, only two members could come from any one party requiring a fifth seat to be held by an Independent, but this is a fig leaf. In fact, the FEC has an Independent now, but it's understood that Commissioner Stephen Walther was appointed at the behest of former Democratic Senate Leader Harry Reid, who Mr. Walther had represented in election matters. And it's understood that he holds a Democratic seat.

Under H.R. 1, Senator Bernie Sanders, for example, a front-runner for the Democratic Presidential nomination in 2020, could be appointed as a, quote, "Independent." Any President could find a nominal Independent to reflect his party's views creating a partisan majority on the Commission. Further, H.R. 1 gives vast new powers to FEC chairman, justifying fully the title of Speech Czar. The chair would be the sole power to determine the agency budget, to subpoena witnesses, to compel testimony and reports, and to appoint the staff director, who oversees, among other things, the FEC's audit division.

This is a prescription for partisan control and abuse. I assume the majority knows that, and that is why this provision of the bill, unlike the others, does not take effect until 2021. The majority has no intention of allowing President Trump to appoint all five commissioners, including the powerful chair.

Now, the claim was made that a partisan-controlled commission is necessary to restore integrity to election enforcement. This has it exactly backward. The only reason that the FEC has any credibility is its bipartisan makeup. Under Title VI, the person elected in 2020 will appoint all five members of the commission, including the powerful chair, which will have the power to write and then rewrite new rules with an eye toward the 2022 midterms, the 2024 and 2028 Presidential elections.

Now, some of you may consider this a feature rather than a bug, but be careful what you wish for, you didn't think Trump would

win in 2016 either. Subtitle B of Title VI is called Stopping Super-PAC Candidate Coordination. The sponsors and drafters are either being intentionally disingenuous here, or they simply do not understand what has been put in their own legislation.

Nothing in Subtitle B, nothing limits its reach to super-PACs, it applies to every union, trade association, advocacy group, and unincorporated association in the country. It applies to Planned Parenthood and Right to Life, to the NAACP and the ACLU, to the National Federation of Independent Business, and to the Brady Campaign for Gun Safety. It even applies to individual citizens who seek to participate in public discussion.

Nothing—this cannot be said often enough—limits it to super-PACs. Through the interplay of its definitions of coordination and coordinated spenders, the law's treatment—traditional treatment of coordinating spending as a contribution to a candidate and current contribution limits in the law, Subtitle B will actually have the effect of banning, not limiting, but actually banning a great deal of speech that was legal even before the Supreme Court's decisions in *Citizens United v. FEC* and *Buckley v. Valeo*.

So, again, this law goes backward to outlaw speech that was always legal in American history even before the *Citizens United* decision. As the full text of my prepared remarks explains in greater details these problems of Title VI, but in a nutshell, Title VI should be called the Alien—the New Alien and Sedition Act.

With just a few seconds remaining, let me add only on Title VIII, this seems to be one of the least harmful provisions of the bill, but that is not to say that it is not like some of the other provisions, a bit of overkill. It's interesting to me that it does not include, as covered individuals, people who have previously lobbied for cities and counties and local government units, and it would normally be the case that those groups lobby extensively in Congress, and perhaps should be also checked for conflict of interest.

I also question the assumption of the bill, which seems to be that anybody with a past experience in the private sector is somehow dangerous and should have a legal conflict of interest defined by law before they even take office. I think that's overkill and inappropriate.

Thank you very much for your time. I'm free to answer any questions.

[Prepared Statement of Mr. Smith follows:]



INSTITUTE FOR  
FREE SPEECH

BEFORE THE  
HOUSE COMMITTEE ON OVERSIGHT AND REFORM  
UNITED STATES HOUSE OF REPRESENTATIVES

*H.R. 1: Strengthening Ethics Rules  
for the Executive Branch*

TESTIMONY OF

BRADLEY A. SMITH, CHAIRMAN  
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FEBRUARY 6, 2019

*The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Founded in 2005 as the Center for Competitive Politics, the Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.*

### Introduction

Thank you Chairman Cummings, Ranking Member Jordan, and Members of the House Oversight and Reform Committee for inviting me to testify today at this hearing on “H.R. 1: Strengthening Ethics Rules for the Executive Branch.”

As you know, H.R. 1 is a massive piece of legislation, totaling an astounding 570 pages in length and altering or uprooting longstanding rules for virtually every piece of U.S. campaign, election, and government ethics law. Of necessity, therefore, I will focus these opening remarks on just a few portions of the bill. For the benefit of this Committee and members of the public, the Institute for Free Speech has produced detailed analyses on individual portions of this lengthy bill, and I have attached those analyses to these remarks and ask that they be considered part of my prepared testimony. I will refer to them in these comments.

Despite proponents’ insistence that H.R. 1 is “For the People,” the bill is anything but. More appropriately labeled the “For the Politicians Act,” H.R. 1 would make seismic changes to the long-held ability of Americans to speak and associate with other Americans on the issues about which they are passionate. The bill would radically transform oversight over the labyrinth of laws that regulate political speech, from its historic bipartisan structure to partisan control. It would impose onerous and unworkable standards on the ability of Americans and groups of Americans to discuss the policy issues of the day with elected officials and the public. Other sections of the bill would violate the privacy of advocacy groups and their supporters, stringently regulate political speech on the Internet, and compel speakers to include lengthy government-mandated messages in their communications. The proposal would also coerce Americans into funding the campaigns of candidates with which they may disagree in a system that research has proven hasn’t worked elsewhere. These issues represent only the tip of the iceberg of what’s included in H.R. 1.

The area of H.R. 1 I will focus on in my comments today is Title VI, “Campaign Finance Oversight,” and I’ll also add a few comments on other portions of this legislation.

### Creating a Campaign Speech Czar and Enabling Partisan Enforcement of Campaign Finance Law

If you’re a Democrat, do you think Donald Trump should be able to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you’re a Republican, would you have wanted those rules enforced by a partisan selected by Barack Obama?

Of course not. That’s why for over 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency – the Federal Election Commission (FEC). The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.

As the late Sen. Alan Cranston (D-Cal.) warned during debate on legislation creating the agency, “We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern

expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.”<sup>1</sup> That concern led to Congressional adoption of the present method of selecting Commission members.

Those concerns also caused Congress to structure the Federal Election Commission so that a president could not install a partisan majority that could abuse campaign regulations to bludgeon their opponents.

Bipartisanship is not easy. It requires both sides to recognize they will not always get their way. But for over 40 years, Republicans and Democrats on the FEC were able to do it. Throwing that away is reckless and presents an enormous threat to the First Amendment.

In a nutshell, H.R. 1 does away with the FEC’s existing bipartisan structure to allow for partisan control of the regulation of campaigns and enables partisan control of enforcement. It also proposes changes to the law to bias enforcement actions against speakers and in favor of complainants.

Specifically, H.R. 1 would:

- Transform the Federal Election Commission from a bipartisan, 6-member agency to a partisan, 5-member agency under the control of the president. This change could have the effect of decreasing the Commission’s legitimacy by significantly increasing the likelihood that the agency’s decisions will be made with an eye towards benefiting one political party, or, at best, be seen that way by the public.
- Empower the Chair of the Commission, who will be hand-picked by the president, to serve as a de facto “Speech Czar.” In particular, the Chair would become the Chief Administrative Officer of the Commission, with the sole power to, among other things, appoint (and remove) the Commission’s Staff Director, prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.
- Dispose of the requirement in existing law that the Commission’s Vice Chair come from a different party than the Chair, further allowing power at the agency to be consolidated within one party.
- Time the enactment of this provision to ensure continued one-party control of the Commission. As a result, the president elected in 2020 will be able to ensure that his or her appointees constitute a majority of the Commission and the powerful Chair’s Office through at least 2027, even if he or she is not re-elected in 2024.

Relatedly, this structure will result in all new regulations required under other provisions of H.R. 1 being written by the initial appointing president’s team of the Chair, supportive commissioners, and their appointed General Counsel. These provisions can be written (and

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<sup>1</sup> Legislative History of Federal Election Campaign Act Amendments of 1976, Federal Election Commission, at [https://transition.fec.gov/pdf/legislative\\_hist/legislative\\_history\\_1976.pdf](https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf) at 89.

if necessary re-written) with a specific eye to the 2022 and 2026 midterms and the 2024 and 2028 presidential races.

- Expand the General Counsel's power while eroding accountability among the Commissioners. In a departure from existing practice, H.R. 1 provides that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days. Such a change allows investigations to begin without bipartisan support while also allowing commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel's recommendation take effect.

H.R. 1 also permits the General Counsel to issue subpoenas on his or her own authority, rather than requiring an affirmative vote by the Commission.

- Create new standards of judicial review that weaken the rights of respondents in Commission matters. If a respondent challenges in court a Commission decision finding that it violated the law, the court will defer to any reasonable interpretation the agency gives to the statute, but if the respondent wins at the Commission, no deference will be given to the FEC's decision, if challenged in court. This "heads I win, tails you lose" approach harms respondents and biases court decisions against speakers.
- Establish a non-binding "Blue Ribbon Advisory Panel" to aid the president in filling Commission vacancies that is exempt from the requirements of the Federal Advisory Committee Act, effectively creating an elite committee to debate in secret, on the public's dime, and with the imprimatur of the government, on whom the president should appoint to the agency.
- Hamstringing the FEC in its advisory opinion process by mandating that interested parties who submit written comments to the Commission must be allowed to present testimony at meetings on advisory opinion requests. This change is akin to dictating to Congress who has a right to testify in committee hearings.

All these changes are said to be necessary to "restore integrity" to the regulation of campaigns. In fact, nothing would more rapidly damage the FEC's integrity than H.R. 1's proposed restructuring. Supporters of the out party would have no confidence in the agency's decisions, a surefire way to increase skepticism among Americans that our elections are fair and unbiased.

The attached analysis, "*Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights*," provides a more detailed explanation of why Title VI, Subtitle A of H.R. 1, wrongly dubbed the "Restoring Integrity to America's Elections Act," would in fact do just the opposite.<sup>2</sup>

<sup>2</sup> This analysis is also available on the Institute for Free Speech's website. See Bradley A. Smith, Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights, Institute for Free Speech (Jan. 31, 2019), at [https://www.ifs.org/wp-content/uploads/2019/01/2019-01-31\\_IFS-Analysis\\_US\\_HR-1\\_Creating-A-Partisan-FEC.pdf](https://www.ifs.org/wp-content/uploads/2019/01/2019-01-31_IFS-Analysis_US_HR-1_Creating-A-Partisan-FEC.pdf).



### Targeting Speech by All Groups Under the Guise of “Stopping Super PAC-Candidate Coordination”

Subtitle B of Title VI is incorrectly titled, “Stopping Super PAC-Candidate Coordination.” This is truly misleading in the most literal sense of the word, because Subtitle B applies not only to super PACs, but to literally *any* American or group of Americans who seek to speak about candidates or public affairs. This should be repeated at the outset – none of the new restrictions in Subtitle B are limited in their application to “super PACs.”

In addition, Subtitle B of Title VI of H.R. 1 would place sweeping new limitations on speech about campaigns and public affairs. It would make illegal huge amounts of speech that have either never before been illegal in America, or more specifically, not been illegal since the brief reign of the Alien and Sedition Acts. It does so in a very complex, vague, and unintuitive manner. The provisions are so complex and open to so many possible interpretations that my comments may well understate the chill this portion of the legislation might place on speech. For advocacy groups, unions, and trade associations, several of the limits proposed in H.R. 1 would operate as a total ban on speech.

The goal seems to be to limit discussion of candidates to the candidates and parties themselves, at the expense of the public at large. However, even candidates are likely to find their speech severely restricted were H.R. 1 to become law.

In short, Subtitle B would raise the following concerns:

- Although this portion of H.R. 1 purports to be focused on “Stopping Super PAC-Candidate Coordination,” it is important to reiterate that the changes it would make to the law create regulations and penalties that would apply to *every group* engaged in public discussion of issues and elections, not just super PACs.
- Under this portion of H.R. 1, speakers will be silenced both literally – through direct prohibitions on speaking – and also through fear, known as chill. Many communications by advocacy groups about legislation that are made routinely today would be illegal under H.R. 1. Many (and likely the vast majority) of these communications have nothing to do with election campaigns. Rather, groups will be silenced when trying to participate in public debate on important policy issues.
- Under existing law, if a civic group, trade association, union, nonprofit, or any other type of organization wants to spend money to discuss candidates and issues, it is regulated as a coordinated expenditure only if it meets both “content” and “conduct” standards. The “content” standards are intended to allow groups to communicate with the public about issues of concern without fear of triggering federal investigations. The “conduct” standards are meant to ensure that groups are not held liable for later expenditures merely because they have general conversations with candidates and officeholders about legislative priorities and issues. H.R. 1 attacks both.

- The radical new coordination standard proposed in H.R. 1 would be interpreted and enforced by a revamped FEC, which for the first time would be under partisan control of the president. If the FEC decides that certain communications are “coordinated,” the agency could impose hefty fines on the organization.
- The “promote, attack, support, oppose” (PASO) standard that applies year-round to the content of coordinated communications is a green light for the government and even private litigants to impose huge legal costs on almost any group’s effort to communicate about politics and issues – except through the speech of candidates and parties themselves.
- H.R. 1 would replace carefully defined rules about what conduct constitutes “coordination” with a sweeping definition that would subject even minimal and mundane communication with members of Congress on legislation to investigation and possible fines and punishment.
- Using virtually any publicly available information that communicates a candidate’s suggestions on the type of message his or her campaign seeks to convey would trigger the conduct standard for coordination. Likewise, any public information regarding the campaign’s strategy would do so too. If taken literally, H.R. 1 would require potential speakers to not use the Internet, watch television, read a newspaper, listen to the radio, or talk to anyone to avoid possible coordination.
- H.R. 1 would also define many groups as “coordinated spenders,” even if they never actually “coordinate” anything, but speak truly independently of any candidate or party. Incorporated nonprofits defined as “coordinated spenders” would be banned from spending money on speech. This provision is directly contrary to Supreme Court precedent. In *Colorado Republican Federal Campaign Committee v. FEC*, the Supreme Court held that the FEC could not simply presume coordination – rather, coordination had to actually be proven to exist in fact in order to be regulated.<sup>3</sup> The reason for this is that these types of restrictions on speech are only permissible to prevent quid pro quo corruption. But, if an organization is not actually coordinating its activity with a candidate or officeholder, the danger of that corruption doesn’t exist.
- This portion of H.R. 1 is also likely to be found unconstitutional due to its overbreadth and vagueness. It requires spending to be “*entirely* independent[] of the candidate,” a standard which it says is not met if there is any “general or particular understanding” between the spender and the candidate, or “*any* communication with the candidate, committee, or agents about the payment or communication.”<sup>4</sup> Even discussions of purely legislative or policy matters would be covered and subject to coordination restrictions unless there was “*no* communication ... regarding the candidate’s or committee’s campaign advertising, message, strategy, policy, polling, allocation of resources, fundraising, or other campaign activities.”<sup>5</sup>

<sup>3</sup> 518 U.S. 604 (1996) (lead opinion by Breyer, J.).

<sup>4</sup> H.R. 1 § 6102(b) (§ 326(b)(1)) (emphasis added).

<sup>5</sup> *Id.* (§ 326(b)(2)) (emphasis added).

Federal courts have emphatically rejected the idea that mere knowledge of a campaign's plans and strategies is sufficient to find coordination, even when the information was not public. Rather, "coordination" necessitates candidate control over the expenditures or, at a minimum, "substantial discussion or negotiation." That means the campaign and the spender had to discuss such things as the content, timing, location, means, or intended audience for the communication – the standards since captured in the existing law that H.R. 1 seeks to repeal and replace. "Coordination" is found only where "the candidate and spender emerge as partners or joint venturers."<sup>6</sup>

- Title VI, Subtitle B of H.R. 1 also imposes unconstitutionally overbroad and vague descriptions of the type of speech that government can prohibit. The Supreme Court has long held that to the extent government can regulate independent campaign speech at all, it must do so in a manner that is neither overly broad nor excessively vague in its language. In particular, to be regulated, such speech must "be susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."<sup>7</sup>

The PASO standard in H.R. 1 clearly fails this test. Suppose, for example, a government employees' union wished to purchase a newspaper ad saying, "Government employees should not be held hostage to a border wall. It's time to end the government shutdown." Is that a statement "attacking" President Trump? Suppose it referred to "Trump's wall." If that is a statement attacking Trump, it would meet the content standard in H.R. 1, and the union would be banned from making such speech, if it also met the newly expanded "conduct" standard discussed above.

- Like current law, H.R. 1 would make republication of campaign material a coordinated activity. However, current law provides several sensible exceptions, which H.R. 1 repeals. Failure to include such exceptions would suppress publication of useful information.
- H.R. 1 eliminates the "safe harbor" for firewalls that allow for use, in certain circumstances, of a common vendor. The effect will be to make it harder for smaller groups to hire good professional help. More specifically, this will negatively impact new and smaller grassroots organizations at the expense of established, bigger spending actors.

Subtitle B responds to a concern that, in certain particular cases, super PACs are working closely with individual candidates, by laying vast new restrictions on political speech by American citizens. It cannot be said too often: Nothing in this Title restricts its provisions to super PACs. Rather than narrowly target and respond to that specific concern, this portion of H.R. 1 will effectively silence all groups that speak about campaigns and public affairs. Consequently, many portions of Subtitle B are clearly unconstitutional under existing Supreme Court precedent.

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<sup>6</sup> *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) ("joint venturers" standard); see also *Clifton v. Federal Election Commission*, 114 F.3d 1309 (1st Cir. 1997) (standard finding "coordination" where there was "any" oral communication between spender and candidate was unconstitutionally overbroad). See generally Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 Willamette L. Rev. 603, 621-626 (2013).

<sup>7</sup> *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

The Institute for Free Speech has analyzed these (and other) problems with H.R. 1 in a forthcoming analysis, *"Analysis of H.R. 1 (Part Three): New Restrictions Target Speech by All Groups Under the Guise of 'Stopping Super PAC-Candidate Coordination.'"*

#### **Violating Americans' Privacy, Regulating Internet Speech, and Compelling Government-Sponsored Messages**

Numerous other parts of H.R. 1 are also problematic, either as a matter of policy, constitutional law, or both. Specifically, H.R. 1 would:

- Force groups to file burdensome and likely duplicative reports with the Federal Election Commission, if they sponsor ads that are deemed to PASO the president or members of Congress in an attempt to persuade those officials on policy issues.
- Compel groups to declare on these so-called "campaign-related disbursement" reports that their ads are either "in support of or in opposition" to the elected official mentioned, even if their ads do neither. This form of compulsory speech and forcing organizations to declare their allegiance to or against public officials is unconscionable and unconstitutional.
- Force groups to publicly identify certain donors on these reports for issue ads and on the face of the ads themselves. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) "campaign" ads in FEC reports and disclaimers, many donors will choose simply not to give to nonprofit groups.
- Subject far more issue ads to burdensome disclaimer requirements, which will coerce groups into truncating their substantive message and make some advertising, especially online, practically impossible.
- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications' substantive message, thereby exacerbating the politics of personal destruction and further coarsening political discourse.
- Force organizations that make grants to file their own reports and publicly identify their own donors if an organization is deemed to have "reason to know" that a donee entity has made or will make "campaign-related disbursements." This vague and subjective standard will greatly increase the legal costs of vetting grants, and many groups will simply end grant programs.
- Likely eliminate the ability of many employees to make voluntary contributions through employee-funded PACs, which give employees a voice in the political process with respect to issues that affect their livelihoods.
- Effectively prohibit many domestic subsidiaries, and perhaps most corporations with even a single foreign shareholder with voting shares, from making independent expenditures, contributions to super PACs, or contributions to candidates for state and local office, thus

usurping the laws in more than half of the states that allow such contributions. (This appears to be a thinly veiled artifice to overturn *Citizens United* and to unconstitutionally accomplish by legislation what congressional Democrats failed to achieve by constitutional amendment in 2014.)

- Disproportionately burden the political speech rights of corporations vis-à-vis unions, thereby ending the long-standing parity in campaign finance law between corporations and unions.
- Increase regulation of the online speech of American citizens while purporting to address the threat of Russian propaganda.
- Expand the universe of regulated online political speech (by Americans) beyond paid advertising to include, apparently, communications on groups' or individuals' own websites and e-mail messages.
- Regulate speech (by Americans) about legislative issues by expanding the definition of "electioneering communications" – historically limited to large-scale TV and radio campaigns naming a candidate that are targeted to the electorate in close proximity to an election – to include online advertising, even if the ads are not targeted in any way at a relevant electorate.
- Impose what is effectively a new public reporting requirement on (American) sponsors of online issue ads by expanding the "public file" requirement for broadcast, cable, and satellite media ads to many online platforms. The public file requirements would compel some of the nation's leading news sources to publish information, which is likely unconstitutional.

Both advertisers and online platforms would be liable for providing and maintaining the information required to be kept in these files, which would increase the costs of online advertising, especially for low-cost grassroots movements. Some of these online outlets may decide to discontinue accepting such ads due to the expense of complying with the requirements.<sup>8</sup> The "public file" also may subject (American) organizers of contentious but important political causes like "Black Lives Matter" and the Tea Party to harassment by opponents or hostile government officials monitoring the content, distribution, and sponsorship of their activities.

- Make broadcast, cable, satellite, and Internet media platforms liable if they allow political advertising by prohibited speakers to slip through, thereby driving up the costs of political advertising, especially for online ads where compliance costs are relatively high.

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<sup>8</sup> Indeed, both Google and Facebook have been forced to stop accepting certain types of ads in both Maryland and Washington State as a result of laws and regulations recently passed in those jurisdictions. See Michael Dresser, *Google no longer accepting state, local election ads in Maryland as result of new law*, BALTIMORE SUN (Jun. 29, 2018), at <https://www.baltimoresun.com/news/maryland/politics/bs-md-google-political-ads-20180629-story.html>; *Facebook to stop accepting campaign ads in Washington State*, ADAGE (Dec. 20, 2018), at <https://adage.com/article/tech/facebook-stop-accepting-campaign-ads-washington-state/316066/>.

- Impose inflexible disclaimer requirements on online ads that may make many forms of small, popular, and cost-effective ads off-limits for (American) political advertisers.

These provisions are discussed in greater detail in the Institute for Free Speech analysis, “*Analysis of H.R. 1 (Part One): ‘For the People Act’ Replete with Provisions for the Politicians,*” which is attached to this prepared statement.<sup>9</sup>

#### **Taxpayer-Financed Campaigns: A Record of Failure Forcing Americans to Subsidize Politicians’ Campaign Coffers**

Finally, I wish to address briefly the provisions of the bill calling for the government to finance election campaigns.<sup>10</sup> H.R. 1 would provide for the government to match contributions to politicians’ campaigns with \$6 in tax money for every \$1 contribution, up to the first \$200 of a contribution. In some cases, the match can reach 9 to 1: nine dollars in tax money for every dollar donated.

As a matter of first principles, it is morally wrong that, if a donor contributes \$1 to Donald Trump’s re-election campaign – or any candidate’s campaign – it forces those opposed to that candidate to contribute \$6 or even \$9 in public tax money to support that candidate and his or her dissemination of ideas those taxpayers may find abhorrent. But beyond these first principles, the idea has problems on its own terms.

Candidates with close ties to advocacy or labor groups that have large canvassing operations will likely benefit from H.R. 1. If the bill becomes law, it’s a safe bet that these canvassing operations will be made available for hire to favored candidates. For a measure touted as insulating candidates from so-called “special interests,” that’s a major loophole.

Another likely winner under tax-financed campaigns will be candidates who take extreme positions that appeal to small, concentrated groups of voters.<sup>11</sup> Rather than appealing to the middle of the electorate, a viable strategy may be to “play to the base” where supporters are more passionate – and partisan.<sup>12</sup> Given the low turnout in party primaries, taking extreme positions to appeal to a base may even become the dominant strategy.

Traditionally in American politics, political parties have been instrumental in candidate selection and have served as a moderating force overall. Parties have a large incentive to win and therefore want to nominate candidates who appeal to broad swaths of the American public and can win over swing voters. Political parties have used their fundraising apparatuses to favor candidates

<sup>9</sup> This analysis is also available on the Institute for Free Speech’s website. See Bradley A. Smith, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at [https://www.ifs.org/wp-content/uploads/2019/01/2019-01-23\\_IFS-Analysis\\_US\\_HR-1\\_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf](https://www.ifs.org/wp-content/uploads/2019/01/2019-01-23_IFS-Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf).

<sup>10</sup> For a comprehensive examination of taxpayer-financed campaign programs and their record of failure at achieving goals set by their proponents, see Taxpayer-Financed Campaigns: A Costly and Failed Policy, Institute for Free Speech (Jul. 16, 2014), at [https://www.ifs.org/wp-content/uploads/2014/07/2014-07-16\\_IFS-Policy-Primer\\_Taxpayer-Financed-Campaigns.pdf](https://www.ifs.org/wp-content/uploads/2014/07/2014-07-16_IFS-Policy-Primer_Taxpayer-Financed-Campaigns.pdf).

<sup>11</sup> See David Keating, H.R. 1’s Tax-Financing Program Could Increase Political Polarization, Institute for Free Speech (Jan. 17, 2019), at <https://www.ifs.org/blog/h-r-1s-tax-financing-program-could-increase-political-polarization/>.

<sup>12</sup> See Andrew B. Hall, *How the Public Funding of Elections Increases Candidate Polarization*, Harvard University (Aug. 13, 2014), at [http://www.andrewbenjaminhall.com/Hall\\_publicfunding.pdf](http://www.andrewbenjaminhall.com/Hall_publicfunding.pdf).

who fit this mold. Meanwhile, candidates who were viewed as extreme often received little support or funding from the party. While party support (or the lack thereof) didn't always prevent these candidates from winning elections, the parties' gatekeeping mechanism certainly provided a moderating function on the types of candidates who were nominated. Taxpayer financing of campaigns threatens to provide a final crushing blow to this important party role.

Look no further than the last election, where some of the best small dollar fundraisers were Donald Trump and Bernie Sanders, respectively. Neither candidate had long been a member of the party whose nomination they sought, yet both came close to securing it, and one did. Programs that turbocharge small dollar candidate fundraising and relegate the parties to the sidelines, like that proposed in H.R. 1, will only lead to more candidates following their example.

Consider how much more difficult it would be for political parties to raise money. What sensible donor would give \$50 to a political party if she could give the same \$50 to a candidate of that party and have taxpayers foot the bill for \$300 or more to match it?

The subsidy will most likely drive donors away from the moderating forces exerted by parties and toward individual candidates. This will likely have the effect of further starving parties that were already hit hard by changes to campaign finance law in 2003.

The potential for tax-financing programs to incentivize polarizing and extreme candidates isn't merely conjecture. The example of Thomas Lopez-Pierre's recent campaign for New York City Council is instructive. In 2017, Lopez-Pierre campaigned for a City Council seat on the platform of making "greedy Jewish Landlords" pay.<sup>13</sup> Ultimately, Lopez-Pierre qualified for \$99,000 in taxpayer dollars to help spread his hateful message.<sup>14</sup> New Yorkers, including those on the City Council, were rightly appalled by Lopez-Pierre's anti-Semitic message. Then-Council Speaker Melissa Mark-Viverito said that to "have someone be able to spend [taxpayer dollars] to put forth that kind of a message is despicable."<sup>15</sup> But under New York City's matching fund system, there was nothing the City could do. The First Amendment prohibits laws from discriminating against individuals based on the content of their message. As such, if H.R. 1 is enacted, American taxpayers would be constitutionally required to fund the speech of all candidates that meet the qualifications for matching government funding – including those with racist, anti-Semitic, sexist, homophobic, transphobic, or otherwise hateful messages. As Lopez-Pierre's campaign proves, this concern isn't unfounded.

Supporters of taxpayer-financed campaign programs often argue that these programs will prevent corruption, but the record suggests otherwise. For a more comprehensive review of corruption in Arizona, Maine, and New York City's tax-financing programs, please consult the Institute for Free Speech report, "*Clean Elections and Scandal: Case Studies from Maine, Arizona,*

<sup>13</sup> Editorial Board, Taxpayer-funded hate, thanks to the city campaign-finance system, *NEW YORK POST* (Mar. 3, 2017), at <http://nypost.com/2017/03/03/taxpayer-funded-hate-thanks-to-the-city-campaign-finance-system/>.

<sup>14</sup> Josh Nathan-Kazis, Candidate Who Condemned 'Greedy Jewish Landlords' Faces Uphill Election Bid, *FORWARD* (Sept. 12, 2017), at <https://forward.com/news/382466/candidate-who-condemned-greedy-jewish-landlords-faces-uphill-election-bid/>.

<sup>15</sup> See note 13, *supra*.

and New York City.”<sup>16</sup> The Institute’s study found that between 2001 and 2013, a staggering total of more than \$19.2 million in taxpayer dollars was distributed to participating candidates in New York City’s so-called “clean elections” program, who were then investigated for – and, in many cases, convicted of – abuse, fraud, and other forms of public corruption.<sup>17</sup> The same issues are true in other localities with these programs, such as Los Angeles and Connecticut.<sup>18</sup> Whether its embezzlement, fraud, bribery, personal use, forgery, or straw donor schemes, for any number of abuses, tax-financing programs have a history of corrupt actors exploiting the system for personal gain at the expense of hardworking American taxpayers. In general, wherever tax-financing has been enacted, abuses of these programs – and, by extension, taxpayer dollars – have followed.

It’s perhaps unsurprising tax-financing programs have a history of corruption in every jurisdiction in which they exist. In reality, these programs *create* new incentives for corrupt candidates – or corrupt staffers and campaign consultants – to cheat and defraud the taxpayers. As just one example, Seattle, which had its first election with tax-financing in the form of the city’s “Democracy Vouchers” program in 2017, already saw its first allegations of fraud. A candidate for Seattle City Council was accused by her campaign manager of contributing her own money to the campaign and claiming it came instead from small donors.<sup>19</sup> This would have entitled her to \$100,000 in public financing had she not been turned in by her former campaign manager (and defeated in the primary). Regardless of the outcome, the structure of the matching component of Seattle’s program is what incentivized that individual to commit fraud. As we’ve seen in Arizona, Maine, New York City, and elsewhere, Seattle is not an outlier in this regard.

Finally, the Institute for Free Speech (formerly the Center for Competitive Politics) has examined and debunked a number of theories about how tax-financing programs fail to meet the lofty standards promised by their supporters using evidence from existing programs around the country:

- Legislative voting behavior is unchanged when elected officials participate in tax-financing programs;<sup>20</sup>
- Tax financing fails to reduce lobbyist or special interest influence in government;<sup>21</sup>

<sup>16</sup> Matt Nese and Tom Swanson, Issue Review: Clean Elections and Scandal: Case Studies from Maine, Arizona, and New York City, Institute for Free Speech (Aug. 14, 2013), at [http://www.ifs.org/wp-content/uploads/2013/08/2013-08-05\\_Issue-Review\\_Swanson\\_Clean-Elections-Scandal-Case-Studies-From-Maine-Arizona-And-New-York-City.pdf](http://www.ifs.org/wp-content/uploads/2013/08/2013-08-05_Issue-Review_Swanson_Clean-Elections-Scandal-Case-Studies-From-Maine-Arizona-And-New-York-City.pdf).

<sup>17</sup> *Id.* at 36-37.

<sup>18</sup> See Matt Nese, Oregon H.B. 4076: Taxpayer-Financed Campaigns – A Failed and Costly Policy, Institute for Free Speech (Feb. 8, 2018), at [https://www.ifs.org/wp-content/uploads/2018/02/2018-02-08\\_IFS-House-Rules-Committee-Comments\\_OR\\_HB-4076\\_Tax-Financing-Policy-Issues.pdf](https://www.ifs.org/wp-content/uploads/2018/02/2018-02-08_IFS-House-Rules-Committee-Comments_OR_HB-4076_Tax-Financing-Policy-Issues.pdf).

<sup>19</sup> Bob Young, Seattle candidate accused of defrauding first-in-nation democracy-voucher program, THE SEATTLE TIMES (Aug. 17, 2017), at <https://www.seattletimes.com/seattle-news/times-watchdog/seattle-candidate-accused-of-defrauding-democracy-voucher-program/>. H.R. 1 creates a “My Voice” Voucher pilot program modeled after Seattle’s “Democracy Voucher” program. See H.R. 1 § 5101.

<sup>20</sup> Jason Farrell, Sean Parnell, & Brett Sullivan, Issue Review: Meet the New Legislature, Same as the Old Legislature: A quantitative analysis of the Connecticut Citizens’ Election Program, Institute for Free Speech (Oct. 22, 2012), at <http://www.ifs.org/wp-content/uploads/2012/11/Connecticut-Clean-Elections.pdf>.

<sup>21</sup> Matt Nese and Luke Wachob, Issue Analysis No. 1: Do Taxpayer-Funded Campaigns Reduce Lobbyist and Special Interest Influence?, Institute for Free Speech (Aug. 14, 2013), at <http://www.ifs.org/wp-content/uploads/2013/08/Issue-Analysis-1.pdf>.



- The diversity of occupational backgrounds of state legislators does not increase after implementing tax financing,<sup>22</sup> nor does the percentage of women legislators;<sup>23</sup>
- Giving money to politicians does not save taxpayer dollars in the long run;<sup>24</sup>
- Voter turnout fails to increase when states institute tax financing;<sup>25</sup> and
- Political competition against incumbent lawmakers does not improve in states with tax financing.<sup>26</sup>

## Conclusion

There are many other provisions in H.R. 1 that I haven't covered in my comments, dealing with redistricting, early voting, the Voting Rights Act, lobbying, and more. My comments today cover only those provisions of the bill that most directly impact the First Amendment rights of American citizens. The first step towards fixing the many flaws in H.R. 1 is to split the bill into its component parts, so that it can be properly considered and amended. At that time, the speech portions of H.R. 1 will demand a significant rewrite that respects the benefits of bipartisan campaign enforcement, allows unfettered exchange of political information by U.S. citizens, and protects the First Amendment rights of all Americans.

Thank you.

<sup>22</sup> Alex Cordell, Issue Analysis No. 2: Legislator Occupations – Change or Status Quo After Tax-Funded Campaigns?, Institute for Free Speech (Jun. 28, 2017), at [http://www.ifs.org/wp-content/uploads/2013/08/2017-06-28\\_Issue-Analysis-2\\_Cordell\\_Legislator-Occupations-Change-Or-Status-Quo-After-Tax-Funded-Campaigns.pdf](http://www.ifs.org/wp-content/uploads/2013/08/2017-06-28_Issue-Analysis-2_Cordell_Legislator-Occupations-Change-Or-Status-Quo-After-Tax-Funded-Campaigns.pdf).

<sup>23</sup> Alex Cordell, Issue Analysis No. 3: Do Tax-Funded Campaigns Increase the Percentage of Women in State Legislatures?, Institute for Free Speech (Jul. 11, 2017), at [http://www.ifs.org/wp-content/uploads/2013/08/2017-07-11\\_Issue-Analysis-3\\_Cordell\\_Do-Tax-Funded-Campaigns-Increase-The-Percentage-Of-Women-In-State-Legislatures.pdf](http://www.ifs.org/wp-content/uploads/2013/08/2017-07-11_Issue-Analysis-3_Cordell_Do-Tax-Funded-Campaigns-Increase-The-Percentage-Of-Women-In-State-Legislatures.pdf).

<sup>24</sup> Matt Nese and Luke Wachob, Issue Analysis No. 4: Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?, Institute for Free Speech (Nov. 1, 2013), at [https://www.ifs.org/wp-content/uploads/2013/11/2013-11-19\\_Issue-Analysis-4\\_Do-Taxpayer-Funded-Campaign-Actually-Save-Taxpayer-Dollars.pdf](https://www.ifs.org/wp-content/uploads/2013/11/2013-11-19_Issue-Analysis-4_Do-Taxpayer-Funded-Campaign-Actually-Save-Taxpayer-Dollars.pdf).

<sup>25</sup> Luke Wachob, Issue Analysis No. 8: Do Taxpayer-Funded Campaigns Increase Voter Turnout?, Institute for Free Speech (Dec. 11, 2013), at [http://www.ifs.org/wp-content/uploads/2013/12/2013-12-03\\_Issue-Analysis-8\\_Do-Taxpayer-Funded-Campaign-Increase-Voter-Turnout.pdf](http://www.ifs.org/wp-content/uploads/2013/12/2013-12-03_Issue-Analysis-8_Do-Taxpayer-Funded-Campaign-Increase-Voter-Turnout.pdf).

<sup>26</sup> Joe Albanese, Issue Analysis No. 10: Do Taxpayer-Funded Campaigns Increase Political Competitiveness?, Institute for Free Speech (Jun. 7, 2017), at [http://www.ifs.org/wp-content/uploads/2017/06/2017-06-05\\_Issue-Analysis-10\\_Albanese\\_Do-Taxpayer-Funded-Campaigns-Increase-Political-Competitiveness.pdf](http://www.ifs.org/wp-content/uploads/2017/06/2017-06-05_Issue-Analysis-10_Albanese_Do-Taxpayer-Funded-Campaigns-Increase-Political-Competitiveness.pdf).



INSTITUTE FOR  
FREE SPEECH

## Analysis of H.R. 1 (Part One)

*"For the People Act" Replete with Provisions for the Politicians*

Eric Wang, Senior Fellow<sup>1</sup>

January 2019

### Introduction

This analysis examines Title IV, Subtitles B ("DISCLOSE Act"), C ("Honest Ads"), and D ("Stand by Every Ad") of H.R. 1 (116th Congress). The Institute for Free Speech (IFS) previously analyzed earlier versions of these provisions when they were introduced as standalone bills.<sup>2</sup> Due to the evolving and obscure legislative language, this analysis represents IFS's latest understanding of the legislation and supersedes any prior analyses IFS has released on these measures. As it continues to analyze these and other sections of H.R. 1 that regulate First Amendment rights, IFS expects to release additional analyses of the bill. IFS's written analyses may not address every concern it may have with the proposal, as the 570-page bill's provisions are simply too numerous and complex to be able to effectively discuss the bill's contents in their entirety.

As a preliminary matter, Title IV, Subtitles B, C, and D of H.R. 1 contain a hodgepodge of partially related and overlapping campaign finance definitional, reporting, and disclaimer provisions that are scattered in a variety of different bill sections. Instead of consolidating and presenting these provisions in an organized, cohesive, and streamlined manner, the bill's sponsors threw together previously separate bills in a way that severely frustrates public understanding of legislative language that was already exceedingly vague and complex. This thoughtless, obfuscatory, and expedient approach to legislating, which is convenient only for the politicians pushing the bill, belie its title purporting to be "For the People." To assist public comprehension of certain parts of H.R. 1, IFS has created a redlined version of the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.*, to show the changes the bill would make to this statute. The document is available for public consumption on the IFS website.<sup>3</sup>

H.R. 1's substance further underscores how the bill would help politicians and campaign finance attorneys more than it would benefit the public. The bill would greatly increase the already onerous legal and administrative compliance costs, liability risk, and costs to donor and associational privacy for civic groups that speak about policy issues and politicians. Organizations will be further deterred from speaking or will have to divert additional resources away from their advocacy activities to pay for compliance staff and lawyers. Some groups will not be able to afford these costs or will violate the law unwittingly. Less speech by private citizens and organizations means politicians will be able to act with less accountability to public opinion and criticism.

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<sup>2</sup> See, e.g., Eric Wang, Analysis of the "DISCLOSE Act of 2018" (S. 3150): Newer Bill, Same Old Plan to Crack Down on Speech, Institute for Free Speech, at [https://www.ifs.org/wp-content/uploads/2018/12/2018-12-19\\_Legislative-Brief\\_Federal\\_S-3150\\_DISCLOSE-Act-Of-2018.pdf](https://www.ifs.org/wp-content/uploads/2018/12/2018-12-19_Legislative-Brief_Federal_S-3150_DISCLOSE-Act-Of-2018.pdf) and Eric Wang, Analysis of Klobuchar-Warner-McCain Internet Ads Legislation (S. 1989, 115th Cong.): So-Called "Honest Ads Act" Is Dishonest About Its Effects, Institute for Free Speech, at [https://www.ifs.org/wp-content/uploads/2017/11/2017-11-01\\_Legislative-Brief\\_Federal\\_S-1989\\_Honest-Ads-Act.pdf](https://www.ifs.org/wp-content/uploads/2017/11/2017-11-01_Legislative-Brief_Federal_S-1989_Honest-Ads-Act.pdf).

<sup>3</sup> See Institute for Free Speech, Changes to Current Campaign Finance Laws Proposed by H.R. 1, at [https://www.ifs.org/wp-content/uploads/2019/01/2019-01-22\\_Annotated-Code\\_US\\_HR-1\\_Changes-To-Current-Campaign-Finance-Laws-Proposed-By-H.R.-1.pdf](https://www.ifs.org/wp-content/uploads/2019/01/2019-01-22_Annotated-Code_US_HR-1_Changes-To-Current-Campaign-Finance-Laws-Proposed-By-H.R.-1.pdf).

*Executive Summary*

Specifically, H.R. 1 would:

- Unconstitutionally regulate speech that mentions a federal candidate or elected official at any time under a severely vague, subjective, and broad standard that asks whether the speech “promotes,” “attacks,” “opposes,” or “supports” (“PASO”) the candidate or official.
  - Force groups to file burdensome and likely duplicative reports with the Federal Election Commission (“FEC”) if they sponsor ads that are deemed to PASO the president or members of Congress in an attempt to persuade those officials on policy issues.
  - Compel groups to declare on these so-called “campaign-related disbursement” reports that their ads are either “in support of or in opposition” to the elected official mentioned, even if their ads do neither. This form of compulsory speech and forcing organizations to declare their allegiance to or against public officials is unconscionable and unconstitutional.
  - Force groups to publicly identify certain donors on these reports for issue ads and on the face of the ads themselves. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) “campaign” ads in FEC reports and disclaimers, many donors will choose simply not to give to nonprofit groups.
  - Subject far more issue ads to burdensome disclaimer requirements, which will coerce groups into truncating their substantive message and make some advertising, especially online, practically impossible.
  - Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications’ substantive message, thereby exacerbating the politics of personal destruction and further coarsening political discourse.
  - Force organizations that make grants to file their own reports and publicly identify their own donors if an organization is deemed to have “reason to know” that a donee entity has made or will make “campaign-related disbursements.” This vague and subjective standard will greatly increase the legal costs of vetting grants and many groups will simply end grant programs.
  - Likely eliminate the ability of many employees to make voluntary contributions through employee-funded PACs, which give employees a voice in the political process with respect to issues that affect their livelihoods.
  - Effectively prohibit many domestic subsidiaries, and perhaps most corporations with even a single foreign shareholder with voting shares, from making independent expenditures, contributions to super PACs, or contributions to candidates for state and local office, thus usurping the laws in more than half of the states that allow such contributions.
- This appears to be a thinly veiled artifice to overturn *Citizens United* and to unconstitutionally accomplish by legislation what congressional Democrats failed to achieve by constitutional amendment in 2014.
- Disproportionately burden the political speech rights of corporations, thereby ending the long-standing parity in the campaign finance law between corporations and unions.
  - Increase regulation of the online speech of American citizens while purporting to address the threat of Russian propaganda.
  - Expand the universe of regulated online political speech (by Americans) beyond paid advertising to include, apparently, communications on groups’ or individuals’ own websites and e-mail messages.
  - Regulate speech (by Americans) about legislative issues by expanding the definition of “electioneering communications” – historically limited to large-scale TV and radio campaigns targeted to the electorate in a campaign for office – to include online advertising, even if the ads are not targeted in any way at a relevant electorate.

- Impose what is effectively a new public reporting requirement on (American) sponsors of online issue ads by expanding the “public file” requirement for broadcast, cable, and satellite media ads to many online platforms. The public file requirements would compel some of the nation’s leading news sources to publish information, which is likely unconstitutional.

Both advertisers and online platforms would be liable for providing and maintaining the information required to be kept in these files, which would increase the costs of online advertising, especially for low-cost grassroots movements. Some of these online outlets may decide to discontinue accepting such ads due to the expense of complying with the requirements.

The “public file” also may subject (American) organizers of contentious but important political causes like “Black Lives Matter” and the Tea Party to harassment by opponents or hostile government officials monitoring the content, distribution, and sponsorship of their activities.

- Make broadcast, cable, satellite, and Internet media platforms liable if they allow political advertising by prohibited speakers to slip through, thereby driving up the costs of political advertising, especially for online ads where compliance costs are relatively high.
- Impose inflexible disclaimer requirements on online ads that may make many forms of small, popular, and cost-effective ads off-limits for (American) political advertisers.

## Analysis

### I. H.R. 1 Would Impose Unconstitutionally Overbroad Regulations on Issue Speech and Subject Organizations' Donors to Excessive and Irrelevant Reporting Requirements, Thereby Inviting Retaliation and Harassment and Deterring Financial Support.

#### A) Overbroad Definition of "Campaign-Related Disbursements"

H.R. 1 would regulate three types of speech as "campaign-related disbursements":

- (1) Independent expenditures that expressly advocate the election or defeat of a federal candidate or that are the "functional equivalent of express advocacy";
- (2) So-called "electioneering communications" – i.e., television and radio ads that so much as mention a federal candidate or elected official who is subject to re-election if the ads are disseminated within the jurisdiction the official or candidate represents or seeks to represent within certain pre-election time windows; and
- (3) Any public communications that mention a federal candidate or elected official who is subject to re-election and that "promote[] or support[]" or "attack[] or oppose[]" the candidate or official.<sup>4</sup>

Of these three categories, the U.S. Supreme Court has only determined that the first – express advocacy independent expenditures – sets forth a bright-line category for regulating speech that is "unambiguously" campaign-related.<sup>5</sup> While some "electioneering communications" may be intended to influence elections, the purpose of many (if not most) of these ads is to call public and official attention to various policy issues and positions. As discussed more below, H.R. 1 would make an already bad law even worse by expanding the regulation of "electioneering communications" as "campaign-related disbursements."

H.R. 1 goes completely off the rails, however, by regulating any public communication that mentions a federal candidate or elected official – at any time – if the message is deemed to "promote," "support," "attack," or "oppose" the candidate or official. This standard, known to campaign-finance attorneys as "PASO," is hopelessly subjective, vague, and overbroad. It cannot be applied with any consistency and would unconstitutionally regulate a large universe of speech that has nothing to do with elections. Despite that, the bill characterizes such ads as "campaign-related disbursements," even though the election may be nearly two years away for representatives, four years away for the president, or six years away for senators.

For example, soon after President Trump took office in 2017, the AARP aired television ads touting Trump's campaign stance on Medicare.<sup>6</sup> These ads obviously were intended to shore up political support for Medicare, and it is inconceivable that the AARP intended them to "support" Trump's 2020 re-election. However, it is quite conceivable, if not likely, that if this bill had been law then, the AARP would have had to report to the Federal Election Commission ("FEC") that these ads were "campaign-related disbursements" because they "support" a Trump campaign position and therefore AARP's ads must be listed as "support" for Trump's re-election.

Similarly, if an organization were to disseminate public communications highlighting Trump's campaign statements on building a wall on America's southern border and urging him to stick to his promise, such ads very likely would be regulated under H.R. 1 as "supporting" Trump. Conversely, organizations that oppose the Administration's immigration policies very likely would be regulated for "attacking" and "opposing" Trump if their ads mention the President.<sup>7</sup> As the Supreme Court has noted, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."<sup>8</sup>

Notably, the PASO standard comes from the provision in the 2002 Bipartisan Campaign Reform Act (a.k.a. "McCain-Feingold") that regulates the funds state and local party committees may use to pay for communications that PASO federal candidates.<sup>9</sup> The Supreme Court upheld the PASO standard against a challenge that it is unconstitutionally vague on the basis that it "clearly set[s] forth the confines within which potential *party speakers* must act" because "actions taken by *the political parties* are presumed to be in connection with election campaigns."<sup>10</sup>

<sup>4</sup> H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(d)); see also 52 U.S.C. § 30104(f) (defining "electioneering communication").

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); see also *FEC v. Wis. Right to Life*, 551 U.S. 449, 469-470 (2007).

<sup>6</sup> See AARP Advocates, Protect Medicare, at <https://www.youtube.com/watch?v=hY0DueXokFA>.

<sup>7</sup> See, e.g., Need to Impeach, at <https://www.needtoimpeach.com/> and Rebel Resist, at <http://rebelresist.com/>.

<sup>8</sup> *Buckley*, 424 U.S. at 42.

<sup>9</sup> See 52 U.S.C. §§ 30101(20)(A)(iii), 30125(b)(1).

<sup>10</sup> *McConnell v. FEC*, 540 U.S. 93, 169-170 and 170 n.64 (emphasis added).

However, H.R. 1 would expand the PASO standard to *all* speakers. Unlike political parties, it is *not* reasonable to presume that all of the legislative advocacy activities of groups like the AARP, Planned Parenthood, Sierra Club, NRA, gun control groups, chambers of commerce, trade associations, and unions are “in connection with election campaigns.” Moreover, while the Supreme Court initially suggested that speakers could seek advisory opinions from the FEC to clarify what the PASO standard means,<sup>11</sup> the Court has subsequently denounced vague campaign finance laws that effectively force speakers to seek FEC advisory opinions as “the equivalent of” an unconstitutional “prior restraint” on speech.<sup>12</sup> In short, H.R. 1’s reliance on the PASO standard to regulate “campaign-related disbursements” not only is unwise, it is very likely unconstitutional.

It is important to keep in mind that “public communications” cover not just broadcast ads, but any form of paid communications including mailings, Internet ads, billboards, magazine ads, etc. Many groups raise money, identify supporters of a cause, and build their brand through such communications and are not attempting to elect or defeat a candidate.

#### B) Compulsory Declarations of Allegiance

H.R. 1 would impose a binary choice on sponsors of “campaign-related disbursements” that are public communications to declare on campaign-finance reports “whether such communication[s] [are] in support of or in opposition to” the candidate referenced in the communication.<sup>13</sup> Under the current law, only reports for independent expenditures that expressly advocated the election or defeat of candidates are required to state whether the communication supports or opposes the candidate involved<sup>14</sup> since, as discussed above, only such communications are unambiguously campaign-related.<sup>15</sup>

Given H.R. 1’s overbroad regulation of “campaign-related disbursements,” using the examples from before, the AARP very likely would have to affirmatively and publicly declare to the FEC whether its television ads “support” or “oppose” President Trump. Similarly, groups advocating for or against the construction of a wall on the Mexican border would have to affirmatively and publicly declare whether they “support” or “oppose” President Trump if they so much as mention or depict Trump in their public communications. This type of compelled speech is obnoxious to its core and goes beyond “mere disclosure,” thereby making it especially likely to be held unconstitutional.<sup>16</sup>

The ads do not even have to be hard-hitting to trigger regulation or force a group to declare if the communication is in support of or opposition to an elected official. For example, a radio ad in the *Independence Institute v. FEC* case only advocated support for a judicial reform bill. Here is the entire text of the ad:

Let the punishment fit the crime. But for many federal crimes, that’s no longer true. Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt. And for what purpose? Studies show that these laws don’t cut crime. In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons. Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619. It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes. Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act. Tell them it’s time to let the punishment fit the crime.

Incredibly, the judges on the three-judge panel ruled “the advertisement could very well be understood by Coloradans as criticizing” Sen. Michael Bennett’s position on the bill.<sup>17</sup> Clearly, a PASO standard is not cabined to hard-hitting ads that are often more effective at persuading lawmakers to change their position.

#### C) Overbroad Reporting and Donor Identification Requirements

As an initial matter, H.R. 1’s reporting requirements for “campaign-related disbursements” appear to be largely duplicative of the existing reporting requirements for independent expenditures and electioneering communications,<sup>18</sup> since the latter two categories of speech are encompassed within the former category. If the bill’s intent is to create additional and duplicative reporting requirements, the added administrative burden for speakers is unconstitutional as it serves no public interest, would clutter the FEC’s website with duplicative and confusing reports, and may mislead some into thinking the reports cover different activities.

<sup>11</sup> *Id.* at 170 n.64.

<sup>12</sup> *Citizens United*, 558 U.S. at 335.

<sup>13</sup> H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(a)(2)(C)).

<sup>14</sup> See 52 U.S.C. § 30104(c)(2)(A); compare *id.* with *id.* § 30104(f)(2)(D) (reporting requirement for electioneering communications).

<sup>15</sup> See *Buckley*, 424 U.S. at 80.

<sup>16</sup> See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>17</sup> See *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D. D.C. 2016), *aff’d per curiam*, 137 S. Ct. 1204 (2017).

<sup>18</sup> See 52 U.S.C. § 30104(c), (f); H.R. 1 § 4111(g) (“Nothing in this section shall be construed to waive or otherwise affect any other requirement of this Act which relates to the reporting of campaign-related disbursements.”).

H.R. 1 departs from existing law by imposing additional donor identification requirements on campaign finance reports.<sup>19</sup> Organizations that make “campaign-related disbursements” totaling more than \$10,000 during a two-year “election reporting cycle”<sup>20</sup> would have to publicly report all of their donors (including their addresses) who have given \$10,000 or more during that same period, unless such communications are paid for using a segregated account (the donors to which must be reported), or if donors affirmatively restrict their donations from being used for such purposes and that donation is deposited “in an account which is segregated from any account used to make campaign-related disbursements” (in which case the other donors still must be reported).<sup>21</sup> Both of these so-called options are impractical, would significantly impede fundraising (particularly for most donors who do not wish to be publicly reported), and would still put many donors on campaign finance reports with the implication they are financing “campaign-related disbursements” that they knew nothing about and may not even agree with. Moreover, while sources of business revenues are exempt from reporting, dues-paying members are not.<sup>22</sup>

The right to associate oneself with a nonprofit group’s mission and to support the group financially in private is a bedrock principle of the First Amendment that the government may not abridge casually.<sup>23</sup> This is particularly true when the cause is contentious, such as abortion, gun control, LGBTQ rights, or civil rights, and association with either side on any of these issues may subject a member or donor to retaliation, harassment, threats, and even physical attack, as recent events have tragically reminded us. The potential divisiveness of these issues does not diminish their social importance and the need to hash out these debates in public while preserving donors’ privacy. Even when a group’s cause is not controversial, there are still many important and legitimate reasons why donors may wish to remain anonymous, such as altruism, religious obligations, and a desire to remain out of the public spotlight.<sup>24</sup>

It is wholly inappropriate, for example, for donors who support a retiree organization’s general activities to have to be publicly identified on campaign finance reports as “supporting” the president if the organization sponsors a television ad about entitlement reform mentioning the president.<sup>25</sup> Similarly, donors to an immigration advocacy organization, for example, should not have to be publicly identified on campaign finance reports as “opposing” the president if the organization were to sponsor a radio ad criticizing the president’s immigration policy. Both of these reporting scenarios would result from the passage and enactment of H.R. 1. Faced with the prospect of these public reporting consequences, many donors will simply choose not to give,<sup>26</sup> thereby limiting the funds available to finance speech to the detriment of our private civic sector and our public debate.

H.R. 1’s gratuitous reporting requirements also are not limited to organizations that sponsor public communications. An organization that makes payments or grants to other organizations also would be deemed to be making “campaign-related disbursements,” and would have to make the same filings and report its own donors, if:

- (1) the organization making the payments or grants has itself made “campaign-related disbursements” other than in the form of certain “covered transfers” totaling \$50,000 or more during the prior two years;
- (2) the organization making the payments or grants “knew or had reason to know” that the recipient has made “campaign-related disbursements” totaling \$50,000 or more in the previous two years; or
- (3) the organization making the payments or grants “knew or had reason to know” that the recipient will make “campaign-related disbursements” totaling \$50,000 or more in the two years from the date of the payment or grant.<sup>27</sup>

19 The bill could easily expand the existing independent expenditure and electioneering communication reporting requirements to include additional donor identification, thereby alleviating speakers from filing two separate sets of reports for each communication. However, the bill does not take this more streamlined approach.

20 An “election reporting cycle” is defined as being coterminous with the two-year congressional election cycle. H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(a)(4)(C)).

21 *Id.* (to be codified at 52 U.S.C. § 30126(a)(1)-(3)).

22 *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(A), (4)(D)).

23 *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

24 See Sean Parnell, *Protecting Donor Privacy: Philanthropic Freedom, Anonymity and the First Amendment*, Philanthropy Roundtable, at [https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy-white-paper.pdf?sfvrsn=566a740\\_6](https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy-white-paper.pdf?sfvrsn=566a740_6).

25 See note 6, *supra*.

26 Buckley, 424 U.S. at 68 (noting that reporting “will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights . . .”).

27 H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(a)(1)-(2), (d), (f)(1)(D) & (E)). Donor organizations must affirmatively restrict their payments or grants in writing from being used by donees for “campaign-related disbursements” in order to avoid having to file reports on the donor side. But note that if the donee organization deposits that donation into an account later used to finance a “campaign-related disbursement,” the exemption would no longer apply. *Id.* (to be codified at 52 U.S.C. 30126(f)(2)(B)). Either scenario typically will function as a trap for the unwary for organizations that do not retain one of the select few campaign finance attorneys steeped in the nuances of this law. As the Supreme Court has noted, “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of the day.” *Citizens United*, 558 U.S. at 324, and the same should hold true for groups providing grants to enable other groups to speak about political issues.

Grant-making institutions that wish to protect their donors' privacy therefore would need to research a recipient group's past activities to determine if the group has engaged in any "campaign-related disbursements." It is unclear whether it would be sufficient under H.R. 1 to rely on any FEC reports that a recipient group has filed within the previous two years. For example, if a group made "campaign-related disbursements" but inadvertently did not report them, would the provider of a grant to that group still be on the hook for having to file its own "campaign-related disbursement" reports and to publicly report its own donors? The types of investigations donor organizations would have to conduct on donees may go far beyond the standard due diligence that is currently performed in the grant-making community, especially among charities. While attorneys will certainly benefit from the thousands of dollars in additional fees that it will cost to vet any donation or grant to a non-profit organization, there is little other apparent upside to this reporting burden.

The bill's vague and subjective "had reason to know" standard is even worse when applied prospectively. Grant-making organizations effectively will need to consult a crystal ball in order to know whether a group they are giving to will, within the next two years, make "campaign-related disbursements" that would require the donor organization to report its own donors.

Lastly, H.R. 1 purports to allow the FEC to exempt donors' names and addresses from reporting "if the inclusion of the information would subject the person to serious threats, harassment, or reprisals."<sup>28</sup> In practice, the FEC and similar agencies have been unable to agree on when such exemptions should apply or to grant exemptions consistently and objectively, and very few exemptions have ever been granted without a court order.<sup>29</sup>

#### D) Expansion of Disclaimer Requirements

Existing law already requires lengthy disclaimers for independent expenditures and electioneering communications.<sup>30</sup> These disclaimers often force speakers to truncate their substantive message or render the advertising impracticable.<sup>31</sup> The Supreme Court specifically has recognized that these disclaimer requirements "burden the ability to speak," and therefore are subject to "exact scrutiny," which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.<sup>32</sup> H.R. 1 would expand the existing disclaimer requirements to apply to all "campaign-related disbursements" that are in the form of a public communication.<sup>33</sup> As discussed above, many of these communications would merely mention elected officials in the context of discussing policies, and treating them as campaign ads subject to the campaign-finance disclaimer requirements is likely unconstitutional.

In addition to expanding the scope of speech covered by the disclaimer requirements, H.R. 1 also would expand the information that must be included in the disclaimers, and specifically the "stand by your ad" portion of the disclaimer. Organizations – other than candidates, certain PACs, and political party committees – that sponsor such ads would have to include in the ads' disclaimers certain donor information.<sup>34</sup> Ads containing video content would have to identify the organization's top five donors of \$10,000 or more during the prior 12 months.<sup>35</sup> Ads containing only audio content (including robocalls) would have to identify the organization's top two donors.<sup>36</sup>

The bill purports to shield certain donors from being identified in the disclaimers, but the exemption in the disclaimer provision is illogical. It also fails to track the donor identification requirement in the reporting provisions. This mismatch will cause enormous confusion for organizations seeking to comply with the law and those trying to understand who supposedly paid for the regulated communications.

Part of the confusion stems from H.R. 1's use of the term "segregated bank account" to describe two different concepts. For "campaign-related disbursement" reports, an organization may choose to pay for such disbursements using one type of "segregated bank account." Donors to this account *would* be publicly reported. Donors whose funds are not deposited in this account would not be reported.<sup>37</sup> However, H.R. 1 also provides that donors may be shielded from public identification on

<sup>28</sup> H.R. 1 (to be codified at 52 U.S.C. § 30126(a)(3)(D)).

<sup>29</sup> See, e.g., FEC Adv. Op. Request No. 2016-23 (Socialist Workers Party); JCOPE Denies Funding Disclosure Exemptions, THE STATE OF POLITICS (Aug. 2015), at <http://www.nysstateofpolitics.com/2015/08/jcope-denies-funding-disclosure-exemptions/>.

<sup>30</sup> 52 U.S.C. § 30120.

<sup>31</sup> See FEC Adv. Op. No. 2007-33 (Club for Growth) (although this advisory opinion specifically addressed disclaimers for express advocacy independent expenditures, the disclaimer requirements for electioneering communications are the same; see 52 U.S.C. § 30120).

<sup>32</sup> *Citizens United*, 558 U.S. at 366.

<sup>33</sup> H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(a)).

<sup>34</sup> H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(e)). The bill exempts "certain political committees" from the donor identification disclaimer requirement, but it is unclear which "certain political committees" this is in reference to. See *id.* (to be codified at 52 U.S.C. § 30120(e)(6)). It is possible that super PACs would be subject to the requirement, while conventional PACs that accept contributions subject to the amount limitations and source prohibitions would be exempt from this requirement. See *id.* § 4111 (to be codified at 52 U.S.C. § 30126(e)(6)).

<sup>35</sup> *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(B), (5)(A) & (C)).

<sup>36</sup> *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(C), (5)(B) & (C)); *id.* § 4303.

<sup>37</sup> *Id.* § 4111 (to be codified at 52 U.S.C. § 30126(a)(2)(E)) (emphasis added).



reports if they give to another form of a segregated account. This would be “an account which is *segregated* from any account used to make campaign-related disbursements.”<sup>38</sup>

As if that were not confusing enough, H.R. 1 only shields donors from being identified in disclaimers for campaign-related disbursements as the top five or top two donors if they give to the “segregated” account that cannot be used for campaign-related disbursements.<sup>39</sup> Incredibly, communications *paid for only from* the segregated account used to pay for regulated communications must list the organization’s top donors, even if their funds were *never* deposited in the account used to fund the communication.

That means a communication paid for by one set of donors (and only those donors) will often list donors in a disclaimer who *did not give any funds* to distribute the communication. In other words, such a law would often require advertising disclaimers with false information. That will, in turn, lead to real news stories that have false information about who paid for the communications.

In addition, the disclaimers would have to include a statement by an organization’s CEO or highest-ranking officer identifying himself or herself and his or her title and stating that he or she “approves this message.”<sup>40</sup> (Current law allows announcers to read disclaimers for organizations.) Ads containing video content would have to include “an unobscured, full-screen view” of the CEO or highest-ranking officer reading the disclaimer or a photo of the individual.<sup>41</sup> “Campaign-related disbursements” sponsored by individuals would have to include disclaimers featuring the individual.<sup>42</sup>

It is unclear that any of these disclaimer requirements, especially the requirement to include an image or picture of a sponsoring individual or a sponsoring organization’s CEO or highest-ranking officer, has any relation – let alone a “substantial relation” – to any important governmental interest, or what the governmental interest even is here.<sup>43</sup> Rather, the bill compels speakers to call attention to certain individuals associated with the sponsoring organizations, thereby detracting from the substantive message itself. One can easily imagine circumstances where the required individual might not want to or not be physically able to deliver such a message, such as during a serious illness, after surgery, or after injury from an accident or attack. Ironically, while the original (and dubious) purpose of the “stand by your ad” disclaimer was to improve the quality of political ads, H.R. 1 would personalize political discourse and may thereby further contribute to the politics of personal destruction.<sup>44</sup>

Moreover, H.R. 1 would expand the “stand by your ad” disclaimer requirement beyond the television and radio ads it currently covers to also apply to Internet ads that contain video and audio content.<sup>45</sup> Internet advertisers already struggle to fit the FEC disclaimers in their ads. Internet video “pre-roll” ads are “usually short, often 10 seconds or 15 seconds long, so as not to unduly annoy viewers who don’t wish to wait long for the clip.”<sup>46</sup> Expanding the “stand by your ad” disclaimer requirement to Internet ads would require substantial portions of ads to be devoted to the disclaimer and would threaten the very viability of the Internet as a medium for political communication.<sup>47</sup> One of the requirements for video ads mandates display of a disclaimer for “at least 6 seconds,”<sup>48</sup> making it illegal to use 5 second video ads.

38 *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(B)) (emphasis added).

39 *Id.* (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).

40 *Id.* § 4302 (to be codified at 52 U.S.C. § 30120(e)(2)(B), (4)(B)).

41 *Id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(ii)).

42 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(A), (2)(A)).

43 See *Citizens United*, 558 U.S. at 366.

44 In any event, the “stand by your ad” disclaimer requirement has not reduced the amount of negative ads, as it was intended to do. See Bradley A. Smith, THE MYTH OF CAMPAIGN FINANCE REFORM, NATIONAL AFFAIRS (Winter 2010), at <https://nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform>.

45 H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(e)(1)).

46 FEC Adv. Op. Request No. 2007-33 (Club for Growth), Comments of Sierra Club.

47 While the bill purports to allow the FEC to adopt regulations to exempt certain ads from the top five or top two funders portion of the disclaimer if the disclaimer would take up a “disproportionate amount” of the ad, the bill also increases the amount of time that the disclaimer must be displayed in video ads to at least six seconds (up from four seconds under the current requirements for television ads). Compare H.R. 1 § 4302 (to be codified at 52 U.S.C. § 30120(e)(1)(B), (C)) with *id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(i)); see also 52 U.S.C. § 30120(d)(1)(B)(ii). The bill’s contrary directives raise serious questions about how much discretion the FEC would have to exempt ads from the expanded disclaimer requirement. The FEC already has struggled for nearly a decade over when disclaimer exemptions should apply to digital ads, see, e.g., FEC Adv. Op. Nos. 2010-19 (Google), 2011-09 (Facebook), 2013-18 (Revolution Messaging), and 2017-12 (Take Back Action Fund), and the DISCLOSE Act fails to give the agency any more legislative clarity on this issue.

48 See note 47, *supra*.

II. H.R. 1 Seeks to Broadly Prohibit Political Engagement by Corporations and Employee-Funded PACs and to Indirectly Overturn *Citizens United* by Legislation.

A) H.R. 1's Foreign National Provisions Could Make It Practically Impossible for *Any* Corporation, Whether Foreign or Domestic, to Speak.

H.R. 1 would treat any corporation as a foreign entity if any foreign national “has the power to direct, dictate, or control the decisionmaking process of the corporation . . . with respect to its interests in the United States.”<sup>49</sup> Such a corporation would be prohibited from making any political contributions or expenditures in connection with U.S. elections.<sup>50</sup>

The owner of even one share of a publicly traded company could have “the power to direct, dictate, or control the decision-making process of the corporation” by means of a shareholder meeting or a proxy vote,<sup>51</sup> and it is likely that every publicly traded American company has at least one foreign national shareholder. H.R. 1 provides no additional gloss on this point and leaves subjective enforcement decisions to unelected bureaucrats.

Few rational corporations would run the risk of an aggressive interpretation of this provision, and thus H.R. 1 could effectively prohibit corporations altogether from making political contributions and expenditures in the U.S. Because the foreign national provision of federal law the bill would amend applies to elections not only for federal office, but also for state and local office,<sup>52</sup> the bill also would usurp the laws in more than half of the states that permit corporations to make contributions in connection with state and local elections.<sup>53</sup>

This extreme outcome is not an implausible interpretation of the legislative language. After all, it is an approach FEC Commissioner Ellen L. Weintraub has suggested for essentially overturning the *Citizens United* decision by legislation. As Commissioner Weintraub wrote in a *New York Times* op-ed on countering *Citizens United*, “Arguably . . . for a corporation to make political contributions or expenditures legally, it may not have *any* shareholders who are foreigners or federal contractors.”<sup>54</sup> And if H.R. 1 were enacted, Weintraub could be one of the FEC commissioners interpreting and implementing this provision.

Consider also that this provision of H.R. 1 is derived from the so-called “DISCLOSE Act,”<sup>55</sup> and 39 of the 40 sponsors of the DISCLOSE Act who were in the Senate in 2014 voted to amend the First Amendment to override *Citizens United*.<sup>56</sup> Albeit constitutionally proper,<sup>57</sup> their 2014 effort to amend the First Amendment failed,<sup>58</sup> and it has been the black-letter law of this land for more than two centuries that Congress may not now attempt to accomplish the same result by mere legislation.<sup>59</sup>

This covert assault on corporations’ political speech is also unwarranted and contrary to the public interest. The vast majority of Americans work at a corporation, whether it is a Fortune 500 company or a local pizza joint.<sup>60</sup> More than half of Americans, including 56 percent of middle-class Americans, have ownership in corporations, whether through stocks or mutual funds.<sup>61</sup> Not surprisingly, then, most Americans believe that it is sensible for corporations to take political action, whether it

49 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)(3)(C)).

50 See existing 52 U.S.C. § 30121(a); see also H.R. 1 § 4102 (to be codified at 52 U.S.C. § 30121(a)(1)(A)).

51 See, e.g., U.S. Securities and Exchange Comm’n, Spotlight on Proxy Matters, at <https://www.sec.gov/spotlight/proxymatters.shtml>.

52 See 52 U.S.C. § 30121(a). Under federal law, corporations may contribute to super PACs in connection with elections for federal office but may not make contributions to candidates for federal office. See *id.* and FEC Adv. Op. No. 2010-11 (Commonsense Ten). However, under existing law, state laws otherwise govern state and local elections (although some municipalities may have their own campaign finance laws).

53 See Nat’l Conference of State Legislatures, Contribution Limits Overview, at <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx> (noting that 28 states permit corporate contributions).

54 Ellen L. Weintraub, *Taking On Citizens United*, N.Y. TIMES (Mar. 30, 2016) (emphasis added); see also Allen Dickerson, No, Commissioner Weintraub, the FEC Can’t Circumvent *Citizens United*, HUFFINGTON POST (Mar. 31, 2016).

55 H.R. 1 § 4100.

56 Compare S. 3150 (115th Cong.) (DISCLOSE Act of 2018) with S.J. Res. 19 (113th Cong., 2nd Sess.), Roll Call Vote No. 261 (Sep. 11, 2014). Sen. Gillibrand, who was a DISCLOSE Act sponsor, did not vote on the 2014 resolution. *Id.* The other DISCLOSE Act sponsors – Senators Catherine Cortez Masto, Tammy Duckworth, Kamala Harris, Maggie Hassan, Doug Jones, Gary Peters, Tina Smith, and Chris Van Hollen – were not in the Senate at the time.

57 See U.S. Const., Art. V.

58 See note 56, *supra*.

59 *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 178 (1803) (“Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions.”).

60 See U.S. Census Bureau, *Statistics of U.S. Businesses Employment and Payroll Summary: 2012* (Feb. 2015), at <https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-sush.pdf>.

61 Justin McCarthy, *Little Change in Percentage of Americans Who Own Stocks*, Gallup.com, at <http://www.gallup.com/poll/182816/little-change-percentage-americans-invested-market.aspx>.

is in the form of lobbying or making political contributions.<sup>62</sup> Based on the largely positive public reaction to the unmistakable political messaging by many corporate advertisers during the 2017 Super Bowl,<sup>63</sup> it appears that most Americans also would welcome corporations weighing in more on political issues. Even many progressives who initially opposed *Citizens United* may be coming around to the idea that corporations have a lot to contribute to the nation's political discourse.<sup>64</sup>

B) Even If H.R. 1 Is Not Interpreted to Prohibit Most Corporate Contributions and Expenditures, It Would Still Shut Most Domestic Subsidiaries of Foreign Corporations Out of the Political Process Altogether.

Even if H.R. 1 is not read so broadly as to treat any corporation with a single foreign shareholder as a foreign national, the bill would still subject a corporation in which any foreign national “owns or controls” 20 percent or more of the voting shares to the ban on foreign national contributions and expenditures.<sup>65</sup> This would likely erode the FEC’s existing distinction between domestic subsidiaries and their foreign parents, which allows domestic subsidiaries, regardless of percentage foreign ownership, to make political contributions and expenditures as long as: (1) the funds used are generated exclusively from the subsidiary’s U.S. operations; and (2) all decisions on contributions and expenditures are made by U.S. citizens or permanent residents.<sup>66</sup>

Domestic subsidiaries of foreign corporations, such as Anheuser-Busch, Bayer, BMW, Honda, Siemens, etc., employ millions of Americans in congressional districts across the country and contribute to the national and local economies.<sup>67</sup> We can have a debate about whether this level of foreign investment and ownership in our economy is good for the country. But the campaign finance law is not the proper arena for weighing in on this debate, and the interests of millions of Americans who work at domestic subsidiaries should not be shut out of the political arena because their employer can’t speak about candidates.

Putting aside domestic subsidiaries of foreign corporations, many corporations that are thought of as “American” also may be considered foreign under H.R. 1’s low 20 percent threshold. For example, almost 17 percent of The New York Times Company is owned by Carlos Slim, a Mexican national.<sup>68</sup> If he increased his stake by a few more percentage points, the Times may not qualify as an American company under the bill.

C) H.R. 1 Could Drastically Affect Employee-Funded PACs, Either Effectively Prohibiting Them Altogether or Prohibiting Them for Employees of Domestic Subsidiaries of Foreign Corporations.

As discussed above, depending on how broadly the vague language of H.R. 1 is interpreted, the bill could treat any corporation with even one foreign shareholder as a foreign entity. At a minimum, corporations that have 20 percent or more foreign ownership would be treated as foreign entities. This aspect of H.R. 1 could have drastic consequences for employee-funded PACs.

Under existing law and the FEC’s implementation, corporations that are considered foreign nationals may not directly establish and administer employee-funded PACs; only the domestic subsidiaries of foreign-national corporations may have PACs.<sup>69</sup> However, because H.R. 1 could treat substantially all publicly traded corporations as foreign nationals or, at the very least, erase the distinction between domestic subsidiaries and foreign corporations, the bill appears to broadly threaten the continued permissibility of employee-funded corporate PACs in general or, at the very least, for domestic subsidiaries of foreign corporations. While the bill purports to set forth various conditions under which employee-funded PACs may continue to operate, it is not at all clear whether these conditions would override the pre-existing and general rule that foreign-national corporations may not establish and administer employee-funded PACs.<sup>70</sup>

62 Press Release: 2015 Public Affairs Pulse Survey: Most Americans Say it’s Smart for Big Companies to Get Political, Public Affairs Council (Sep. 10, 2015), at <https://pac.org/news/general/most-americans-say-its-smart-for-big-companies-to-get-political>.

63 See, e.g., Sapna Maheshwari, *During Breaks in Super Bowl, Advertisers Enter Political Debate*, N.Y. TIMES (Feb. 6, 2017), at <https://www.nytimes.com/2017/02/06/business/super-bowl-ads-politics.html>.

64 See, e.g., Garrett Epps, *When Corporations Are Good Citizens*, THE ATLANTIC (Aug. 17, 2017), at <https://www.theatlantic.com/politics/archive/2017/08/when-corporations-display-good-citizenship/537231/>.

65 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)). For corporations in which a foreign country (which likely includes sovereign wealth funds) or foreign government official holds ownership, the cutoff for foreign ownership would be five percent. *Id.* (to be codified at 52 U.S.C. § 30121(b)(3)(A)(ii)).

66 See, e.g., FEC Adv. Op. No. 2006-15 (TransCanada).

67 See, e.g., Brookings Institution, *FDI in U.S. Metro Areas: The Geography of Jobs in Foreign-Owned Establishments*, at <https://www.brookings.edu/research/fdi-in-u-s-metro-areas-the-geography-of-jobs-in-foreign-owned-establishments/> (“Foreign owned U.S. affiliates directly employ some 5.6 million workers spread across every sector of the economy”).

68 The New York Times Co., 2018 Proxy Statement, at [https://s1.qfdn.com/156119269/files/doc\\_financials/annual/2017/final-2018-Proxy-Statement.pdf](https://s1.qfdn.com/156119269/files/doc_financials/annual/2017/final-2018-Proxy-Statement.pdf).

69 See FEC Adv. Op. Nos. 1977-53 (APCAC) and 1982-34 (Sonat).

70 See H.R. 1 § 4102 (to be codified at 52 U.S.C. § 30118(b)(8)). Ironically, the section heading in the bill purports this provision is a “clarification” of the law, but it confuses more than it clarifies.

Just as the positions of the DISCLOSE Act's supporters may shed light on H.R. 1's legislative intent, IFS cannot help but note that H.R. 1 is a bill proposed and supported exclusively by congressional Democrats,<sup>71</sup> many of whom have expressed their categorical opposition to the idea of employee-funded PACs and have rejected PAC contributions.<sup>72</sup> This assault on PACs is misguided. Employee-funded PACs are comprised entirely of voluntary, after-tax, amount-limited contributions by certain eligible employees who wish to have a voice in the political process with respect to issues that affect their livelihoods.<sup>73</sup>

Notably, H.R. 1's potential effects on PACs in this respect also would only affect employee-funded PACs that are established and administered by corporations, but would not affect PACs established and administered by labor unions.<sup>74</sup> This would end the campaign finance law's longstanding equal treatment of corporations and unions.<sup>75</sup> For example, while the Service Employees International Union ("SEIU") describes itself as "a large international labor organization"<sup>76</sup> that receives income from foreign sources<sup>77</sup> and maintains foreign bank accounts,<sup>78</sup> it is unlikely to have foreign owners that would subject the union to treatment as a foreign-national entity under H.R. 1.

### III. H.R. 1 Would Impose Sweeping Regulations on Online and Digital Speech That Are at Once Overbroad and Underinclusive in Addressing Foreign Propaganda.

#### A) H.R. 1 Would Undo the FEC's Internet Exemption

H.R. 1 would undo the FEC's "Internet exemption," which continues to set the appropriate framework for regulating online political speech. Under this exemption, online political speech generally is unregulated unless it is in the form of paid ads. By negating the FEC's carefully considered Internet regulations,<sup>79</sup> H.R. 1 would increase the costs of online political speech and subject many online speakers to the risk of legal complaints, investigations, and penalties.

In enacting the agency's "Internet exemption," the FEC recognized the Internet is unique in that:

- it "provides a means to communicate with a large and geographically widespread audience, often at very little cost";
- "individuals can create their own political commentary and actively engage in political debate, rather than just read the views of others"; and
- "[w]hereas the corporations and other organizations capable of paying for advertising in traditional forms of mass communication are also likely to possess the financial resources to obtain legal counsel and monitor Commission regulations, individuals and small groups generally do not have such resources. Nor do they have the resources . . . to respond to politically motivated complaints in the enforcement context."<sup>80</sup>

None of these justifications for an enlightened regulatory approach to Internet communications has changed since the FEC enacted its Internet rules. By imposing additional FEC disclaimer and reporting requirements and risk of legal liability, H.R. 1 would add significant regulatory costs to online political speech and substantially negate the tremendous benefits of Internet media. As the FEC noted, this is a particular challenge for the smaller and less well-established grassroots organizations, for whom the Internet has provided a low-cost and effective means of organizing and getting their message out, and one that is far superior to any other communications medium available.

At the outset, it is important to note that, even under the current rules, paid Internet advertising is subject to regulation. Specifically, under the FEC's existing rules, "communications placed for a fee on another person's Web site" are regulated.<sup>81</sup> However, other forms of online communications, such as mass e-mails; creating, maintaining, or hosting a website; unpaid

71 See, e.g., Peter Overby, *House Democrats Introduce Anti-Corruption Bill As Symbolic 1st Act*, NPR (Jan. 5, 2019), at <https://www.npr.org/2019/01/05/682286587/house-democrats-introduce-anti-corruption-bill-as-symbolic-first-act>. As a nonpartisan organization, IFS does not support or oppose any political party.

72 See, e.g., Alexi McCammond, *Nearly 200 Democrats are refusing corporate PAC money*, AXIOS (Aug. 7, 2018), at <https://www.axios.com/democrats-refusing-corporate-pac-money-2018-nid/terms-025e9e71-f63d-4516-971c-e9e7e9a10630.html>.

73 See 11 C.F.R. § 114.5.

74 H.R. 1 § 4101 (to be codified at 52 U.S.C. § 30121(b)).

75 See 52 U.S.C. § 30118.

76 SEIU, IRS Form 990 (2016), Part III Line 1, at <https://pdf.guidestar.org/PDF/Images/2016/360/852/2016-360852885-0ec457b8-90.pdf>.

77 *Id.* Part IV Line 14b.

78 *Id.* Part V, Line 4a.

79 See FEC, *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

80 *Id.* at 18,590-18,591.

81 11 C.F.R. §§ 100.26, 100.155. Although the rule's exclusive reference to "Web site" is somewhat outdated, it is generally understood to also apply to "apps" and other similar digital advertising platforms.

Facebook posts; unpaid Twitter tweets; YouTube uploads; or “any other form of communication distributed over the Internet” are not regulated.<sup>82</sup>

H.R. 1 would severely erode the FEC’s current Internet rules by changing the standard that triggers regulation of a “public communication” to include any “paid internet, or paid digital communication.”<sup>83</sup> This is a vaguer and broader standard than what the FEC’s rules currently regulate. The bill’s use of different terminology to describe the scope of regulated Internet communications suggests an intentional effort to cover additional forms of online speech. This is especially so in light of the bill drafters’ apparent familiarity with the FEC’s regulations.<sup>84</sup> Indeed, the “paid internet, or paid digital communication” standard is broader than even the standard set forth elsewhere in H.R. 1 for “electioneering communications” (discussed more below) that are “placed or promoted for a fee on an online platform.”<sup>85</sup>

Thus, if H.R. 1 were enacted, it is likely that anyone operating a website, for example, may unwittingly run afoul of the FEC’s disclaimer and reporting requirements by posting unflattering information about a federal candidate or elected official. This is because the costs of hosting and maintaining a website likely would qualify the website as a “paid internet, or paid digital communication.”<sup>86</sup> Similarly, a group that sends out a voter guide or a legislative scorecard using a paid e-mail service or mobile device app likely would be making a “paid internet, or paid digital communication” under H.R. 1. Even a group’s Facebook posts, Twitter tweets, and YouTube uploads could be regulated if paid staff are used to create such content.<sup>87</sup> In other words, H.R. 1’s “Honest Ads Act” component would regulate communications that are not “ads” at all. This is especially problematic where, as discussed above, H.R. 1’s “DISCLOSE Act” provisions also would impose an extremely vague and broad standard for when the content of a “public communication” would trigger regulation.<sup>88</sup>

H.R. 1’s effective repeal of the FEC’s Internet exemption would cause much more online and digital speech to become subject to the FEC’s existing disclaimer requirements, which apply to regulated communications of any dollar value whatsoever,<sup>89</sup> and reporting requirements, which apply to regulated communications of as little as \$250.<sup>90</sup> (These disclaimer and reporting requirements are in addition to the expanded disclaimer and reporting requirements that H.R. 1’s “DISCLOSE Act” provisions would impose on certain Internet ads, as discussed above.)

While compelling speakers to comply with disclaimer and reporting requirements may, in theory, seem like no big deal, in practice, these requirements are anything but straightforward. As IFS has demonstrated, a super PAC ran by Harvard Law Professor Larry Lessig, a self-styled campaign finance policy expert and advocate, was unable to correctly decipher the FEC’s disclaimer requirements.<sup>91</sup> Violations of the disclaimer and reporting requirements, whether inadvertent or intentional, also subject speakers to monetary penalties (after enduring complaints and investigations).<sup>92</sup> Thus, H.R. 1 will force speakers, at great expense, to consult the small cottage industry of campaign finance attorneys (most of whom are concentrated “inside the Beltway”) before speaking.<sup>93</sup> Many speakers, especially smaller groups, would choose silence instead.

<sup>82</sup> *Id.* § 100.155(b).

<sup>83</sup> H.R. 1 § 4205 (to be codified at 52 U.S.C. § 30101(22)).

<sup>84</sup> *See id.* § 4207 (addressing 11 C.F.R. § 110.11(f)(1)(i), (ii)).

<sup>85</sup> Compare H.R. 1 § 4205 (to be codified at 52 U.S.C. § 30101(22)) with *id.* § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A), (D)); *see also Russell v. U.S.*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

<sup>86</sup> Prior to the FEC adopting its current regulation in 2006, which H.R. 1 would upend, the FEC routinely found that any expenditure of funds to maintain a personal or group website constituted a regulated expenditure. *See, e.g.*, FEC Adv. Op. No. 1998-22 (Leo Smith) (where an individual citizen creates a website with political content, “costs associated with the creation and maintaining of the web site, ... would be considered an expenditure under the Act and Commission regulations.”); FEC Advisory Opinion 1999-25 (D-Net) (website maintained by League of Women Voters would not be regulated as a campaign “expenditure” only if it was operated on a nonpartisan basis). *See also, e.g.*, FEC Matter Under Review 6795: Citizens for Responsibility for Ethics in Washington (“CREW”) allegedly failed to file FEC reports for content on its website impugning the character and fitness for office of various federal candidates and elected officials, and for maintaining a list of the “Most Corrupt Members of Congress,” among other activities. As two of the FEC’s commissioners explained, CREW’s activities fell within the Internet exemption. *Id.* Statement of Reasons of Commissioners Lee E. Goodman and Caroline C. Hunter. H.R. 1 would remove the Internet exemption for organizations like CREW.

<sup>87</sup> *See* FEC, Matter Under Review 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (explaining that YouTube videos are covered by the Internet exemption).

<sup>88</sup> H.R. 1 § 4111 (to be codified at 52 U.S.C. § 30126(d)(1)(B)).

<sup>89</sup> 11 C.F.R. § 110.11(a)(2).

<sup>90</sup> 52 U.S.C. § 30104(c)(1).

<sup>91</sup> Inst. for Free Speech, *FEC Complaint: Mayday PAC violated campaign finance laws* (Nov. 20, 2014), at <http://www.ifs.org/2014/11/20/fec-complaint-mayday-pac-violated-campaign-finance-laws/>.

<sup>92</sup> *See* 52 U.S.C. § 30109(a).

<sup>93</sup> *See Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney ... or seek declaratory rulings before discussing the most salient political issues of our day.”).

## B) H.R. 1 Would Expand Regulation of Issue Speech to the Internet

H.R. 1's "Honest Ads Act" provisions purport to be premised on the unique ability of Internet advertising to micro-target recipients,<sup>94</sup> but the bill's "electioneering communications" provision doesn't match the bill's premise. Not only would H.R. 1 expand the existing disclaimer and reporting requirements for "electioneering communications" to online advertising, but it would do so indiscriminately by covering communications that are not even targeted to any relevant electorate. In other words, an online ad only running in Texas that named a Senate leader from New York would become a regulated communication. A similar TV or radio ad would not. The bill's regulation of online issue speech in this overbroad manner raises serious questions about its constitutionality.

Despite their name, so-called "electioneering communications" often encompass issue speech not related to any election. For example, an ad asking members of the public to contact their Senators about a criminal justice reform bill pending in Congress has been held to be an "electioneering communication," even though the ad did not praise or criticize the elected officials in any way.<sup>95</sup> Under existing law, broadcast, cable, or satellite ads that refer to federal candidates or elected officials, but that do not expressly advocate their election or defeat, are regulated as "electioneering communications" if they:

- (1) Refer to a clearly identified federal candidate or elected official;
- (2) Are publicly distributed within 60 days before the general election in which the referenced candidate or official is on the ballot, or within 30 days before the primary election or party convention or caucus in which the candidate or official is seeking the party's nomination; and
- (3) Are "targeted to the relevant electorate."<sup>96</sup>

Importantly, with respect to the last condition, the ad must be capable of reaching at least 50,000 or more persons in the jurisdiction the candidate seeks to represent, in the case of congressional candidates, or, in the case of presidential candidates, in the state holding the primary or anywhere in the country in the case of a national nominating convention.<sup>97</sup>

Like express advocacy communications, "electioneering communications" are subject to complex FEC disclaimer, reporting, and recordkeeping requirements.<sup>98</sup>

H.R. 1 would extend the regulation of "electioneering communications" to "any communication which is placed or promoted for a fee on an online platform," and which references a federal candidate or officeholder within a relevant 30- or 60-day pre-election time window.<sup>99</sup> Notably and ironically, given the bill's concern about micro-targeting on online platforms,<sup>100</sup> H.R. 1 dispenses with any targeting requirement whatsoever for online "electioneering communications."<sup>101</sup>

Thus, an online issue ad could be regulated as an "electioneering communication" if it targets Iowa farmers to contact House Speaker Nancy Pelosi, whose district consists of the San Francisco area, to urge her to help pass an agriculture bill, or if it targets residents of Gulf Coast states to contact Senate Majority Leader Mitch McConnell, who represents Kentucky, to urge him to help pass a hurricane relief bill. Even an ad that refers to a bill by the sponsor's name would trigger regulation if the sponsor were up for election, notwithstanding that the ad was targeted to a "geofenced" area 1,000 miles away from the sponsor's state or district. Obviously, the recipients of the online ads in these examples are ineligible to vote for or against the referenced elected officials,<sup>102</sup> and it makes no sense for H.R. 1 to regulate these ads as "electioneering" under the campaign finance laws, even if they were to be disseminated within the designated pre-election time windows.

The Supreme Court has upheld the current federal "electioneering communication" regime against constitutional challenges, both facially<sup>103</sup> and as-applied to "pejorative" ads about then-Senator Hillary Clinton's 2008 bid for the Democratic presidential nomination.<sup>104</sup> But it did so because "the vast majority of [electioneering communication] ads clearly" sought to elect

<sup>94</sup> H.R. 1 § 4203.

<sup>95</sup> See *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D. D.C. 2016), *aff'd per curiam*, 137 S. Ct. 1204 (2017).

<sup>96</sup> 52 U.S.C. § 30104(f)(3).

<sup>97</sup> 11 C.F.R. § 100.29.

<sup>98</sup> 11 C.F.R. §§ 110.11(a)(4), (b)(3), (c)(4); 104.20(d).

<sup>99</sup> H.R. 1 § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A), (D)).

<sup>100</sup> *Id.* § 4203.

<sup>101</sup> *Id.* § 4206 (to be codified at 52 U.S.C. § 30104(f)(3)(A)(i)(III)).

<sup>102</sup> U.S. Const., Art. I § 2(1) and Amend. XVII § 1.

<sup>103</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201-202 (2003).

<sup>104</sup> *Citizens United*, 558 U.S. at 366-367; also *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of *cert.*) ("And finally in *Citizens United v. Federal Election Comm'n*, the Court concluded that federally required disclosure 'avoid[ed] confusion by making clear' to voters that advertisements naming then-Senator Hillary Clinton and 'contain[ing] pejorative references to her candidacy' were 'not funded by a candidate or political party'" (quoting *Citizens United*, 558 U.S. at 368).

candidates or defeat candidates.<sup>105</sup> The government documented through a record “over 100,000 pages long”<sup>106</sup> that Congress had precisely targeted the type of communication and forms of media required to regulate “candidate advertisements masquerading as issue ads.”<sup>107</sup> However, the Supreme Court also has cautioned that “the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”<sup>108</sup>

By contrast, the regulation of online issue ads under H.R. 1 as “electioneering communications” would run into a potential constitutional buzz saw because: (1) the bill would regulate ads that are targeted to recipients ineligible to vote for or against the referenced candidates; and (2) the bill recites no evidence whatsoever that online issue ads are “candidate advertisements masquerading as issue ads.”

#### C) H.R. 1 Would Impose Unconstitutionally Burdensome “Public File” Requirements for Online Ads

H.R. 1 also would require online advertisers and platforms to comply with the “public file” requirements that currently apply to broadcasters and cable and satellite system operators. This is, in effect, a new reporting and recordkeeping requirement for online ads that would cover not only speech about candidates, but also speech about any “national legislative issue of public importance.” The “public file” requirement would raise the costs of online speech and likely would impede or deter, and may even end, many small grassroots advertising efforts.

Specifically, any person or group spending as little as \$500 during a calendar year on “qualified political advertisements” on many popular and widely-accessed Internet platforms (including news and social networking websites, search engines, and mobile apps) would have to provide certain information to those platforms, and the information would have to be posted in an online “public file.”<sup>109</sup>

These files would have to include:

- A digital copy of the regulated ad;
- A description of the audience targeted by the ad, the number of views generated, and the dates and times the ad was first and last displayed;
- The average rate charged for the ad;
- The name of, and the office sought by, the candidate referenced in the ad, or the “national legislative issue of public importance” discussed in the ad; and
- For ad sponsors that are not candidates or their campaign committees, the name of the sponsor; the name, address, and phone number for the sponsor’s contact person; and a list of the chief executive officers or board members of the sponsor.<sup>110</sup>

The term “national legislative issue of public importance” is not defined and is borrowed from the “public file” requirements for broadcasters under the federal Communications Act, which also does not define this term.<sup>111</sup> In practice, broadcasters’ advertising departments have interpreted this term loosely to cover most forms of non-commercial advertising. Thus, grassroots groups using social media to promote contentious but important causes, such as support or opposition for a wall on the U.S.-Mexico border, immigration reform, the “Tea Party,” “Black Lives Matter,” or the “Women’s March,” to targeted supporters, may find themselves targeted for harassment and retaliation by opponents monitoring the content and scope of their online advertising campaigns using the information reported in the “public file.”

Moreover, H.R. 1 would impose liability on both advertisers and online platforms for properly providing and collecting the information, which must be retained and made publicly accessible for at least four years after each ad is purchased.<sup>112</sup> Penalties could amount to several thousand dollars per violation.<sup>113</sup> (Oddly enough, H.R. 1 also would place these requirements

<sup>105</sup> *McConnell*, 540 U.S. at 206; *id.* at 193 (“And although the resulting advertisements do not urge the viewer to vote for or against a candidate *in so many words*, they are no less clearly intended to influence the election.”) (emphasis added).

<sup>106</sup> *Citizens United*, 558 U.S. at 332 (citation and quotation marks omitted).

<sup>107</sup> *McConnell*, 540 U.S. at 132 (quotation marks omitted); *id.* at 127–128 (noting that “so-called issue ads,” which “eschewed the use of magic words,” were “almost all [] aired in the 60 days immediately preceding a federal election.”).

<sup>108</sup> *McConnell*, 540 U.S. at 206 n.88.

<sup>109</sup> H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(j)).

<sup>110</sup> *Id.*

<sup>111</sup> See 47 U.S.C. § 315(e)(1)(B)(iii).

<sup>112</sup> H.R. 1 § 4208 (to be codified at 52 U.S.C. § 30104(j)(5)).

<sup>113</sup> *Id.* (to be codified at 52 U.S.C. § 30104(j)(6)); see also 52 U.S.C. § 30109(a)(5), (6).

under the campaign finance law, granting enforcement authority to the FEC, even though much of the speech covered by these requirements would have nothing to do with federal elections.<sup>114</sup>) The combination of these compliance costs and legal risks may cause many online platforms to conclude that it is simply not worth their while to offer any political or issue advertising at low-dollar amounts, to the detriment of small grassroots groups.

Sen. Amy Klobuchar, who sponsored the original “Honest Ads Act” incorporated into H.R. 1,<sup>115</sup> mistakenly claimed the proposed requirements would “harmonize[] the rules governing broadcasters, radio, print, on one hand, and online on the other.”<sup>116</sup> In fact, advertisers using telephone calls, canvassing, and print (e.g., newspapers, magazines, direct mailers, and pamphlets) are not subject to the “public file” requirement.<sup>117</sup> Moreover, broadcasters are subject to the “public file” requirement because they are required to act in the “public interest” due to the scarcity of the portion of the electromagnetic spectrum over which content and data may be transmitted, or, in the case of cable and satellite operators, because their services affect broadcast service.<sup>118</sup>

The “online platforms” that would be regulated by H.R. 1 are not at all like broadcast, cable, or satellite services. To the extent that they have any “bandwidth” limitations, they are not in any way comparable to the spectrum limitations for broadcasters. Regardless of whether there are alternative policy reasons for subjecting online platforms to heightened regulation, lawmakers should not be misled by the false proposition that the “public file” justifications that apply to broadcast, cable, and satellite media also apply to Internet media.

H.R. 1’s “public file” provisions are similar to a Maryland law that a federal court recently issued a preliminary injunction against for likely being unconstitutionally burdensome.<sup>119</sup> While the Maryland law has some material differences, the general infirmity in H.R. 1 – as in the Maryland law – is that the bill’s requirements are a poor fit for the Russian propaganda campaign against Americans that the “public file” provisions purport to counteract.<sup>120</sup> As a bill that would regulate core political speech and compel speech in the form of information that online platforms must publish, H.R. 1 would be subject to the “strict scrutiny” standard of judicial review.<sup>121</sup> As such, the bill may be neither overbroad nor underinclusive in terms of the speech it regulates and fails to regulate.<sup>122</sup>

H.R. 1 is overbroad in that its “public file” requirements would apply mostly to speech by American citizens. This is especially apparent when H.R. 1 is held up against the Foreign Agents Registration Act, which imposes registration and reporting requirements only with respect to agents of foreign persons, foreign organizations, foreign governments, and foreign political parties.<sup>123</sup> H.R. 1 also is underinclusive in its exclusive focus on paid advertising when most of the Russian propaganda has been in the form of unpaid social media posts.<sup>124</sup> H.R. 1 also is generally a poor fit for the Russian threat because it is rather fanciful to think that a foreign government adversary bent on wreaking havoc on American society is going to bother to comply with the law by providing accurate information for the “public file.”<sup>125</sup>

Facebook and Twitter have recently announced their own efforts to address foreign propaganda, which contain some similarities to the “public file” requirement that H.R. 1 would impose.<sup>126</sup> Nevertheless, these self-initiated measures are preferable to inflexible, one-size-fits-all legislation, as they can be adjusted and tailored over time to meet each platform’s unique advertising program and changing foreign threats.

114 See *id.*

115 See S. 1989 (115th Cong.).

116 Sens. Warner & Klobuchar Introduce the Honest Ads Act, Youtube.com (Oct. 19, 2017) at <https://www.youtube.com/watch?v=LVEHjNN1WIk> at 7:00-7:10.

117 See note 111, *supra*.

118 See 47 U.S.C. § 309; FCC, Licensing, at <https://www.fcc.gov/licensing-databases/licensing>; FCC, *In re* Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees (Jan. 28, 2016) ¶¶ 5-7, at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-4A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-4A1.pdf); FCC, Public Inspection Files, at <https://publicfiles-demo.fcc.gov/>; FCC, Cable Television, at <https://www.fcc.gov/media/engineering/cable-television>.

119 *Wash. Post v. Manus*, Case No. 1:18-cv-02527-PWG, Memo. Op. (D. Md. Jan. 3, 2019).

120 See *id.*; H.R. 1 § 4203.

121 *Wash. Post*, Memo. Op. at 14-16. Unlike other campaign finance reporting laws, which require filing reports with government agencies, H.R. 1 would impose the reporting requirement with the online platforms and would charge them with publishing the information, and thus the more lenient “exact-ing scrutiny” that typically applies to campaign finance reporting laws would not apply here. See *id.* at 26-29.

122 *Id.* at 38.

123 22 U.S.C. § 611 *et seq.*

124 *Wash. Post*, Memo. Op. at 41-42; New Knowledge, *The Tactics & Tropes of the Internet Research Agency*, at <https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper-121718.pdf>; Computational Propaganda Research Project, *The IRA, Social Media and Political Polarization in the United States, 2012-2018*, at <https://comprop.ohi.os.ac.uk/wp-content/uploads/sites/93/2018/12/JRA-Report-2018.pdf>.

125 *Wash. Post*, Memo. Op. at 47.

126 Mary Clare Jalonick, *Facebook announces new transparency for political ads before Russia hearing*, CHICAGO TRIBUNE (Oct. 27, 2017), at <http://www.chicagotribune.com/bluesky/technology/ct-facebook-ads-20171027-story.html>; Cecilia Kang and Daisuke Wakabayashi, *Twitter Plans to Open Ad Data to Users*, N.Y. TIMES (Oct. 24, 2017), at <https://www.nytimes.com/2017/10/24/technology/twitter-political-ad-data.html>.



#### IV. H.R. 1 Would Make Media Outlets Liable for Policing Prohibited Speakers

H.R. 1 also would make broadcast, cable, satellite, and Internet media companies liable for failing to “make reasonable efforts to ensure that” “campaign related disbursements” are not purchased “directly or indirectly” by any foreign national.<sup>127</sup> Similar to the imposition of liability on online platforms for maintaining a “public file,” this requirement for media outlets to act as gatekeepers against foreign nationals will ultimately be passed on in the form of increased costs for all advertisers – especially for online ads, where the cost of compliance will often be far higher relative to, and may exceed,<sup>128</sup> the revenue from the ads themselves. Online platforms may stop selling political ads altogether, as they have done in response to similar state laws being enacted in Maryland and Washington.<sup>129</sup>

This is especially the case since “reasonable efforts” are undefined, and careful lawyers will doubtlessly suggest a conservative approach that will further drive up the costs of small-scale advertising. Moreover, given the apparently discrete ad buys by Russian interests driving this legislation,<sup>130</sup> Congress will be understood to have targeted both large-scale ad buys where individual vetting is economically viable, and small-scale advertising where it is not. Basic economics suggests the result: online platforms will not offer small-scale products that are unprofitable.

Lastly, media outlets may be spurred by liability concerns to engage in undesirable profiling, or to impede advertising containing disfavored viewpoints under the guise of investigating a speaker’s eligibility to sponsor an ad.<sup>131</sup>

#### V. H.R. 1 Would Impose Inflexible and Impractical Disclaimer Requirements

In addition to the disclaimer requirements discussed above that H.R. 1 would impose on Internet ads containing video and audio content, the bill would impose other general and inflexible disclaimer burdens on all Internet ads.<sup>132</sup> Many of these rules are written for broadcast ads and are impractical for many online ad formats – not just small-sized display ads.

The existing FEC disclaimer requirements that H.R. 1 would extend to online ads are already unwieldy, especially for space-limited ads. For independent expenditures and electioneering communications, the disclaimer must provide the sponsor’s name; street address, telephone number, or website URL; and state that the ad is not authorized by any candidate or candidate’s committee.<sup>133</sup> In addition, TV and radio ads must include an audio disclaimer declaring that “[Sponsor’s name] is responsible for the content of this advertising,” and video ads must also contain a similar text disclaimer. As discussed above, H.R. 1 also would require additional donor information to be included in this existing disclaimer language for video and audio ads.

For candidate-sponsored ads, the disclaimer must state, “Paid for by [name of candidate’s campaign committee].”<sup>134</sup> In addition, TV and radio ads must include an audio disclaimer spoken by the candidate stating his or her name, and that he or she has approved the message, and TV ads also must contain a full-screen view of the candidate making the statement or a photo of the candidate that appears during the voice-over statement.<sup>135</sup> TV ads also must contain an on-screen text disclaimer containing “a similar statement” of candidate approval.<sup>136</sup>

<sup>127</sup> H.R. 1 § 4209 (to be codified at 52 U.S.C. § 30121(d)).

<sup>128</sup> See Peter Kafka, *Facebook will spend so much reviewing political ads this year that it will lose money on them*, RECODE (May 1, 2018) at <https://www.recode.net/2018/5/1/17309514/facebook-money-politics-advertising-2018-mark-zuckerberg>.

<sup>129</sup> Michael Dresser, *Google no longer accepting state, local election ads in Maryland as result of new law*, BALTIMORE SUN (Jun. 29, 2018), at <https://www.baltimoresun.com/news/maryland/politics/ba-md-google-political-ads-20180629-story.html>; Facebook to stop accepting campaign ads in Washington State, *ADAGE* (Dec. 20, 2018), at <https://adage.com/article/tech/facebook-stop-accepting-campaign-ads-washington-state/316066/>.

<sup>130</sup> See, e.g., Tom Huddleston, Jr., *Russian Facebook Ads Targeted Muslims, Gun Owners, Black Lives Matter*, FORTUNE.COM (Oct. 2, 2017), at <http://fortune.com/2017/10/02/facebook-russian-ads-congress/> (describing “nearly 3,000 ads” from “hundreds of Russian-linked accounts”).

<sup>131</sup> See, e.g., Kyle Swenson, *Twitter calls foul on Rep. Marsha Blackburn ad because of ‘baby body parts’ comment*, WASH. POST (Oct. 10, 2017), at [https://www.washingtonpost.com/news/morning-mix/wp/2017/10/10/twitter-calls-foul-on-rep-marsha-blackburn-ad-due-to-baby-body-parts-comment/?utm\\_term=.a34e139ad8d0](https://www.washingtonpost.com/news/morning-mix/wp/2017/10/10/twitter-calls-foul-on-rep-marsha-blackburn-ad-due-to-baby-body-parts-comment/?utm_term=.a34e139ad8d0).

<sup>132</sup> H.R. 1 § 4207 (to be codified at 52 U.S.C. § 30120(d), (e)).

<sup>133</sup> 11 C.F.R. § 110.11(a)(2) and (4), (b)(3).

<sup>134</sup> 11 C.F.R. § 110.11(b)(1).

<sup>135</sup> *Id.* § 110.11(c)(3).

<sup>136</sup> *Id.*

The current radio ad disclaimers – which H.R. 1 would make even lengthier – often run for as long as 10 to 15 seconds, depending on the name of the group and contact information provided, but many online radio or podcast ad formats are limited to only 10 to 15 second lengths.<sup>137</sup> Online video ads also are commonly much shorter than broadcast TV ads.<sup>138</sup>

The FEC's existing disclaimer requirements exempt "small items" and communications where it is "impracticable" to include a disclaimer.<sup>139</sup> Such small items include pens, buttons, and bumper stickers, but also include Google search ads and presumably other small online ads.<sup>140</sup>

H.R. 1 would make "qualified internet or digital communications" (i.e., those "placed or promoted for a fee on an online platform") ineligible for these exemptions from the disclaimer requirements.<sup>141</sup> At a minimum, a digital ad would have to contain on its face the name of the ad's sponsor, and this information could not be displayed by alternative means, such as "clicking through" the ad.<sup>142</sup> The ad also would have to provide some means for recipients to obtain the complete required disclaimer, thus barring the use of formats where this may be technically impossible or impractical or if the vendor does not allow for it.<sup>143</sup> Notably, the complete disclaimer also could not be provided by linking to the advertiser's website where all of the remaining information would be available, but rather must be provided on a stand-alone page.<sup>144</sup> Thus, H.R. 1 may make many forms of small, popular, and low-cost Internet and digital ads off-limits for political advertisers.

### Conclusion

H.R. 1 is clearly a slapdash legislative vehicle that stitches together prior standalone bills comprised of unworkable and likely unconstitutional provisions that rightfully went nowhere. For this reason, the bill may seem like an unserious political ploy that is unlikely to pass the Senate or to be signed into law. Nonetheless, it should be examined carefully and subjected to critical pushback. As the first bill to be introduced in the House of Representatives for the 116th Congress, H.R. 1 is a disturbing statement of legislative priorities that does not augur well for efforts to protect free speech and associational and donor privacy for the rest of this Congress.

137 See *Personalization of Audio: Shorter Audio Ads*, PANDORAFORBRANDS.COM (Aug. 24, 2017), at <http://pandoraforbrands.com/insight/personalization-of-audio-shorter-audio-ads/> and *Everything You Need to Know about Podcast Advertising*, CLEVERISM.COM (Apr. 9, 2016), at <https://www.cleverism.com/everything-about-podcast-advertising/>.

138 See, e.g., Garrett Sloane, *Facebook Gets Brands Ready for 6-Second Video Ads*, ADAGE.COM (Jul. 26, 2017), at <http://adage.com/article/digital/facebook-brands-ready-6-video-ads/309929/>.

139 11 C.F.R. § 110.11(f)(1)(i), (ii).

140 See FEC Adv. Op. No. 2010-19 (Google).

141 H.R. 1 § 4207(b)(2).

142 *Id.* § 4207 (to be codified at 52 U.S.C. § 30120(e)(1)).

143 *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(b)).

144 *Id.*

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The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, press, assembly, and petition.

Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

2019 Institute for Free Speech

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## INSTITUTE FOR FREE SPEECH

### Analysis of H.R. 1 (Part Two)

#### *Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights*

Bradley A. Smith, Chairman

January 2019

#### *Introduction*

While most of the attention on H.R. 1 has focused on “hot” issues, such as earmarking government subsidies for political campaigns, gerrymandering, and new restrictions on grassroots organizations that engage in public affairs,<sup>1</sup> twenty pages of the bill are devoted to the unsexy, yet vitally important, issue of the Federal Election Commission’s (FEC) composition and operating procedures.<sup>2</sup>

If you’re a Democrat, do you think Donald Trump should be able to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you’re a Republican, would you have wanted those rules enforced by a partisan selected by Barack Obama?

Of course not. That’s why for over 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency. The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.<sup>3</sup>

As the late Sen. Alan Cranston (D-Cal.) warned during debate on legislation creating the agency, “We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.”<sup>4</sup> That concern led to Congressional adoption of the present method of selecting Commission members.

Those concerns also caused Congress to structure the Federal Election Commission so that a president could not install a partisan majority that could abuse campaign regulations to bludgeon their opponents.

Bipartisanship is not easy. It requires both sides to recognize they will not always get their way. But for over 40 years, Republicans and Democrats were able to do it. Throwing that away and simply hoping a new agency will side with your preferred party is reckless and an enormous threat to the First Amendment.

In a nutshell, H.R. 1 does away with the FEC’s existing bipartisan structure to allow for partisan control of the regulation of campaigns and enables partisan control of enforcement. It also proposes changes to the law to bias enforcement actions against speakers and in favor of complainants.

<sup>1</sup> See, e.g., Eric Wang, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at [https://www.ifsf.org/wp-content/uploads/2019/01/2019-01-23\\_IFS\\_Analysis\\_US\\_HR-1\\_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf](https://www.ifsf.org/wp-content/uploads/2019/01/2019-01-23_IFS_Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf).

<sup>2</sup> As the Institute for Free Speech (IFS) continues to analyze this and other sections of H.R. 1 that regulate First Amendment rights, it expects to release additional analyses of the bill. IFS’s written analyses may not address every concern it may have with the proposal, as the 570-page bill’s provisions are simply too numerous and complex to be able to effectively discuss the bill’s contents in their entirety.

<sup>3</sup> See Scott Blackburn, Delusions about “Dysfunction”: Understanding the Federal Election Commission, Institute for Free Speech (Oct. 5, 2015), at [https://www.ifsf.org/wp-content/uploads/2015/10/2015-10-05\\_IFS-Issue-Brief\\_Blackburn\\_Delusions-About-Dysfunction-Understanding-The-FEC.pdf](https://www.ifsf.org/wp-content/uploads/2015/10/2015-10-05_IFS-Issue-Brief_Blackburn_Delusions-About-Dysfunction-Understanding-The-FEC.pdf).

<sup>4</sup> Legislative History of Federal Election Campaign Act Amendments of 1976, Federal Election Commission, at [https://transition.fec.gov/pdf/legislative\\_hist/legislative\\_history\\_1976.pdf](https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf) at 89.

*Executive Summary*

Specifically, H.R. 1 would:

- Transform the Federal Election Commission from a bipartisan, 6-member agency to a partisan, 5-member agency under the control of the president. This change could have the effect of decreasing the Commission's legitimacy by significantly increasing the likelihood that the agency's decisions will be made with an eye towards benefiting one political party, or, at best, be seen that way by the public.
- Empower the Chair of the Commission, who will be hand-picked by the president, to serve as a de facto "Speech Czar." In particular, the Chair would become the Chief Administrative Officer of the Commission, with the sole power to, among other things, appoint (and remove) the Commission's Staff Director, prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.
- Dispose of the requirement in existing law that the Commission's Vice Chair come from a different party than the Chair, further allowing power at the agency to be consolidated within one party.
- Time the enactment of this provision to ensure continued one-party control of the Commission. As a result, the president elected in 2020 will be able to ensure that his or her appointees constitute a majority of the Commission and the powerful Chair's Office through at least 2027, even if he or she is not re-elected in 2024.

Relatedly, this structure will result in all new regulations required under other provisions of H.R. 1 being written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel. These provisions can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races.

- Expand the General Counsel's power while eroding accountability among the Commissioners. In a departure from existing practice, H.R. 1 provides that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days. Such a change allows investigations to begin without bipartisan support while also allowing commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel's recommendation take effect.

H.R. 1 also permits the General Counsel to issue subpoenas on his or her own authority, rather than requiring an affirmative vote by the Commission.

- Create new standards of judicial review that weaken the rights of respondents in Commission matters. If a respondent challenges in court a Commission decision finding that it violated the law, the court will defer to any reasonable interpretation the agency gives to the statute, but if the respondent wins at the Commission, no deference will be given to the FEC's decision, if challenged in court. This "heads I win, tails you lose" approach harms respondents and biases court decisions against speakers.
- Establish a non-binding "Blue Ribbon Advisory Panel" to aid the president in filling Commission vacancies that is exempt from the requirements of the Federal Advisory Committee Act, effectively creating an elite committee to debate in secret, on the public's dime, and with the imprimatur of the government, on whom the president should appoint to the agency.
- Hamstringing the FEC in its advisory opinion process by mandating that interested parties who submit written comments to the Commission must be allowed to present testimony at meetings on advisory opinion requests. This change is akin to dictating to Congress who has a right to testify in committee hearings.

## Analysis

### I. Creating A Partisan FEC

#### A) Background

Title VI, Subtitle A of H.R. 1, dubbed the “Restoring Integrity to America’s Elections Act,” begins by abolishing the FEC’s historic, bipartisan structure.

Since it was created in 1974, the FEC has been a true bipartisan commission, with each major party effectively controlling 3 of its 6 seats. (Current law says that “[n]o more than 3 members of the [FEC] . . . may be affiliated with the same political party.”)<sup>5</sup> Under the post-Watergate statute creating the FEC, four votes are needed for the Commission to initiate investigations or to prosecute alleged violations.<sup>6</sup> As a result, it is impossible for an investigation or prosecution of a Democratic campaign to go forward on the basis of Republican votes alone, and vice versa – there must be at least some bipartisan agreement that an investigation or charges are warranted.

Critics who favor more regulation of political speech have long complained that this bipartisan structure hamstringing FEC enforcement efforts and detracts from the legitimacy of the Commission. With 3 Republicans and 3 Democrats, the Commission, they argue, “frequently deadlocks” and is unable to move forward on enforcement matters.<sup>7</sup> Effectively, two-thirds of commissioners must agree before the Commission moves forward. This critique, however, is wrong on several fronts.

First, any small commission requires a sizeable supermajority to operate, including commissions with an odd number of members. A five-member body requires a 60% majority; a three-member body requires a two-thirds majority.

But, in fact, tie votes have always been a small percentage of FEC votes. Historically, they have totaled approximately one percent to four percent of Commission votes on enforcement matters.<sup>8</sup> During the peak years of alleged “gridlock” on the Commission, 2008-2014, they still totaled less than 15 percent of overall votes.<sup>9</sup>

Second, even when deadlocks occur, that does not leave an enforcement matter unresolved. Rather, it means that the FEC will not open an investigation, or will not prosecute an alleged violation, as the case may be. A 3-3 vote on such a motion means the motion fails – there is nothing mysterious or out of the ordinary about it. And since the goal is to assure some degree of bipartisan agreement before proceeding, that is the proper result.

That leads to the third and most important point: Although critics claim that tie-votes sap the FEC’s ability to enforce campaign finance laws, in fact, it is assuredly the opposite. The only reason that the FEC has any legitimacy is its bipartisan makeup. Particularly in the current environment, it is inconceivable that an agency empowered to make prosecutorial decisions about the legality of campaign tactics, communications, funding, and activities on a straight party-line vote would have any legitimacy.

#### B) Creating a Partisan Commission

##### 1. Abandoning the FEC’s Equal Party Makeup

H.R. 1 does away with the FEC’s historic bipartisan makeup, creating a 5-member Commission and allowing a simple majority vote to launch an investigation or to prosecute an alleged violation.<sup>10</sup>

<sup>5</sup> 52 U.S.C. § 30106(a)(1).

<sup>6</sup> 52 U.S.C. § 30106(c).

<sup>7</sup> See, e.g., Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), at <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html> and Justin Miller, *Reform Advocates’ Elusive Goal: Fix the FEC*, THE AMERICAN PROSPECT (Mar. 3, 2016), at <https://prospect.org/blog/checks/reform-advocates%2%80%99-clusive-goal-fix-fec>.

<sup>8</sup> See, e.g., Bradley A. Smith, Opening Statement of Bradley A. Smith, Chairman of the Federal Election Commission Before the Senate Committee on Rules and Administration, Federal Election Commission (Jul. 14, 2004), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smithstatement05.pdf>; Bradley A. Smith and Stephen M. Hoerstering, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, ELECTION LAW JOURNAL (Vol. 1, No. 2, 2002), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smitharticle01.pdf> at 159.

<sup>9</sup> See, e.g., Lee E. Goodman, End of Year Statement from Chairman Lee E. Goodman, Federal Election Commission (Dec. 2014), at [http://www.fec.gov/members/goodman/statements/LEG\\_Closing\\_Statement\\_Dec\\_2014.pdf](http://www.fec.gov/members/goodman/statements/LEG_Closing_Statement_Dec_2014.pdf) at 2; Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), at <https://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html>.

<sup>10</sup> H.R. 1 § 6002(a).

The bill attempts to cover this partisan makeup by providing that no more than two of the five commissioners may be members of any one political party. This means that the fifth member would have to be a member of a minor party, or a political independent. This is not, however, a barrier to partisan control. For example, under this criteria, Senator Bernie Sanders, who nearly gained the 2016 Democratic presidential nomination, would not count as a Democrat on the Commission (technically, Sanders remains an “independent”), allowing him to join two other Democrats in a Commission majority. The same would be true for Angus King, the Maine senator elected as an independent, but who caucuses with Democrats.

Indeed, the FEC currently has an independent serving, Commissioner Steven Walther. But Walther was nominated at the behest of former Democratic Senate Majority Leader Harry Reid, having served as Reid’s lead attorney in a 1998 recount election Reid won by just 428 votes.<sup>11</sup> Walther holds a “Democratic” seat on the Commission, and is regularly identified as a Democrat.<sup>12</sup> Under H.R. 1, Walther would be the “balance of power.” Does that really sound nonpartisan?

The Pew Research Center has found that roughly two-thirds of self-identified “independents” are reliable supporters of one of the two major parties, and tend to be so because they intensely dislike the other major party.<sup>13</sup> In short, any president worth his salt would have no trouble finding an “independent,” or perhaps a Green or Libertarian, with views favorable to his or her party’s position, and inclined to particularly distrust the other major party. This is no recipe for nonpartisan enforcement.

What little fig leaf is added by having an “independent” member of the Commission can also be stripped away by the president. Under the current law, there must always be some level of bipartisan support for the Commission to undertake an investigation or prosecution. But H.R. 1 provides that a simple majority of sitting commissioners (but no less than three) constitutes a quorum and can take official action.<sup>14</sup> Thus, merely by refusing to fill vacancies set aside for the opposition party or the nominally independent fifth member, the president can assure that his or her two party appointees – with or without the support of the nominal independent or any member of another party – can enact a partisan enforcement agenda.

It is hard to imagine a better way to spread distrust of federal regulation of campaign speech.

## 2. A More Powerful, Partisan Chair – A Campaign Speech Czar

Under the FEC’s longstanding structure, the Chair of the Commission is elected by the Commissioners themselves to a one-year term at the start of each year and can only serve as Chair once in a six-year term. The Vice Chair and Chair must be from different parties. The Chair is not devoid of added power, but to a substantial extent, the position is ceremonial, because almost all major decisions, including hiring and firing key staff, issuing subpoenas, initiating enforcement actions, and approving proposed budgets for submission, must be made by a majority Commission vote. Again, the obvious purpose is to legitimize the Commission by assuring that it does not operate as a partisan agency.

H.R. 1 would create a speech czar in the form of a much more powerful Chair, appointed by the president, who would dominate the Commission. Under the legislation, the Chair would become the “Chief Administrative Officer” of the Commission, with the sole power to appoint – and remove – the Commission’s Staff Director, prepare its budget, “require . . . any person to submit, under oath, such written reports and answers to questions as the Chair may prescribe,” issue subpoenas, and compel testimony.<sup>15</sup> The legislation would require the Chair to “consult” with other commissioners on these matters, but, in the end, the Chair would have full authority to act alone.<sup>16</sup>

About the only administrative act the Chair cannot do alone is appoint the agency’s General Counsel. The Chair must make the appointment, but at least two other commissioners (again, no required bipartisanship) must concur.<sup>17</sup> Whether a majority of the Commission can appoint or dismiss the General Counsel over the Chair’s objections is not clear, but even if it can, no bipartisanship is required. The General Counsel has enormous influence on the Commission’s enforcement policies, and, as we will see below, H.R. 1 grants him or her even greater powers.

11 See Matt Bewig, Chair of the Federal Election Commission: Who Is Stephen Walther?, AllGov (May 16, 2017), at <http://www.allgov.com/news/top-stories/chair-of-the-federal-election-commission-who-is-steven-walther-170516?news=860181>.

12 That Commissioner Walther, after 13 years on the Commission, must still regularly make the point that he is not a registered Democrat illustrates that being an “independent” does not strip one of partisan leanings. See Tisha Thompson, et al., Deadlock: FEC Commissioners Say They’re Failing to Investigate Campaign Violations, NBC Washington (Sept. 19, 2016), at <https://www.nbcwashington.com/investigations/Deadlock-FEC-Commissioners-Say-Theyre-Failing-to-Investigate-Campaign-Violations-394014971.html>.

13 See Samantha Smith, 5 Facts about America’s political independents, Pew Research Center (Jul. 5, 2016), at <http://www.pewresearch.org/fact-tank/2016/07/05/5-facts-about-americas-political-independents/>.

14 H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(1)).

15 *Id.* § 6003 (to be codified at 52 U.S.C. § 30107(a)(1)(A)(i), (iii) and 52 U.S.C. § 30107(a)(1)(B)(ii), (iv)-(vi)).

16 *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(A)).

17 *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(B)(i)).

The Chair's power to appoint the Staff Director may sound like an innocuous administrative post, but, in fact, this is a powerful position and one that, like the General Counsel, exercises considerable sway in the FEC's enforcement processes as well as administration. That is because the FEC's Audit and Reports Analysis divisions and its Alternative Dispute Resolution Office fall under the direction of the Staff Director. Commission audits are extremely time-consuming for the committees and campaigns that are audited, and may require them to reveal substantial information about their political strategies and tactics. Audits may uncover violations, intentional or inadvertent, leading to fines and penalties. The Reports Analysis Division is responsible for compliance with the law's extensive reporting requirements, and its efforts, too, often identify violations – typically inadvertent, but still leading to penalties and bad publicity. And the Alternative Dispute Resolution Office has been a highly successful program through which the Commission resolves many contested or inadvertent violations. Any of these offices could easily be subverted to partisan use by a presidentially-appointed Chair and his or her hand-picked Staff Director.

Thus, the Chair's sole power to appoint or dismiss the Staff Director is not merely a matter of administration, but a matter of enforcement and enforcement policy. What will be the criteria for selecting campaigns and committees to be audited? What violations will be a priority for the Reports Analysis Division? Once again, current law requires bipartisan agreement to appoint or dismiss the Staff Director, but H.R. 1 subjects the position to partisan control.

Finally, H.R. 1 does away with the provision in existing law that the Vice Chair come from a different party than the Chair.<sup>18</sup> This further allows power to be consolidated within one party.

With the power to craft the agency budget, appoint the Staff Director at their sole discretion, appoint the General Counsel without bipartisan support, issue subpoenas, and compel testimony and reports on their sole authority, the Chair, appointed by the president, will be the single dominant member of the Commission, fully deserving of the speech czar label.

#### C) The Provision's Timing Is Intended to Ensure Ongoing One-Party Control of the Commission

While most provisions of H.R. 1 take effect in 2020, the provisions regarding FEC appointments take effect in 2021.<sup>19</sup> This means the victor in the 2020 presidential elections will appoint all five commissioners and name the initial Chair of the reconstructed commission. Furthermore, this president will be able to assure that his or her appointees constitute a majority of the Commission through at least 2027, even if he or she is not re-elected in 2024. That president will also have appointed the “independent” commissioner and the powerful Chair's Office through at least 2030.<sup>20</sup> That Chair and his or her majority will then name the Staff Director and General Counsel.

That means that all the new regulations required under other provisions of H.R. 1 will be written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel, and can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races. That same group would also respond to Advisory Opinion Requests and approve or disapprove of all enforcement actions.

Working with these potential advantages, if that president is re-elected in 2024, he or she could appoint a Commission majority through 2033.

#### D) Summary

In sum, under the guise of fixing a non-problem (alleged “gridlock”), H.R. 1 abandons the longstanding idea of a nonpartisan FEC and establishes a five-member commission subject to de facto partisan control. It adds to that partisan structure by giving enormous power to the Chair, acting alone, to establish agency priorities, issue subpoenas, appoint the powerful Staff Director without consent of other commissioners, and appoint the General Counsel.

The end result will be to weaponize the FEC as a potential tool of partisan campaign finance law enforcement, eroding public trust in the legitimacy of the agency and in the fairness of the election process more generally.

## II. Enhancing the General Counsel's Power and Eroding Commission Accountability

Historically, as with other FEC decisions, the decision to hire or fire an agency General Counsel has required some degree of bipartisan agreement. As we have seen, H.R. 1 would destroy that bipartisan requirement, allowing the president's appointed Chair to name the General Counsel with the support of any two of the other four commissioners appointed by that same president – and no bipartisan support.

<sup>18</sup> *Id.* (to be codified at 52 U.S.C. § 30106(a)(5)(C)).

<sup>19</sup> *Id.* § 6007(a).

<sup>20</sup> *Id.* § 6002 (to be codified at 52 U.S.C. § 30106(a)(2)(A)-(B)).



The General Counsel has always been a powerful voice at the agency, since that office, subject to Commission approval, investigates and prosecutes violations, litigates on behalf of the Commission, and drafts regulations and advisory opinions, among other duties. The FEC budget provides for just one attorney position directly under control of each commissioner (two for the Chair and Vice Chair – who, under the new structure, can both come from the president's party), so commissioners are of necessity heavily reliant on the legal advice and recommendations of the General Counsel and his or her staff.

H.R. 1 enhances the power of the General Counsel in several ways.

First, under current law, the FEC does not launch an investigation without the approval of the Commission<sup>21</sup> – again, an approval requiring bipartisan agreement. H.R. 1 provides, instead, that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days.<sup>22</sup> Not only does this allow investigations to begin without bipartisan support, but it also allows commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel's recommendation take effect.

Similarly, once an investigation is begun, H.R. 1 enhances the power of the General Counsel to issue subpoenas on his or her own authority. Under current law, subpoenas must be approved by the Commission. As a matter of efficiency, the FEC often authorizes the General Counsel to engage in broad discovery at the start of an investigation, without seeking approval at each step. But the Commission remains in the saddle. Under H.R. 1, the General Counsel need merely notify the Commission of his or her intent to conduct discovery, and unless a majority of the Commission affirmatively votes against the discovery within 15 days, the Counsel can proceed with whatever discovery is desired.<sup>23</sup> Again, the commissioners are absolved of the responsibility to vote on the matter, and the default option is to proceed with the investigation and subpoenas.

This section does include one of the few good provisions of this portion of H.R. 1 – extending the time for respondents to file briefs challenging the General Counsel's recommendation to find a violation of the Federal Election Campaign Act from 15 to a more realistic 30 days,<sup>24</sup> but this minor technical change doesn't even begin to offset the serious problems with the bill.

As with provisions for the appointment of the Commission itself, H.R. 1 is structured so that the party that gains initial control of the Commission will be able to keep its choice of a General Counsel in office through at least 2030 even if, and perhaps especially if, the General Counsel proves to be a rank partisan, and even if the presidency changes parties before then and the new president appoints a Chair from his or her own party.

### III. New Standards of Judicial Review Weaken Rights of Respondents

The Federal Election Campaign Act has long included a provision allowing for citizen suits where the Commission has failed to act on a complaint, or the party believes the Commission has wrongfully dismissed the complaint.<sup>25</sup> In such cases, the complainant can file suit in the U.S. District Court for the District of Columbia. H.R. 1 appropriately increases the time that the Commission has to act on a complaint from an unrealistic 120 days to a more realistic one year,<sup>26</sup> but it's downhill from there.

H.R. 1 provides that any such review into the lawfulness of the FEC's dismissal of a complaint shall be decided under *de novo* review.<sup>27</sup> This means the Court gives no deference to any prior finding of the agency, but looks at the issue as if it were deciding the case in the first instance. This is contrary to the so-called *Chevron* doctrine that federal courts normally use when reviewing the decisions of administrative agencies, such as the FEC.

Under *Chevron* doctrine, if a statute is ambiguous, a court will defer to the agency's reading of the law, unless it finds that the agency's interpretation is clearly wrong. This is known as "*Chevron* deference." Under *de novo* review, however, if the statute is ambiguous, the Court gives no deference to the agency's reading of the law, but merely applies its own best reading of the statute. In recent years, *Chevron* doctrine has come under tremendous fire, primarily from conservatives, who have argued that it is the role of the courts to interpret statutes, and giving any special weight to the agency's interpretation is not so much "deference" as "bias" in favor of one of the litigants – the government – on the exact issue in dispute.

We take no position in this analysis on the wisdom or validity of the *Chevron* doctrine. But regardless of how one feels about *Chevron* deference, H.R. 1 takes a curious approach. First, it is a partial, one-time invalidation of the *Chevron* doctrine for

<sup>21</sup> 52 U.S.C. 30109(a).

<sup>22</sup> H.R. 1 § 6004 (to be codified at 52 U.S.C. § 30109(a)(2)(A)).

<sup>23</sup> *Id.* (to be codified at 52 U.S.C. § 30109(a)(2)(B)).

<sup>24</sup> *Id.* (to be codified at 52 U.S.C. § 30109(a)(3)(B)).

<sup>25</sup> 52 U.S.C. 30109(a)(8).

<sup>26</sup> H.R. 1, § 6004 (to be codified at 52 U.S.C. § 30109(a)(8)(B)(i)).

<sup>27</sup> *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii), (B)(ii)).

a single agency. While Congress clearly has the power to set standards of judicial review, and thus to overturn the *Chevron* doctrine, H.R. 1 is critical of *Chevron* only to the extent that *Chevron* deference might actually work in favor of respondents at the Federal Election Commission. If a respondent challenges in court a Commission decision finding that it violated the law, the *Chevron* doctrine will apply, and the court will defer to any reasonable interpretation the agency gives to the statute. But if the respondent wins at the Commission – if the Commission determines that the respondent's conduct is not illegal – then the *Chevron* doctrine does not apply, and no deference will be given to the FEC's decision.<sup>28</sup> For respondents, it's a "heads I win, tails you lose" approach.

Furthermore, it is not clear if *de novo* review applies only to legal questions, or also to questions of fact. The better reading, we think, is that it applies only to legal questions, but the language is not clear. Historically, of course, courts have always given deference to the determinations of the original fact finder.

The bill also provides that, in any case where the alleged violation might trigger a fine greater than \$50,000, the agency may not rely, even in part, on "prosecutorial discretion" in defending in court its decision not to proceed.<sup>29</sup> This runs contrary to longstanding administrative law doctrine that gives agencies the authority to decide what cases they wish to devote resources to. For example, imagine a losing presidential campaign that spent \$600 million, and an allegation that the campaign illegally coordinated just over \$25,000 in expenditures by an outside group – a violation that, if proven, could trigger a penalty over \$50,000.<sup>30</sup> The FEC might conclude that, though it believes the law was broken, the law is admittedly murky as to whether the conduct actually was illegal; the facts would be extremely difficult to prove; and the candidate lost and is not in office, nor likely to run again. In such circumstances, the FEC might conclude that it was not worth pursuing a violation for an amount that was less than one one-hundredth of the campaign's total spending, in litigation that could last years and use up hundreds of thousands of taxpayer dollars in time and resources, with a relatively low probability of success. Prosecutorial discretion allows the agency to simply decline to prosecute, so that it can use its resources more effectively on other matters. H.R. 1 requires a zero-tolerance approach that would strip the agency of the discretion to decline to prosecute in order to efficiently manage resources. Eliminating prosecutorial discretion is akin to saying that a cop must ticket everyone going more than 5 miles per hour over the speed limit.

There is no evidence that the FEC has been abusing its discretion by dismissing major violations on the grounds of prosecutorial discretion, and no reason to abolish *Chevron* deference only in cases where the agency has interpreted the law in favor of the respondents.

In summary, H.R. 1 would rig judicial review in favor of punishing those who speak in a campaign context.

#### IV. Miscellaneous Mischief

Two other provisions of the "Restoring Integrity to America's Elections Act," embedded in the "For the People Act," deserve mention.

First, while the Act leaves it to the president to appoint FEC commissioners – as, constitutionally, it must – it provides for a "Blue Ribbon Advisory Panel" to make non-binding recommendations to the president. The odd-numbered panel will consist of "retired Federal judges, former law enforcement officials, [and] individuals with experience in election law," and will publicly recommend one to three candidates to the president for each seat.<sup>31</sup> It's not really clear what the purpose of the panel is, since the president is always free to consult whom he or she likes regarding appointments. Rather, it seems to be the hope of those desiring more speech regulations that they will be selected to the "Blue Ribbon Advisory Panel" and then be able to pressure the president to choose from among their preferred candidates for each position.

What is interesting about this provision is that it would exempt this "Blue Ribbon Advisory Panel" from the requirements of the Federal Advisory Committee Act, which exists precisely to assure that such advisory committees operate with transparency.<sup>32</sup> It's an interesting way to "restore integrity" to elections – by creating an elite committee to debate in secret, on the public's dime, and with the imprimatur of the government, on whom the president should appoint.

Finally, H.R. 1 also hamstring the FEC in its advisory opinion process. Under the law, any party can request an opinion as to whether its proposed activities are legal. If the Commission gives the go-ahead, the requestor cannot later be prosecuted for that behavior, nor can others who operate on the same terms, and in good faith reliance on the Opinion. Advisory Opinion

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii)).

<sup>30</sup> For reference, Hillary Clinton's 2016 presidential campaign spent \$768 million. See Christopher Ingraham, *Somebody just put a price tag on the 2016 election. It's a doozy*, WASHINGTON POST (Apr. 14, 2017), at [https://www.washingtonpost.com/news/voxp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/?utm\\_term=.91558b9ec51d](https://www.washingtonpost.com/news/voxp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/?utm_term=.91558b9ec51d).

<sup>31</sup> H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(3)(B)(i)-(ii)).

<sup>32</sup> *Id.* (to be codified at 52 U.S.C. § 30106(a)(3)(B)(iv)).

Requests are public documents, and anyone can submit comments to the Commission making recommendations on how it should decide the request. The Commission then considers the request at an open, public meeting.

Over a decade ago, the Commission began to allow requestors to appear in person before the Commission. The logic was simple: frequently, as the Commissioners considered a request, new questions about the intended activity, or the requestor, would come to the fore. Typically, the requestor, or its attorney, would be seated in the public audience and could readily answer the question involved, but the Commission had no provision allowing them to testify, even for the limited purpose of answering the question on the spot. Thus, the matter would be delayed, and a written request would go out to the requestor seeking an answer, after which the matter would be re-scheduled for further debate at a later Commission meeting. Allowing the requestor to appear in person at the public hearing to answer such questions while the matter was debated was mere common sense and stopped some needless delays.

H.R. 1 would provide that, if the Commission allows a requestor to appear before it in person, it must also allow “an interested party who submitted written comments ... in response to the request ... to appear before the Commission to present testimony.”<sup>33</sup>

Simply put, there is no real point to this provision, since these “interested parties” cannot answer the types of questions the Commission asks of requestors and have already submitted their views on the legal framework. On certain Advisory Opinion Requests, there may be a dozen or more commenters, pro and con, who would all have to be given an opportunity to appear. Of course, if the Commission felt it would be helpful to hear from such parties, it can alter its procedures to allow for it. But there is no need to tie the Commission's hands with a blanket rule requiring this procedure. It would be a bit like dictating to Congress who has a right to testify in committee hearings. But securing the ability to testify orally on Advisory Opinion Requests has been a pet priority of leading groups that advocate for more speech regulations ever since the FEC began allowing requestors to appear in person.

The impetus for this proposal is well-known to the campaign finance bar – those advocating speech restrictions simply want an opportunity to further lobby the Commission to deny most requests to speak. That such an arcane provision made it into the bill is a clear sign that its contents were written by lobbyists from speech censorship groups.

### *Conclusion*

The FEC “reform” provisions tucked into the “For the People Act” would, if enacted, abolish a bipartisan commission in favor of one under partisan control and beholden to the president, do away with checks and balances within the Commission, attempt to bias judicial proceedings against respondents, and hamstring the efficient operations of the agency. On the basis of this section of H.R. 1 alone, members of Congress and the public would be well-served to carefully scrutinize this legislation.

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<sup>33</sup> *Id.* § 6905 (to be codified at 52 U.S.C. 30108(e)).

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The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, press, assembly, and petition.

Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

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Nominated by President Clinton to a designated Republican seat, Professor Smith served on the Federal Election Commission from 2000 to 2005, including as Vice Chair of the Commission in 2003 and Chair of the Commission in 2004. He is the author of "Unfree Speech: The Folly of Campaign Finance Reform" (Princeton University Press, 2001) and is the co-author of *Voting Rights and Election Law*, a leading casebook in the field. He has published over 30 articles in academic journals, including the *Election Law Journal*, *The George Washington Law Review*, *The Georgetown Law Journal*, the *Harvard Business Law Review*, the *University of Pennsylvania Law Review*, and the *Yale Law Journal*, among others. His work has been cited by the United States Supreme Court on multiple occasions.

He is Chairman of the Board of the 1851 Center for Constitutional Law, Chair of the Buckeye Institute for Public Policy Studies, a member of the Editorial Board of the *Election Law Journal*, and the Board of Advisors of the *Harvard Journal of Law and Public Policy*.

Professor Smith received his B.A., *cum laude*, from Kalamazoo College and his J.D., *cum laude*, from Harvard Law School.

### Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)\*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: Oversight & Reform

Subcommittee: \_\_\_\_\_

Hearing Date: Feb. 6, 2019

Hearing Subject: H.R. 1

H.R., 1
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Witness Name: Bradley A. Smith

Position/Title: Chair

Witness Type: ☐ Governmental ☒ Non-governmental

Are you representing yourself or an organization? ☐ Self ☒ Organization

If you are representing an organization, please list what entity or entities you are representing:

Institute for Free Speech
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If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.*

None
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If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.*

None
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Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

Bradley A. Smith

Witness signature

2/1/2019

Date

If you are a non-governmental witness, please ensure that you attach the following documents to this disclosure. Check both boxes to acknowledge that you have done so.

☒ Written statement of proposed testimony

☒ Curriculum vitae

\*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

Chairman CUMMINGS. Thank you very much to all of our witnesses, and thank you for staying within the time limit. I will now yield five minutes to the distinguished lady from Michigan, Ms. Tlaib.

Ms. TLAIB. Thank you so much, Chairman, and thank you so much to Chairman Sarbanes for his incredible leadership on this issue. I think For the People, H.R. 1, is important in trying to restore public trust and to this institution. I know I'm a freshman, I'm new, I think a lot of people know that I really truly believe in the rule of law and believe in trying to restore to the core center of getting people to understand this body here works for them.

So as a new Member, you know, I see now why a lot of my residents are really taken aback by this process and not feeling like it belongs to them. Through the chair, we all know this is a very critical issue. I think both Republicans and Democrats alike see this as a critical issue in taking corruption out of government. So for me, as you said about strengthening this, but more importantly, you know, in the first two years in office, I think the President made 281 visits to properties he still profits from.

More than 150 political committees, including campaigns and party committees have spent nearly \$5 million at Trump businesses since he became President. At least 13 special interest groups have lobbied the White House around the same time they also did business with the Trump organization.

I can go on, I can submit this to record, but as a person that's coming here as a brand new Member, I cannot believe this is not illegal already. That this is not something that we push up against, and say, Enough. Because as we step into here, we work for the people. We have to check our businesses, we have to check our personal and professional conflicts. Any lawyer across this country will tell you, it is dangerous to allow any sort of conflict to exist while you're trying to serve others, especially in a public position like this.

I have seen modern Presidents, both parties, before this President, address these potential conflict of interests by adhering to all ethical norms and traditions that resulted in the sale of their financial interest, completely divesting in their foreign and domestic investments. I'm really taken aback by the fact that we still have to currently now fight for something that is so critically important in restoring public trust. That now we're setting a precedent that it's okay for a President not to divest. That it's okay that I have—Gary Cohn, President Trump's Director of National Economic Council, received more than \$100 million like payments from Goldman Sachs before he came in to work for Trump—for the President, I'm sorry, Chairman.

So one of the things that I'm taken aback by is like, you know, we're talking in the good—my good colleague from Ohio mentioned the original H.R. 1 tax break. Who works on that? Because back home in the district, they call that a payout. They really do. They know who was behind the scenes running that and pushing that forward.

So my question to you is, how can we move because this should-have, could-have, maybe, and all these kind—to me that doesn't go far enough to starting to make people feel like this is their House,



that this Congress belongs to them. Because right now all they see is people that are at the top that make millions of dollars that are completely disconnected with the American people. And I can tell you, every single day from underemployment to poverty in my district, we're feeling like here we don't have a voice.

So with that, Mr. Shaub, I really would love to hear, how do you think we can really strengthen this, and where the dangerous precedent is, because more and more, we're now seeing other people interested, former CEOs, others, interested in becoming President of the United States.

Mr. SHAUB. You know, I applaud the bill for including a Statement of Congress that the President should divest. I think that takes a step toward reestablishing the norm, and it would have been helpful to me as director of OGE to be able to point to that. I personally would like to see it go further and require divestiture, because we have a situation now where people who seek to influence the government can funnel bags of cash to the President through his various properties.

You have government contractors, charities, businesses, associations, politicians, political parties, political groups, using his facilities and paying just absolutely gobs of cash for the privilege of hobnobbing with the President. Unfortunately, the President has done nothing to discourage this. He didn't even try to mitigate it by saying, I and my appointees will refuse to attend events at my properties, to discourage people from holding them there because they would lose access to the government by having the event there. Instead, there seems to be this embrace and this encouragement, and the sense on the part of interested parties that they have to engage in this to even be on an even footing with their competitors.

Mr. MEADOWS. Mr. Chairman.

Ms. TLAIB. Can I reclaim my time?

Chairman CUMMINGS. The gentlelady has about 5 seconds, but go ahead.

Ms. TLAIB. Oh, I just want—the constituent you spoke about, do you know in 2017, for example, Saudi lobbyists spent \$217,000 to reserve rooms at Trump-owned hotels. And that, to me, makes you pause about your constituent being killed by that government.

Mr. SHAUB. I do know that, yes.

Chairman CUMMINGS. Thank you.

Mr. MEADOWS. Mr. Chairman, I would just point out to the chairman, the witness may want to clarify his remarks when he's saying "gobs of cash." I don't know that he would have any proof, and since he's under oath, I don't know that he would want to make that type of Statement.

Chairman CUMMINGS. Well, I will allow the gentleman, if you want to clarify what you meant by "gobs of cash."

Mr. SHAUB. Representative Meadows, what I mean is that people are paying money to the Trump organization to use his facilities, and the direct beneficiary of that money is President Trump, because he's the beneficiary of the trust that holds that. So the money is flowing to President Trump, and the steps he's taken to step back from it have had absolutely zero effect in any way to diminish the financial interest in the money that comes through. So I do, indeed, mean that this is a funnel for money, but—

Mr. MEADOWS. You didn't mean cash?

Mr. SHAUB. Yes, I don't mean they are handing it directly to him.

Chairman CUMMINGS. The gentleman has defined it, thank you.

Chairman CUMMINGS. We will now hear from Mr. Gosar for five minutes.

Mr. GOSAR. Thank you very much, Mr. Chairman.

I must have been living in the twilight zone for the first six years of my first eight years. Fast and Furious, Operation Choke Point, Benghazi, IRS targeting, the intimidation of the press with James Rosen and Sharyl Attkisson, Uranium 1, the unmasking of American citizens, and out-of-control DOJ. Really? Really?

Mr. Smith, I'm going to concentrate with you. H.R. 1 expands the definition of foreign national. Do you think, however, that it would make sense to strengthen the disclosure requirements in order to prevent foreign nationals from potentially funneling hundreds of millions of dollars to the U.S. campaigns?

Mr. SMITH. Well, the difficult question is always how exactly does one intend to do this. And one of the things that you have to keep in mind is that most regulations that would be imposed will be felt by American citizens. The vast majority of people who have to comply will be American citizens. So, when we engage in this type of thinking, we need to be, you know, careful that we're not giving up our own rights. You know, we fought the cold war without surrendering our own rights, and now the fact that, you know, we're afraid of, you know, the rump State of the former Soviet Union is going to somehow destroy America and so now we should rush to throw away hard-won protections—I think Mr. Jordan talked about them in the cases like the NAACP v. Alabama. We need to be careful. So I do think foreign engagement poses a different issue, but kind of a scattershot approach that mainly hits American citizens is unwise.

Mr. GOSAR. You know, I agree with you, and let's just tailor that aspect. Do you think amending the Federal Election Campaign Act of 1971 to require what is already required of American citizens, the disclosure of the credit verification value, or the CVV, and a legal billing address, for all loaned contributions would help ensure that the credit cards are registered to someone who actually lives in the United States?

Mr. SMITH. Well, one thing you could do, for example—most campaigns for years did this voluntarily, and this became something of an issue because the Obama campaigns did not—was to put checks in place on credit cards, in particular, prepaid credit cards. That is the kind of thing that could be done by regulation through the FEC or I suppose by statute if there were a desire to do that, to ensure that those credit cards were tied to a U.S. individual, not just sort of handed out to whoever wants to use prepaid credit cards.

Mr. GOSAR. Well, and these are two great ideas, a CVV and a billing address. It would actually make sure that somebody's actually living in this country, wouldn't you agree.

Mr. SMITH. You're aware that people don't have to live in this country.

Mr. GOSAR. Oh, I understand.

Mr. SMITH. U.S. citizens live abroad and so on.

Mr. GOSAR. This definitely is a means of calibration that would stop some of the illegal contributions.

Mr. SMITH. It would probably be a safeguard. Again, one that most campaigns have followed and one that could be enacted, I think, either by regulation or statute.

Mr. GOSAR. You know, in the last administration, we saw multiple examples of average American citizens being targeted for their political beliefs, most notably the IRS and FBI targeting political opponents. With that in mind, H.R. 1 would create a partisan FEC—I think you addressed that—that could use the power of the Federal Government to quell speech that disagrees with it. What effects do you think this will have on free speech and discourse?

Mr. SMITH. Well, you know, I called it the new alien and sedition act, so I think that's a pretty strong Statement to put in very general terms. One of the things that has been an issue at the FEC and in enforcement in the States as well is the use of these complaint processes as political weapons in and of themselves. It often doesn't matter if you actually even prove a violation; you simply start the investigation process. Responding to an FEC investigation can be very costly. The investigation is intrusive. They can go into your strategies and tactics to tie up campaign time, to get bad press, and so on. So often it was said the punishment is the process rather than any fine that's meted out at the end in part because you quite likely did nothing wrong. So very definitely there can be a chilling effect here, and that chilling effect is most pronounced on small grassroots campaigns which don't have the lobbyists and the lawyers and so on who know these complex regulations and can deal with them easily.

Mr. GOSAR. So two quick questions. Can you explain what ethics reform, FEC restructuring, and a new Federal holiday all have in common?

Mr. SMITH. I suppose they all deal in some way with the Federal Government, but this is certainly a grab bag of bills. I would actually suggest that one of the best things the majority could do would be to divide this bill into its component parts so that they could be focused on one at a time. Many of them are only in the most vague sense related.

Mr. GOSAR. One last question. Why do you think my good friend from Maryland chose to combine such different topics into one bill? You started in on it, so—

Mr. SMITH. I think that would probably be a question better directed to your good friend from Maryland. I'm not going to try to read his mind.

Mr. GOSAR. I thank the gentleman.

I yield back.

Chairman CUMMINGS. I yield to the distinguished lady from New York, Mrs. Maloney, for five minutes.

Mrs. MALONEY. Thank you, and I thank you and Mr. Sarbanes for your selfless, devoted work on H.R. 1 over many years.

Mr. Amey, I'd like to ask you about Presidential contracts, the ability of the President and Vice President now under the law to compete against the Members of Congress—to compete for properties that other Federal employees and Members of Congress are barred by law from entering into contracts or leases. And I want

to speak to the Presidential Conflicts of Interest Act, which is part of Intro 1, which would put a restriction on the President and the Vice President in entering into any contracts, which happens to be the standards for Members of Congress and Federal employees. Would you agree with the intent of Intro 1's specific proposal on Presidential conflicts of interest?

Mr. AMEY. Yes, Congresswoman. Obviously, you're talking about the General Services Agency's lease with President Trump and the Trump Hotel here in Washington D.C.

Mrs. MALONEY. Yes, sir.

Mr. AMEY. There is a provision in that lease, you know, that is up for debate. Obviously, the GSA and their legal counsel have had different feelings than a lot of people on this side of the table have had about the interpretation of that lease provision. The one problem and why H.R. 1 on this specific provision is necessary is it was in about 1994 that the Federal Acquisition Regulation stripped the provision that was called the Officials Not Benefit provision, and so it was in one of the acquisition reform bills, Federal Acquisition Reform Act or the Services Acquisition Reform Act, but that provision was stripped out, so it's no longer in the FAR.

So I think it's important to put back, and you raise a good point. That provision actually mentioned Members of Congress at that time, and that has continued for Members of Congress but hasn't affected other people in the executive branch, and so I do think it's necessary.

Mrs. MALONEY. Well, as many of my colleagues know, in 2017, the members of this committee, the Democrats, literally sued for information about the lease and contract between the President's hotel here, the Washington, DC, hotel and the lease with the old office building. And we were told then by the general accounting services, the General Services Administration, that we were not entitled to exercise our oversight and responsibilities of reviewing this lease. They barred us from getting this information. So we are literally still in court trying to obtain this. Many of us feel that this is a glaring conflict of interest. Why shouldn't the Oversight Committee have access to leases and contracts that we want to question even if it includes the President of the United States? Now, in this case of the Trump International Hotel, the President is both the landlord and the tenant, and he ultimately also oversees GSA, the agency that was responsible for enforcing this lease, this contract. How can Congress, Mr. Amey, or the American people be sure that GSA is really acting impartially in carrying out the law when they are really interpreting what their supervisor—

Mr. AMEY. Well, when you have someone that's the landlord, the tenant, the judge, and the jury, and obviously appointed the head of the General Services Administration, then, at that point, it is a major conflict of interest. There are also some concerns because the Trump children were involved in the negotiation of that lease, and I'm actually outraged at the fact that the GSA hasn't turned over the information to Congress. That's where it is important. That's where transparency when it comes to government ethics matters, that we should be seeing as much information about that to remove the appearance of a conflict of interest but also to ensure that there's not an actual conflict of interest that needs to be resolved.

Mrs. MALONEY. Okay. Now, in this particular lease for the Old Post Office building, it explicitly prohibited an elected official from being a party, but GSA failed to enforce it, and I would say that there would definitely be an impact, and I'll ask Mr. Mehrbani.

Mr. MEHRBANI. Mehrbani.

Mrs. MALONEY. There could be a definite conflict of interest that could have a freezing effect on competition. How many people want to compete against the President of the United States for a lease or a contract? Wouldn't you agree that that would be a chilling effect on any competition? What would be the effect of this going forward?

Mr. MEHRBANI. I would agree with that, Congresswoman, and as you know, the inspector general of the General Services Administration recently released a report that was critical of GSA's analysis of the validity of this lease for improperly omitting constitutional issues from their analysis. And to me, that raises the question of whether there was improper influence or at least the specter of self-dealing to the public that greatly undermines public trust. It's also one of the reasons why I should say that the National Task Force for Democracy and Rule of Law, which is a Brennan Center initiative that includes some of your former colleagues in a bipartisan group of former Republicans and Democrats, and they've proposed extending the existing prohibition and the conflicts of interest law to the President and Vice President to avoid specific instances like this.

Mrs. MALONEY. And that's what H.R. 1 will do, and I strongly support it and urge its passage.

Chairman CUMMINGS. The distinguished gentleman from North Carolina, Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman, and thank all of you for your testimony.

Mr. Mehrbani, I guess you're in favor of matching dollars, using taxpayer dollars to match small donations as is outlined in H.R. 1. Is that correct?

Mr. MEHRBANI. The Brennan Center does support the proposal in H.R. 1, which is modeled after an existing proposal that has existed for years in New York which multiple—

Mr. MEADOWS. Well, I've only got five minutes. Yes or no. Do you support it?

Mr. MEHRBANI. Yes.

Mr. MEADOWS. So I guess here's the interesting fact that I just find just fascinating: A Democrat bill, H.R. 1, would actually use taxpayer dollars to reelect the Freedom Caucus chairman. I would—under their bill, I would get almost \$4 million of taxpayer dollars, and I would say I don't see any of my constituents in the audience here. I can't imagine that they would be happy with taxpayer dollars being used to reelect a Freedom Caucus chairman. Do you not see a problem when we use taxpayer dollars to reelect individual Members of Congress?

Mr. MEHRBANI. If I may.

Mr. MEADOWS. I mean, would you support me financially?

Mr. MEHRBANI. I would support spending the equivalent that H.R. 1 would require, which I think is a dollar per citizen every year over 10 years.

Mr. MEADOWS. It's a matching deal. We've done the math. It's \$3.8 million that I would get because I'm one of the top 10 in terms of small dollar donations in Congress. I would get \$3.8 million under this bill for reelection. I cannot find anyone who holds government accountable that would think that that would be a wise use of taxpayer dollars. Would you?

Mr. MEHRBANI. Sir, campaigns need to be funded from somewhere.

Mr. MEADOWS. I agree, but not my taxpayer dollars shouldn't be going to it, sir.

Mr. Shaub, let me come to you. Are you in support of H.R. 1's investigative mandate for OGE?

Mr. SHAUB. You know, I—

Mr. MEADOWS. You were in the job.

Mr. SHAUB. I have said publicly that I'd prefer to see an inspector general that has global authority over every agency that doesn't have an inspector general and have supplemental ethics authority upon referral to OGE. That's a proposal I've presented to former Chairman Gowdy and current Chairman Cummings. I do support the current bill because I don't think—

Mr. MEADOWS. But it has investigative authority. I've gone through it, Mr. Shaub, and let me tell you why I'm concerned. Because you came before my committee—

Mr. SHAUB. Yes.

Mr. MEADOWS [continuing]. and you gave sworn testimony—

Mr. SHAUB. Yes, I did.

Mr. MEADOWS [continuing]. which is exactly opposite of H.R. 1, and yet here you are today espousing its merits, and I can't find why all of a sudden you would have this newfound interest to have investigative authority if it were not directed at the current President of the United States.

Mr. SHAUB. Yes. I have two Statements about that. One is I don't think it creates the kind of investigative authority that an inspector general does, so I don't think all investigative authority is created equally—

Mr. MEADOWS. I agree with that.

Mr. SHAUB [continuing]. but it does create some. My views on that have changed. But this proposal—

Mr. MEADOWS. With this President?

Mr. SHAUB. This proposal would not apply only to this President. It would apply to the next President.

Mr. MEADOWS. No. Listen. It's not my first rodeo; it's not yours, either. But what I'm saying is I find it extremely hypocritical that you would come here today, having sworn under oath that this was not the way to go when there was a different President in the White House, and then here today—and followed it up with a letter. I mean, we've got numerous quotes from you over and over and over again which would undermine H.R. 1, and yet here you are today supporting that. How do you have this evolution in such a short period of time, Mr. Shaub?

Mr. SHAUB. Well, first of all, I was telling the truth then, and I'm telling the truth now, so let's be clear about that. I did disagree with the idea of investigative authority back then. I've now sat for two years and just watched—

Mr. MEADOWS. So you were just wrong back then.

Mr. SHAUB. No, I wasn't.

Mr. MEADOWS. Because I was suggesting that you should have the investigative authority, and you said, quote—let me quote you. Hold on -

Mr. SHAUB. No. I recall you suggested—

Mr. MEADOWS. Let me quote you here. I said, "So you do not want the authority to be able to investigate?"

"No, I don't think so."

I said, "You don't want it," and, quote, "Well, I don't think we should have it. What I might want one way or another is not relevant as it would not be the right thing," closed quote. All of a sudden today you're having an epiphany, and it's changing, Mr. Shaub?

Mr. SHAUB. No, it's not all of a sudden at all. It's after watching for two years somebody proved to me that the executive branch ethics program was much weaker and much more fragile than I ever thought it was. Frankly, I was naive. I never imagined the President could come in and refuse to eliminate his conflicts of interest, have appointees who are completely disinterested in government ethics, and have, with all respect, a Congress refuse to exercise oversight over them in that respect. So, in the absence of any other avenue, I do now believe that the Office of Government Ethics is going to have to fill the gap.

Mr. MEADOWS. But, Mr. Shaub, that was precisely the point I made in 2015, and you disagreed with me then.

I yield back.

Chairman CUMMINGS. Thank you very much.

Mr. SHAUB. I'll just say you were right.

Chairman CUMMINGS. Thank you very much.

Mr. MEADOWS. We can agree on that.

Chairman CUMMINGS. Thank you very much.

We'll now hear from Ms. Norton of the District of Columbia.

Ms. NORTON. Thank you very much, Mr. Chairman, and unrelated to my question, I do want to thank Mr. Sarbanes for the findings in H.R. 1 regarding the D.C. Statehood Act because these findings simply speak for themselves. People I represent pay the highest taxes per capita in the United States. We do vote the committee of the whole but have no final vote on the house floor. I'm grateful to have a vote in this committee, and I thank you, Chairman Cummings, for agreeing to hold a hearing on this bill.

But I want to speak about the parts of H.R. 1 which simply go to transparency. I think my first question is to Mrs. Hobert Flynn, but I honestly would like to hear Mr. Smith's view of this question. The Secretary of Education, Betsy DeVos, and her family have donated millions of dollars to organizations who lobby for education policy. Do either of you think that the public has a right to know if the Secretary has donated substantially to organizations, her background in donating that could now influence her policies as Secretary? First, Ms. Flynn, and I'd like to hear Mr. Smith on this question.

Mrs. Hobert Flynn. Thank you. You know, Education Secretary Betsy DeVos and her family have given large sums of money to influence politics at all levels of government, including pressing for

school voucher programs, something she's clearly very supportive of. According to the Center for Responsive Politics, DeVos and her family have donated over \$20 million to Republican candidates, party committees, PACs, and super-PACs, and much of that political spending has been focused on education as she now influences an Education Secretary. You know, to me, I think it's important when the Senate is looking at the nomination, when the American people are paying attention, it's an important part of the equation that helps shed light both on issues that she cares about and also her investment in that. In fact, she gave an interview in Roll Call where she said she, quote, decided to—decided, quote, “to stop taking offense at the suggestion that we are buying influence.” Quote, “Now I simply concede the point,” she wrote 20 years ago, “they are right. We do expect some things in return. We expect to foster a conservative governing philosophy consisting of limited government and respect for traditional American values.” So I think it's important for the nomination process to have a fuller picture of where their fundraising and political spending is going.

Ms. NORTON. Mr. Smith, how could that do any harm? How can it do anything but good, the more information we have?

Mr. SMITH. I am, I have to say, shocked—shocked—to discover that the Republican appointee to Secretary of Education has been a Republican who has donated to Republican candidates and causes and that her viewpoints—

Ms. NORTON. So would you be shocked for us to know, for the public to know about that background history as she takes office?

Mr. SMITH. I think that, as Ms. Hobert Flynn said, I agree that's something that certainly Senators could ask during the confirmation process. I find it hard to believe that there's an ethical conflict in somebody—

Ms. NORTON. There may not be. Reclaiming my time. I'm not implying an ethical conflict, and my questions about transparency are simply going to that, you know. Let it all hang out, and then let everybody make their own judgment. Let the committee make its own judgment. Let the public make its own judgment.

Mr. SMITH. I have a number of questions about your personal life that I would be interested in, but I won't ask them here today.

Ms. NORTON. Well, come on and go straight ahead.

Mr. SMITH. You know—

Ms. NORTON. The point is it's not her personal life that I'm asking about, Mr. Smith. What we're asking about is her donations of money.

Mr. SMITH. These are not—

Ms. NORTON. Donations of money in ways that could reflect on a trust she's now been given as part of her enforcement activities. So it's not about just let it all hang out about my personal life. It's about the relevance to what it is she is enforcing. She is enforcing education policy. She's had a known not only position but given millions of dollars in ways that may conflict with parts of that policy. As I indicated when I opened this line of questioning, it's only about transparency.

Let me go on to ask about the Conflicts of Political Fundraising Act. I'm a co-sponsor of that. It's also in H.R. 1. It simply requires—



Chairman CUMMINGS. Your time has expired.

Ms. NORTON. Thank you very much, Mr. Chairman.

Chairman CUMMINGS. Mr. Amash.

Mr. AMASH. Thank you, Mr. Chairman.

I yield to the ranking member, Mr. Jordan.

Mr. JORDAN. I thank the gentleman for yielding.

Professor Smith, does H.R. 1 require States to offer early voting?

Mr. SMITH. Yes.

Mr. JORDAN. Does H.R. 1, Professor, require States to offer no excuse absentee voting?

Mr. SMITH. Yes.

Mr. JORDAN. Does H.R. 1 require paid leave for Federal Workers to be poll workers?

Mr. SMITH. Yes.

Mr. JORDAN. Does H.R. 1 require States to let released felons vote?

Mr. SMITH. I believe it does.

Mr. JORDAN. Does H.R. 1 require taxpayers to finance campaigns?

Mr. SMITH. Definitely.

Mr. JORDAN. Definitely. Does H.R. 1 require taxpayers—as Mr. Meadows was alluding to just a few minutes ago, does H.R. 1 require taxpayers pay for the campaigns of candidates they oppose?

Mr. SMITH. Yes. For example, under the system, if I were to contribute \$10 to the reelection campaign of the President, the folks on this side of the aisle would collectively and with others contribute \$6 or something like that.

Mr. JORDAN. Yep. Does H.R. 1 require States to have same-day registration for voters?

Mr. SMITH. I believe it does.

Mr. JORDAN. Does H.R. 1 require automatic voter registration?

Mr. SMITH. I believe that's correct.

Mr. JORDAN. Does H.R. 1 encourage States to pre-register 16-year-olds?

Mr. SMITH. That I don't know off the top of my head.

Mr. JORDAN. I'll tell you that one. It does.

Mr. SMITH. I'll take your word for it.

Mr. JORDAN. I appreciate that. Professor, does H.R. 1 require election day to be a Federal holiday if you work for the Federal Government?

Mr. SMITH. Yes, it does.

Mr. JORDAN. And does H.R. 1 require the outing of donors, a direct violation of freedom of association. You give to a campaign; it permits that through the disclosure you're going to be outed.

Mr. SMITH. A great many provisions require a tremendous amount of outing of a great many donors.

Mr. JORDAN. Does H.R. 1 make the bipartisan FEC a partisan organization?

Mr. SMITH. I believe that it effectively does.

Mr. JORDAN. Yes. And the example—I liked the example you used. We'll take the U.S. Senate. Let's say Mitch McConnell and Ted Cruz are the Republicans. Let's say Cory Booker and Kamala Harris are the Democrats, and then the independent is Bernie Sanders. That's supposed to be balanced, right?

Mr. SMITH. That would work, yes.

Mr. JORDAN. That would work. That's exactly what the majority intends for it to be in 2021, something like that. Maybe not those people, but I think people understand what we're getting at here. Does H.R. 1 require—does H.R. 1 limit free speech?

Mr. SMITH. I believe that it does in significant ways, as I pointed out in my testimony, in ways that it was not limited even before some of the Supreme Court decisions that H.R. 1 purports to want to overturn.

Mr. JORDAN. So let me take a whack at a little summary here, Professor. H.R. 1 requires taxpayers to pay for a holiday on election day for government workers. H.R. 1 requires taxpayers to pay for six days of paid leave for government workers who want to be poll workers. H.R. 1 requires taxpayers to pay for politicians' campaigns, and if those same taxpayers give to some organization, some C-4, they can be outed under H.R. 1 so that the left can or anyone can harass them and their family.

Mr. SMITH. Yes.

Mr. JORDAN. Such a deal for the taxpayer, right?

Mr. SMITH. I'll leave that judgment to you folks who get to vote on it.

Mr. JORDAN. I mean, this is exactly where H.R. 1 sends us, and that's why we're opposed to it, and that's why we're going to keep fighting it. That's why we're saying the things we're staying. So anything I'm missing in my summary there, Professor? Anything you'd like to add?

Mr. SMITH. I would only add that I think the disclosure provisions are often worse than people think because they're defining as political activity things that have never been defined as political before, and you run the risk of regulations swallowing up the entire discourse in which the public engages. So I would really say I think the provisions are worse than people think and that they're often hidden through the complex interrelationships of—

Mr. JORDAN. Give me an example.

Mr. SMITH. Well, one example would be if an organization, for example, were to hire somebody who had previously been an intern, a paid intern for a Member of Congress, that organization would then be prohibited from making any communications that were deemed to promote, attack, support, or oppose that candidate, and that vague term could apply to almost anything, praising the candidate for introducing a bill, criticizing the Congressman for opposing a bill, whatever it might be.

Mr. JORDAN. Wow. That would put the whole consulting business in this town out of business.

Mr. SMITH. It's not just the consulting, of course. It puts out of business all of the interest groups—

Mr. JORDAN. Of course.

Mr. SMITH [continuing]. and all of the civic groups that people belong to.

Mr. JORDAN. I appreciate it.

Mr. Chairman, I yield back.

Chairman CUMMINGS. Thank you very much.

I'm going to yield myself a few minutes.

One of the things, Ms. Hobert and Mr. Mehrbani, that gave me chills when I read it was the 2016 opinion of the Fourth Circuit Court of Appeals. You know, we're sitting around here acting like it's not an inalienable right to be able to vote. It's something they said that is chilling, and we can argue back and forth all we want. They talked about the legislature down there in North Carolina, and this is a quote from the fourth circuit. These are Federal judges. They said before enacting that law, the legislature requested data on the use by race of a number of voting practices. Upon receipt of the race data, the general assembly enacted legislation that restricted—come on. You're talking about an inalienable rights—that restricted voting and registration in five different ways, all of which disproportionately affected African Americans. They went on to say—this is the fourth circuit. I didn't say this. The Federal court said it. They said in response to claims that intentional racial discrimination animated its action. The State offered only meager justifications, although the new provisions target—and this is what the court said—although the new provisions target African Americans with almost surgical precision. They constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not even exist. They went on to say: Thus, the asserted justifications cannot and do not conceal the State's true motivation, end of quote.

The reason why that quote means so much to me is that one year ago today, on my mother's dying bed at 92 years old, former sharecropper, her last words were: Do not let them take our votes away from us.

They had fought, she had fought and seen people harmed, beaten trying to vote. Talk about inalienable rights. Voting is crucial, and I don't give a damn how you look at it. There are efforts to stop people from voting. That's not right. This is not Russia. This is the United States of America. I will fight until the death to make sure every citizen, whether they're Green Party, whether they're Freedom Party, whether they're Democrats, whether they're Republicans, whoever, has that right to vote. Because it is the essence of our democracy, and we can play around and act like it's not, and guess what? I want to be clear that when they look back on this moment 200 years from now, that there are those of us who stood up and were able to stay they stood up and said we will defend the right to vote. Because you know what the problem is? For so many people, their rights are pulled away from them. Then they got to put in laws to get them back. Pulled away from them. What does that mean? They cannot progress rapidly. They cannot progress with the rest of society. All they're trying to do is trying to control their own destiny. I'd just like to hear your comments, Ms. Hobert and Mr. Mehrbani, on the fourth circuit's opinion.

Mrs. Hobert Flynn. So we have seen since 2010 a number of States move efforts to shut down opportunities for people to vote. We've seen proof of citizenship laws, photo ID. We've seen early voting days repealed. We have seen States that have election day registration repealed, all in efforts to make it difficult for people to vote. A lot of this is focused on so-called in-person voter fraud, which there is a 0.0003 percent chance that that happens. It is a very rare thing. So what we have is all these measures that are

trying to tamp down on something that isn't happening out there, and the end result is we see many people purged from voter rolls and other things with the thought that they're going to be addressing something that isn't happening very frequently.

So that is a real challenge and one that we've seen in States across the country. The reforms in H.R. 1, to put in place early voting, to deal with voting machines so that they're working and functioning, to add poll workers where we have a real shortage of poll workers so people aren't standing in line and leaving. All of these things are put in place to help create opportunities for people to vote.

Election day registration is a perfect antidote to a purge so that you can show up on election day; if you see that there's a problem, then you can register vote and vote on that day. That's why it's so important to be looking at these reforms.

Chairman CUMMINGS. Mr. Mehrbani.

Mr. MEHRBANI. The one thing I want to add to that is these reforms not just make it easier for people to vote and are proven to increase turnout and participation; they actually increase the accuracy of the rolls. So what we're hearing as reasons not to adopt things like automatic voter registration, same-day voter registration. As was said earlier, these are reforms that already exist in States across the country, and the Brennan Center has studied the implementation of them, and they've shown to increase the accuracy of the poll and to even decrease existing errors in the system.

I just want to say, Mr. Chairman, I appreciate your telling that incredibly personal story and the impact that it had on me personally and I'm sure on everyone who was listening.

Chairman CUMMINGS. Mr. Hice.

Mr. HICE. I thank the chairman.

I would just—Mr. Chairman, all of us want integrity at the voting booth, but if you are somehow implying that only Republicans have been engaged in voter fraud, I challenge that and take great offense at it.

We just saw in Texas tens of thousands of illegal aliens voting, and this is an issue that goes far and wide. It is not on one side of the aisle, sir, and I would like that to stand corrected. This bill does not—

Chairman CUMMINGS. Will the gentleman yield?

Mr. HICE. Yes, sir.

Chairman CUMMINGS. I'll give you your second back.

Nobody said that. I didn't say that. I quoted the court, and I did not just blame Republicans or anybody. All I know, I was trying to make it clear that it has been made far difficult for people who look like me to be able to vote, period, and we all need to be addressing that. That's what I was trying to say.

Mr. HICE. Reclaiming my time.

Chairman CUMMINGS. If you took it any other way, I did not intend it that way.

Mr. HICE. It was certainly implied that way, Mr. Chairman. I accept what you just said.

My contention across the board, however, H.R. 1 does not address this problem. It makes the potential for voter fraud even a

greater possibility. This is not a solution to the problem that all of us in this room are concerned about.

Mr. SMITH. I'd like to go to you. Should taxpayers be required to pay for political speech?

Mr. SMITH. Well, I think there are a couple of points there. One is sort of a moral point that was raised earlier by Mr. Meadows and by Mr. Jordan, that there's something sort of deeply wrong about forcing people to fund the political campaigns of candidates they greatly abhor, but there's also a practical problem here.

Mr. HICE. Well, let me go on. All right. So yes or no, should—

Mr. SMITH. I mean, I think clearly not.

Mr. HICE. Okay.

Mr. SMITH. There is a practical problem as well; it is not just an ideological problem.

Mr. HICE. Well, absolutely. Maybe we'll have time to get into some of that. So they should not be required to pay for political speech. I'm assuming you would also agree that they should not be required to pay for political speech that they disagree with.

Mr. SMITH. Well, in particular, yes.

Mr. HICE. All right. Our colleagues on the other side have pointed to so-called success in expanding public funding of election in places like Arizona, Maine, New York, and so forth. So far as you're aware, have these programs been successful?

Mr. SMITH. No. Typically the measure they use for that is how many candidates choose to take the money. So they're kind of saying: Well, if the government offers you free money and you take it, wow, the program was successful. But in terms of quality of governance, almost all the claims do not come true. We're told that it would elect more minorities; that has not been the case. To elect more women, that's not been the case. You don't see much difference in the makeup of legislators. Certainly I don't think people look at, you know, New York City and say: Wow, now that they've had this matching program there, they're well governed, you know, or better governed than in the past.

Mr. HICE. So have these programs been successful in preventing corruption?

Mr. SMITH. I don't see any way they have. In fact, they're often an avenue for corruption because, again, you have things that were previously private money people, you know—if a candidate wants to waste money, he can do it. Now it's public money. If he diverts it to personal use, it creates a greater scandal.

Mr. HICE. Do these programs really limit the influence of special interests groups?

Mr. SMITH. I've not seen that at all in part because particularly with these matching funds types of things, groups that are well organized to go out and solicit large amounts of small contributions can do that. They also invite fraud in the sense that, in the past, you know, a person might contribute 250- or \$500,000 but now he tries to get a bunch of other people to each contribute an amount below the matching amount and give them money to make the contributions because then you up the matches. So they're really sort of invitation to corruption.

Mr. HICE. You touched on this a while ago. I'd like for you to go a little bit further. But what will this program do to public discourse and free speech?

Mr. SMITH. Well, public financing programs I think are not helpful for free speech in part because again, they tend to be avenues for corruption in many ways. We also find there are studies that show that the small donors that are often solicited for these things actually extend to be more partisan donors than sort of more institutional people so that they tend to lead to further polarization of the political system.

Mr. HICE. Okay.. One last question. Going back, it was interesting to me when you mentioned the five-member versus six-member on the FEC. Can you elaborate on that, why six members, in your opinion, is the appropriate way to go, as opposed to five?

Mr. SMITH. Sure. It's a unique mission in the sense that it directly regulates elections and who's going to win those offices or can have that effect. So it's always required four votes on a six-member commission; that is, you had to have some measure of bipartisanship. Once you go to a five-member commission, you'll lose that requirement of bipartisanship. Furthermore, it will totally go away because the chair, again, will have this tremendous authority on his own, even if all the Commissioners oppose him, to subpoena people and launch investigations and so on.

Mr. HICE. Thank you very much.

I yield back.

Chairman CUMMINGS. Mr. Raskin of Maryland for five minutes.

Mr. RASKIN. Thank you, Mr. Chairman. I want to first start by applauding the sentiments that you just expressed. There's been a profound struggle for the right to vote in American history. We began with the vast majority of people in our country not having the right to vote, but through political struggle and constitutional change, we've enlarged the electorate to include African Americans and to include women, to include 18-year-olds. We've dismantled the property and wealth qualifications, and at every turn, there have been forces of conservatism and reaction that have tried to stop the changes, oftentimes claiming fraud, oftentimes claiming that the people newly enfranchised weren't really, truly deserving voters. So we're seeing the same historic process reenacted right now.

But that's just the first part of the issue. Once we get people elected to office, there's the problem of the agency of people who go into government. The Founders of the Constitution wrote in Article I, section 9, the Emoluments Clause to make sure that the President and other Federal officials would not be on the take from foreign powers, kings, princes, and governments, would accept no money at all, no payments whatsoever, no offices, no titles, no emoluments. And, yet, with that signal original breach, that original sin, this administration basically opened the floodgates on corruption in Washington and then appointed a fox to preside over every henhouse in Washington, every regulatory agency taken over by a regulated industry.

So we need to protect the right to vote against these constant efforts to take people's right to vote away, and we need to make sure that the people come to work in Washington are actually serving

the American people. And that's what part of this legislation is all about. It's about strengthening the Office of Government Ethics, and it includes the executive branch Comprehensive Ethics Enforcement Act, which I'm proud to introduce on the House side along with Senator Blumenthal on the Senate side. One of the things it would do is to provide the Director of the Office of Government Ethics with the same authority that the inspectors general have to subpoena documents, and I'm wondering, Mr. Amey, starting with you, how would this help the work of the OGE Director, and can you give us some examples of what that might mean?

Mr. AMEY. Well, specifically, I mean, that's one of the problems. The OGE currently has some authority, very limited authorities to conduct investigations, hold a hearing, and ask government officials to come in and testify. But that needs to be strengthened. We have found that OGE is really a paper tiger. Without this authority, it's very difficult. The ethics system is really based on self-policing, you know, from day one. I mean, it's up to a government official to come to an ethics officer and disclose certain things. During the confirmation process, it's up to them to go to OGE and make certain disclosures. And that's where at least allowing OGE to subpoena and hold the proper investigation with the proper information in front of them will instill the fact that, you know, we're trying to get to the conflicts of interest and whatever waivers, recusals, or exemptions apply to make it more transparent so we're aware of those conflicts and we can handle them in due course.

Mr. RASKIN. Thank you very much.

Mr. Shaub, you testified before this committee in 2015 while you were the Director of Office of Government Ethics, and during that hearing, Mr. Chaffetz, who was then the chairman of the committee, was frustrated with some of your testimony because OGE was not doing its own investigations, and he thought it was toothless. He said, and I quote: And I'm just suggesting that you're just shuffling paperwork. If you're just taking everything at face value and then reprinting and putting it on the shelf, what good are you? Why should we even have you if you're not going to actually review them and hold people accountable and do an investigation?

H.R. 1 would, in fact, give OGE precisely the authority to do meaningful investigations that Chairman Chaffetz and our counterparts on the other side of the aisle were demanding. Isn't that right?

Mr. SHAUB. I think that's absolutely right. At the time, I tried to explain that, as a practical matter, despite the appearance of language that might look like investigative authority in the current version of the Ethics in Government Act, OGE was powerless to actually conduct any kind of investigation. This bill would change that.

Mr. RASKIN. I wonder if you would give us a sense of this culture of corruption and lawlessness which now permeates Washington. Most people would be astounded to know that people come to Washington, go into a Federal agency, not in order to pursue the common good and protect the public interest but in order to pursue other agendas. Can you suggest from your wide experience in this field what those other agendas might be?

Mr. SHAUB. Well, I think one of the concerns that we look at is the types of loyalties that they have, and the goal of any ethics program should be to ensure that the loyalty of the government officials is only to the people they serve and not to companies for which they previously lobbied or previously served as a high-level executive or anything like that.

Mr. RASKIN. Mr. Amey, I'll go to you.

Mr. AMEY. If I may, I think the one problem that we've seen with the ethics system is, even if you look at OGE's prosecution surveys or if you would go back through the Public Integrity Section at the Department of Justice, most of it is low-hanging fruit. I mean, most of it is low-level people that are, you know, handling a contract or doing something. As you go up the chain of command, the ethics laws kind of dwindle off, and I truly believe it's kind of a catch-me-if-you-can system these days.

Mr. RASKIN. I yield back, Mr. Chairman. Thank you very much.

Chairman CUMMINGS. Mr. Comer for five minutes.

Mr. COMER. Thank you.

Chairman Cummings, I don't want to make it harder for people to vote. I just want to make sure that elections are fair and that only eligible voters vote. I'm from rural Kentucky. Many elections this past election cycle were decided by 10 votes or less.

But I have a huge problem with the proposal for same-day voter registration. What I witnessed in California this past Federal election cycle with the questionable ballot harvesting gave me grave concerns about the integrity of our elections and who is actually casting votes in some States that have passed this type of version of election reform.

So I want to ask my first question to Mr. Smith and to touch upon what Congressman Hice mentioned. This proposal, one of the things it does is it removes the standard of the chairman and vice chairman being from separate parties. In Kentucky, we have a Board of Elections, and it's split down the middle. Kentucky, it's half Republican, half Democrat. How might consolidating power in the hands of a single party and a chairman of a single party undermine the legitimacy of the Federal Election Commission?

Mr. SMITH. As I mentioned earlier, historically it's required bipartisanship. There has to be some degree of buy-in from one commissioner who has identified with the other side of the aisle, and that disappears here. As somebody pointed out, in theory, the independent commissioner doesn't need to be truly independent. But it's even worse than that, actually, because if the President simply doesn't fill certain positions, then a three-member quorum which could be two members of one party and one independent or something could be free to launch whatever investigations it chose, pass the regulations. The regulations that you pass, of course, can be terribly biased in favor of one party or the other. But also the enforcement process, the priorities you choose, how you choose to go after people, whether you choose to pursue certain folks, can be very damaging. As I pointed out, oftentimes, the punishment is in the process itself. You get bad press. Your resources become tied up. And this can be on charges that are very bogus, that have almost no real foundation in fact.



So a partisan FEC is a very dangerous potential weapon, and it's worth noting that groups—you know, from time to time, the FEC will get criticized. Republicans will say something like: You know, this is a biased agency.

And the very first response that always comes out of the mouth of people like some of the organizations represented down the table here is: It requires some degree of bipartisanship, right?

See, they themselves know that that's really the only thing that gives the agency its legitimacy is that bipartisan makeup.

Mr. HICE. Right. To followup on that, this proposal, H.R. 1, also allows the general counsel to initiate an investigation without bipartisan support and issue subpoenas on his own authority. Does the bill provide sufficient checks on the general counsel to make sure this significant authority is not abused?

Mr. SMITH. Well, I don't think—there is the possibility for the Commission to override the general counsel's actions, but if the Commission doesn't act, doesn't have enough time to act for some reason or another, can't muster a quorum, the general counsel can simply plow ahead. Plus, it allows the Commissioners themselves to dodge any responsibility. They can simply not vote and let the general counsel's recommendation move forward. And note that first general counsel will be appointed by the chair with concurrence of two of the Commissioners. He has to have concurrence of two others for this, but those will all be people appointed by this first President who makes that appointment. And once he's in, he can stay in indefinitely, unless you can muster a majority to vote him out.

Mr. HICE. Let me ask you this last question. The asserted purpose of H.R. 1 is to increase transparency in the electoral process. I think we would all support that. But in what way does creating a secretive taxpayer-funded blue ribbon panel to lobby the President about whom to appoint to the FEC increase transparency?

Mr. SMITH. Well, this is a fascinating little part of the bill. One part of the bill requires the creation of this blue ribbon panel that's supposed to make recommendations to the President as to whom he ought to appoint to the FEC. It's not quite clear what the purpose of the panel is since they don't have binding authority, but it is very interesting that the first thing the bill does, then, is take this body out of the requirements of the Federal Advisory Committee Act, which exists precisely to make sure that it operates transparently, and it allows it to operate in secret.

Mr. HICE. Thank you, Mr. Chairman. I yield back.

Chairman CUMMINGS. Thank you very much.

Mr. Rouda.

Mr. ROUDA. Thank you, Mr. Chairman, and thank you for your comments earlier. A clear reminder for all of us here as to what our obligations are to all Americans. In 2010, Citizens United was settled by the Supreme Court. In that decision, the majority made it very clear that they did not think that decision would have virtually any impact on dark soft money coming into the election process. The reality is, in that same year, there was approximately \$140 million of dark money that came into the election process. Yet, in 2016, it was \$1.6 billion—\$1.6 billion. All because the Supreme Court decision basically said corporations are people too.

And I don't know about you, but personally, I have never held hands with a corporation. I've never dated a corporation. I've never made out with a corporation. And I'm pretty sure no one else in this room has either. We know that dark money leads to undue influence at best and, at worst, outright corruption.

At the end of the Constitutional Convention in 1787 in Philadelphia at Independence Hall, 11 years after the Declaration of Independence was adopted by our Founders, Benjamin Franklin was exiting the building. And a citizen came up to him and asked him, Mr. Franklin, what kind of government do we have? And he answered and said: A republic if you can keep it.

Let that be a reminder to all of us as we contemplate the amount of dark money and soft money coming into our government and the ethics that can be corrupted by it, that this is something that our Founders never envisioned. Now more than ever, we do need to restore decency, transparency, and responsibility by introducing ethics reforms for the President, Vice President, and all Federal officers and employees.

This administration has had at best a very awkward relationship with ethics and integrity. We must make sure the President and his family members do not use the Presidency to enrich themselves at the expense of the American people. I know every single one of my colleagues here didn't come to Congress to get rich. They came here because they believe in America, in putting service above self, and country over party. We can do that by passing commonsense reforms to our political system. Let's work together to reduce the influence of big money in politics, strengthen our rules for public service.

With that, I'd like to ask Mr. Shaub, does current law prohibit all Federal employees from taking official actions to benefit their own financial interests, and if so, what gray areas still exist that need to be addressed?

Mr. SHAUB. Well, I think the biggest gap is that it doesn't cover the President or Vice President, and it's important to remember that that exemption was not supposed to be some kind of perk of high office, but rather, a recognition that a President can't really recuse, not participate in urgent matters of State which is why divestiture was always the practice until now.

I think there are other conflicts of interest in the form of these golden parachutes where people are not sufficiently kept out of matters affecting those companies that give them big payouts. And I think that there's an oversight problem that's become apparent that there just is a limited ability to be able to get into the matter and find the information because OGE doesn't have the authority to do it, and I think this bill addresses that.

Mr. ROUDA. Yes, please.

Mr. AMEY. Congressman, I just also want to point out the fact that obviously there are some constitutional issues with applying certain ethics rules and regulations to the President. Some of those have been handled, and I think the provision in H.R. 1 that specifically talks about this that was the sense of Congress in the rules don't apply but they should act as if they do actually follows the precedent of, in 1974, of Assistant Attorney General Scalia in which he said the rules don't apply, but it's good policy and that

the exemptions to them when they don't apply should be common—you know, like, should be common and should be transparent so that we can follow that and be aware of it.

And so, you know, this isn't a partisan issue. The bill actually has come out where OLC and the Department of Justice has said that has been the precedent for this, you know, for 30, 40 years.

Mr. ROUDA. Thank you very much.

I yield back.

Mr. DESAULNIER. Mr. Cloud, you're next.

Mr. CLOUD. Thank you, Mr. Chairman.

There's no doubt that government is broken. This Congress, I can tell you especially after being here for six months, my thoughts on that matter have only been confirmed.

But for all what we'll assume are the best intentions, historically centralizing power has only led to more corruption. I think a great example of this was how we saw the IRS weaponized against groups that didn't agree with the political leaning at the time. I'm also puzzled by the kind of thinking that says, well, we don't trust government, so let's give them more power. I think that the Founders understood this in creating a Federalist republic form of government.

And, Mr. Smith, that brings me to a question. You mentioned in your testimony—I believe I counted 28 times you mentioned the word unconstitutional. Could you speak to some of your concerns with this bill in reference to the Constitution?

Mr. SMITH. Sure. And I'll focus on the speech parts because that's what the Institution for Free Speech does—the Institute for Free Speech. One of the things it does, for example, is it would regulate speech that uses the term—it uses the term promotes, supports, attacks, or opposes a candidate. That term is extremely vague. It's not really clear what it means. If somebody were to—if a union were to take out an ad saying it's unfair that Federal employees should have to be laid off during a shutdown, you know, tell President Trump to open—reopen the government, is that attacking President Trump or not? The Supreme Court has long said you have to have a clear standard so that people know what they can say and what they don't when they have to start reporting to the Federal Government, when their ability to finance ads is limited in different ways. So that's one thing, the vagueness of that phrase and another phrase.

Another example would be that the bill presumes that certain people are coordinated, coordinating their activities with candidates even if they are not actually, in fact, coordinating their activities with candidates. I used an example earlier in response to one of your colleagues noting that, for example, if you had a former intern, paid intern go off and work for a citizens' group and they had concerns about the bill, about some bill, they would be prohibited from advertising on that because anything they did would be considered coordinated even if it wasn't, and because they're a corporation, they can't do coordinated expenditures at all. This would mean, for example, if somebody were to leave the minority staff and go to the majority staff and go to work for the ACLU, at that point the ACLU would have to be quiet on any kind of legislation they might want to comment on. That's clearly unconstitutional

under a case called Colorado Republican Campaign Committee. The Supreme Court said you can't presume coordination. People actually have to engage in coordination before you can tell them that you can limit their political speech. So those would be just two quick examples of where I think the bill clearly goes off the rails and into the teeth of existing constitutional law.

Mr. CLOUD. Thank you. This bill also purports to limit foreign influence in elections. Could you speak to how this limits foreign interference, namely, to illegal immigration, illegal immigrants voting in our elections?

Mr. SMITH. I'm really not prepared to talk about how it pertains. Obviously illegal immigrants are not allowed to vote in U.S. elections. And, you know, because we're a speech organization, we've not really commented much on the voting rights provisions of the bill.

I will say the one thing that's often overlooked is the issue is not really that illegal immigrants might vote in elections. I think the more legitimate concern is that illegal immigrants then count in the census, and thus, they inflate the congressional representation of areas in which they tend to settle. And it's no secret that those areas have tended to be in recent years areas represented by Democrats. So essentially it's a way that you kind of boost Democratic representation because these nonvoters are included in the population. Now, that may not be an inherently wrong thing. There's different theories of regulation or representation, but that is the effect there.

Mr. CLOUD. Well, can you speak to any certain provisions in this bill that might secure the vote for citizens?

Mr. SMITH. Secure the vote for citizens?

Mr. CLOUD. Yes.

Mr. SMITH. I'm not quite sure I follow that. Sorry, Congressman.

Mr. CLOUD. Any provisions in the bill that ensure that only citizens are voting in our elections.

Mr. SMITH. I don't think there are any that take that approach at all. Indeed, to the extent people are worried about that, the bill probably has provisions that cut the other direction.

Mr. CLOUD. Okay. Could you then address whether or not minority groups would be—have their vote count more or less should illegal immigrants be invited to vote?

Mr. SMITH. Well, I'm not sure it would change whether other votes would count more or less. It would have an impact, of course, on the makeup of the electorate, and that would obviously have an impact on who wins elections at some point.

Mr. CLOUD. Okay. Thank you. I yield back.

Mr. DESAULNIER. Thank you, Mr. Cloud.

Next up is Ms. Wasserman Schultz.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

My question is for Mr. Shaub. The Presidential Transition Act allows candidates for the incoming Commander in Chief to submit transition team members who would be eligible to receive selected security clearances, and the current process is clearly very flawed. I think you referenced that in your opening remarks. There is really no transparency and a risk of compromising our national security.

And we've got familiar facts here. The Trump transition team requested a security clearance for his son-in-law, Jared Kushner, and that gave him access to classified information that we now know he should not have had. His history of failing to report meetings, extensive business relationships should and apparently did raise red flags that he could potentially be compromised. And just a couple of weeks ago we learned that Federal specialists proposed rejecting his application because of concerns about his family business and his foreign contacts, travel, and meetings that he had during the campaign and that he could potentially be subject to undue influence.

Now we know that those same specialists were overruled by their politically appointed supervisor, Mr. Carl Kline. And in fact, Mr. Chairman, as I'm sure you're aware, Mr. Kline overruled 30 such clearances, which is an unprecedented amount. Apparently there had only been one prior overruling, I think, in the history of that process.

Now, for the record, the committee might recall I actually proposed two amendments in the appropriations bill in 2017 to revoke Mr. Kushner's security clearance because he repeatedly violated the rules and didn't report meetings that he had had because he forgot about them. I don't know about you, but I generally remember the foreign contact meetings, and I have a record of them. I don't just forget them and repeatedly have to amend applications. Most people wouldn't.

So it strained credulity to suggest that these were meetings that he didn't remember. So we can't have the fox watching the hen house any longer. And this bill at least takes a step toward transparency. But how can we ensure that these overrulings are no longer allowed, and what steps do you think need to be taken to be sure that people in the White House and the executive branch who should not have security clearances don't have them, can't get them, and have them revoked when they have been temporarily granted?

Mr. SHAUB. Well, I think that—turning first to your comments about the transition team, I think it's very important that this bill addresses ethics for the transition team. It's well established that it's not governmental, yet it does receive governmental funds; it's full of people who are about to become government officials; and it's full of people who are getting access to information.

In terms of the security clearance process, I don't have specific recommendations on that. That's not my specialty. It is important, however, to depoliticize it as much as possible and take steps to make sure that there isn't political interference in the security clearance process. I also think in this case we have a nepotism problem where you've got an individual who repeatedly amended his security clearance form. I have never in all my years seen as many amendments to a financial disclosure form as he had to make, and I think that this is the kind of thing that would ordinarily potentially lead to either a termination or a revocation of security clearance. But you've got a President's son-in-law in office, which is another majority departure from the prior 50 years of governmental practice.

Ms. WASSERMAN SCHULTZ. Thank you.

Yes, Mr. Mehrbani.

Mr. MEHRBANI. If I just may say on security clearances, having worked on hundreds of these, not once out of all of my experience in the White House do I recall overruling the decisions of a career professional, and I think making sure that that process is led by career professionals is one way to prevent that from occurring.

Another way, especially for those who are nominated to Senate-confirmed positions, is ensuring that their background investigations are fully completed before those folks are nominated and considered by the Senate.

Ms. WASSERMAN SCHULTZ. Mr. Mehrbani, if I can ask you since you do have experience in reviewing those security clearances, why do you think that—why did you not—do you not recall any of the clearances you reviewed being overruled?

Mr. MEHRBANI. I don't recall any being overruled.

Ms. Wasserman Schultz. But for—I mean, for what valid reason would there be to overrule a recommendation that someone not be granted a security clearance? What's the risk of doing that?

Mr. MEHRBANI. So I never viewed myself as an expert, and it requires expert experience and training to understand the different factors that go into conducting a background investigation, what factors should be considered derogatory and potentially put an individual at risk of compromise or other ways put national security at risk. And so I deferred to the professionals who did that for many years.

Ms. WASSERMAN SCHULTZ. So it's your opinion that potentially national security is jeopardized with the overruling of these recommendations?

Mr. MEHRBANI. I do think it puts national security at risk, yes.

Mr. DESAULNIER. Thank you, Mr. Mehrbani.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman, I yield back.

Mr. DESAULNIER. I recognize Mr. Armstrong for his five minutes.

Mr. ARMSTRONG. Thank you, Mr. Chairman.

My question is for Mr. Smith. First, do you know the only State in the country without voter registration?

Mr. SMITH. No.

Mr. ARMSTRONG. Well, I'm going to give everybody a little trivia lesson. It's North Dakota.

Mr. SMITH. That was my guess, but I'm under oath.

Mr. ARMSTRONG. One of the things I think we run into when we do Federal one-size-fits-all piece of legislation is maybe the negative disparate impact it would have on certain rural States that do things in a very unique way, which we're very proud of. North Dakota is the only State in the country without voter registration. We have an incredibly robust rural voting program.

We have voting—counties that vote exclusively by mail, and we have developed these programs with input from our citizens, our electorate, our county officials and dealing with those issues. We currently have no-excuse absentee ballot—absentee voting. We allow felons to vote immediately upon release from prison. Our poll workers are almost exclusively volunteers across the entire State.

So, in short, we have the best and easiest voting booth access in the entire country, and we are incredibly proud of that. We also are

set up somewhat uniquely in that we have cities, counties, legislative districts, and one very big congressional district.

But we have also gone through a lot of different issues, and one of the questions I have is: Each of these counties interacts differently with their voters based on the resources available to them. And if I read this bill, it requires mandatory 15-day early voting. Is that correct?

Mr. SMITH. That's my understanding.

Mr. ARMSTRONG. So what if you're an exclusively vote-by-mail county?

Mr. SMITH. Well, I'm not sure what you mean. I mean, if you're an exclusively vote-by-mail county, you have a long period to vote, generally.

Mr. ARMSTRONG. So, in some of our counties, we actually go earlier than 15 days; some of them we go shorter, but we have extended hours to like 10 p.m. So, when we do mandatory early voting, is that required in each district or each precinct or—I mean, we set things up differently; like, in our larger city, we have five legislative districts, but our early voting is at one or two locations in that city.

Mr. SMITH. Yes, as I understand the bill, it would require all citizens have an opportunity for early voting. I am not aware if it specifies all the polling locations where those have to take place.

Mr. ARMSTRONG. And we have gone through significant affidavit reform in our State and have dealt with these issues both at the county level, the local level, and the State level, and we have worked forward to require all different forms of ID, whether they're student IDs, and created mechanisms where somebody can come to the polling place with an ID and a different address, and we just do things that way.

But what we have gotten away from is the affidavit process. And the reason we have gotten away from it is we have found through a volunteer voting in excess of—we have found that there has never been any mechanism to check an absentee ballot after it's been submitted to whichever district it is. Now, this would require the absentee ballot process to come back—or the affidavit process to come back into place, correct?

Mr. SMITH. That would be my understanding, yes.

Mr. ARMSTRONG. And we—and this might be a little change, but it's really important to the voters in North Dakota. So we start our absent—our early voting process I think for military deployed overseas as early as August. And we have, as I said, no-excuse absentee ballots. But what we require is that our ballots are postmarked the day before the election.

And in North Dakota, we really, really try to make sure the election is over on election day. North Dakotans don't understand how an election can change by 12,000, 13,000, 14,000 votes in the two to three weeks after an election day. Now, I'm not in the business of telling people in California or somewhere else how to do their voting laws, but that just is something that is not appropriate here. And this would require ballots to be postmarked up until election day, correct?

Mr. SMITH. That's correct.

Mr. ARMSTRONG. So, when we are implementing laws at the Federal level to deal with perceived or real problems in other areas of the country, I think we run into serious concerns about particularly rural districts who deal with these issues. Right now in our State legislature, we have a bill moving in place where county auditors and State legislators are dealing with voting precincts in particular counties, and it's a very unique North Dakota problem. And I would just caution everybody here to remember that those issues and those challenges are better suited to be dealt with by the people who are closest to their communities and dealing with the issues we face.

And when we deal with these laws at this level, we turn this into something that we can't control at our local level. And we have unique challenges in North Dakota that other people don't.

Mr. SMITH. It's worth noting, Mr. Armstrong, that there actually are no Federal elections; there are States elections for Federal office, and you made that point very well.

Mr. ARMSTRONG. I yield back.

Mr. DESAULNIER. Thank you, Mr. Armstrong. The gentleman from Maryland, Mr. Sarbanes.

Mr. SARBANES. Thank you, Mr. Chairman. I want to thank the panel.

I wish Congressman Meadows were still here because I'm delighted that he's thinking of stepping into the small donor matching system that is proposed in H.R. 1. Because when you step into that system, you step into a system that is owned by the people. This is why it's in the bill because the public is tired of feeling like their elections, their system, their government, their democracy is owned by special interests, big corporations, Wall Street, oil and gas industry, super-PACs, lobbyists, everybody but them. This is the power move. They want to own their democracy again. And all across the country, as you pointed out, citizens are stepping up and taking that power back by creating these systems where they're the owners, the rightful owners of their own democracy. And they can get that back, Mr. Mehrbani, I think you said, for a dollar a year—\$1 a year.

Mr. MEHRBANI. That's right.

Mr. SARBANES. Per citizen. To ransom your democracy back from the people who have taken it hostage, so you can call the shots. So I would love for Congressman Meadows to step into that system. I'd like every Member—it's a voluntary system; you don't have to do it. But I'd like every person to step into that system because that's owned by the people. That's the whole idea.

People are sick and tired of being sick and tired, to use Fannie Lou Hamer's words, at a system that is run by somebody else. So that's the argument for that system. Now, let me get to a couple of other things that have been mentioned here in the three minutes and 15 seconds that I have.

Somebody said at the outset that this was theater. I think the ranking member said maybe it was theater. This is not theater. We're trying to set the table on the democracy, make people feel more empowered, like their voice counts and they're not locked out and left out of their own democracy and their own government and their own republic. That's why we're doing this.



Somebody said, why are we hooking all these things together? Voting, ethics, campaign finance. Because the people have told us: If you just do one and you don't do the others, we're still frozen out; the system is still rigged. You fix the voting stuff, but if you go to Washington and nobody is behaving themselves, that doesn't solve the problem. Or you fix the ethics part, but we're still—the system is still owned by the big money and the special interests because they're the ones that are underwriting the campaigns, then we're still left out; the system is still rigged. You got to do all of these things together to reset the democracy in a place where it respects the average citizen out there, who right now is sitting in their kitchen, they're looking at the TV screen, they're hearing about billionaires and super-PACs who are making decisions inside conference rooms somewhere on K Street that affect their lives. And all they're saying is: We want back in. We're tired of sitting out here with our noses pressed against the window looking in on the democracy that we have no impact on. That's why we're linking all of these things together: to reset the table so the special interests aren't the ones that are calling the shots.

Is voter fraud the problem? Mr. Smith would think you—would have you think so. Voter fraud is not the problem. We know the statistics on voter fraud; they're microscopic. Voter suppression is the problem, the obstacle course that has been set up that makes it so difficult for people to register and get to the polls, and then it demoralizes them. And they stay home; it's not worth it.

We have to fix that. As Congressman Cummings said, that's the baseline. The most powerful form of protest and engagement an American citizen has is the right to vote. But too many people in too many parts of this country still can't get to the ballot box. That's all it's about: Coordination. Violating free speech. We can have sensible coordination rules so the super-PACs aren't coordinating with candidates and violating the campaign contribution limits and so forth. We can do that. We can protect free speech while actually giving more speech back to people who are denied it right now. That is not a problem.

We're not outing donors. The provisions of transparency in this bill are targeted to mega donors who give more than \$10,000, who right now are hidden behind this Russian doll kind of structure where you can't see who it is. Who's behind the curtain? Who's putting all this money in the campaigns? The public wants to know that. That's reasonable. Let them see what's happening to their own democracy and give them their power back. That's what H.R. 1 is, For the People. That's how we designed it.

Mr. SMITH. Mr. Chairman.

Mr. ARMSTRONG. I yield back my time.

Mr. SMITH. Mr. Chairman, if I may, because Mr. Sarbanes specifically referenced something and said that I said this.

Mr. DESAULNIER. Very quickly.

Mr. SMITH. In a very loud voice. I have not addressed the question of voter fraud. That's not what the Institute for Free Speech does. And I just want to make that clear that he's imputed to me comments that I did not make.

Mr. DESAULNIER. Thank you, Mr. Smith.

Mr. Grothman from Wisconsin.

Mr. GROTHMAN. A few questions. I'll start out with Mr. Smith again since he's all warmed up. H.R. 1 is a big bill, and it takes a lot of time to go through it. Do you think the public will be able to read and understand how this bill affects their ability to participate in political discourse?

Mr. SMITH. I'm sorry. I didn't quite catch the operative verb in that question. Was it—

Mr. GROTHMAN. Do you believe members of the public will be able to read and understand—

Mr. SMITH. I don't think they would have the faintest idea. Again, one of the problems anytime I think you put together a 570-page sort of omnibus bill is that it becomes very hard for people to grasp what it is that's going on, including I would suspect Members.

Mr. GROTHMAN. Do you think more careful drafting could solve that problem?

Mr. SMITH. Well, I think that splitting the bill up would allow it to be considered in its component parts, and people might decide some parts are worth keeping and some are not. I think do think there was a certain amount of carelessness in drafting or, again, perhaps some disingenuity. I mean, when you have a section titled Preventing Super PAC-Candidate Coordination that applies to every citizen in the United States, not just super-PACs, that seems to be some kind of drafting problem.

Mr. GROTHMAN. Okay. Just a general question. You know, I can't tell you—you know, probably the most powerful special interest in every election is the media. And I can't tell you how many times I'm told: You know, you can do this or you can't do that because this is the way it's going to be spun in the newspapers or spun on TV.

I don't have an answer to this question, but when I look, there's a study that shows—when you look at like journalism, communication, tenure-track professors, 20 Democrats for every 1 tenure-track position. And it just dominates this building as people try to form their press releases or Statements not to get in trouble with the media.

Do any of you have any suggestions as to what we can do, or is it just something we're going to have to deal with a situation in which apparently 95 percent of the professors, tenure-track professors in journalism and communications, where the people who, you know, determine how what we do here is reported, are Democrat in nature. Does anybody have any—would you agree with me that it's hard to have fair elections as long as that happens, and is there anything we can do about it?

Mr. SMITH. It's clear—I'll go ahead and take the first stab at it. It's clear that the media has a tremendous amount of influence in elections, and they remain largely unregulated by this. And I'm not sure that you decrease that influence by putting limits on what groups of people can say and what citizens, you know, in the country operating through the groups they join can say and do.

I will personally say and I have often said in the context of elections, is the current system perfect? Is it perfect to have a system in which people are relatively free to participate and give money? Well, it's not perfect, but as Churchill once said, it seems to be bet-

ter than all of the alternatives. And that's somewhat true here as well. As much as the biased media may be a problem, the alternatives are probably not better. And I think this is something that each side would do very well to remember from time to time: that the world is not perfect and we're not going to have perfect elections. We try to do the best elections we can, and for most of our history, that has meant entirely unregulated elections, and I don't think we have much to show for the last 40 years of very heavy regulation.

Mr. GROTHMAN. I agree with you. The government shouldn't be weighing in on regulating what people can say or what type of people are hired, but given that I assume the majority of these tenure-track people work for public universities, I just wondered if there's a—I mean, a lot of people feel there is an unfairness out of there, you know, that you have to overcome not only your opponent, but the mainstream media. No one knows suggestions how to deal with it.

Okay. I'll go to something else, and people always ask me why we don't talk about this: the influence of money in elections. During the last administration, we had a situation in which the Secretary of State's husband was paid a half a million dollars on a speech in Russia. And, you know, I don't think there'd be any question if the Secretary of State herself had accepted \$500,000, but do you think that we should begin to regulate the size of checks people are getting from spouses of relevant figures? Would that cause people to have more confidence in what goes on?

Mr. SMITH. I always think the detail or the devil is in the details, but I will say that too often the response has been to put limits on the American people, you know, rather than say maybe the limit should be on the people who are actually serving in government, including their families having to give something up.

Mr. GROTHMAN. Okay. Thank you very much.

Mr. DESAULNIER. Thank you.

Next up is the gentlelady from California, Ms. Speier.

Ms. SPEIER. Thank you, Mr. Chairman.

This is a great segue. Mr. Smith just suggested that maybe the families of people in government should have some restrictions on their income. And I'd like to draw attention to Mr. Shaub, who has been of great service to our country, and to all of you for your presentations here today.

But Ivanka Trump, who last I noted was the daughter of the President of the United States, has businesses. And she was granted 34 trademarks in China after her father was elected and she became a member of the administration. These trademarks were granted during a period of economic tension between the United States and China and coincided with the Trump administration's lifting a ban on U.S. sales of technology to Chinese firm ZTE, which violated U.S. sanctions with illegal sales to Iran.

Mr. Shaub, what are the risks to the American people about these kinds of conflicts of interests?

Mr. SHAUB. Well, I think these and all conflicts of interests create the risk of a divided loyalty. The American people ought to be able to confidence that their leaders in Washington are serving their best interests and not their own person financial interest. I

think the situation got worst when the President departed from past traditional interpretation of the nepotism law, which for 50 years and at least I believe four OLC pieces of guidance had told President's they couldn't do that, and the consequence has been that she's been allowed by the White House to retain the types of assets that even this White House is not allowing other people other than her husband to retain.

Ms. SPEIER. So strengthening the antinepotism laws would be a key component if we're trying to clean up the mess that is in the White House right now?

Mr. SHAUB. I absolutely think so.

Ms. SPEIER. Thank you.

Mrs. Flynn, I serve on the Intelligence Committee, and I'm deeply troubled at what appears to be Russian engagement through 501(c)(4)'s in this country, whether it's the NRA or other nonprofits that are created for the express purpose here in the United States to lobby on behalf of Russia as it related to the Magnitsky Act.

So right now there is no limitation on how much money can be contributed by a foreign government entity to a 501(c)(4). Is that correct?

Mrs. HOBERT FLYNN. I believe that is, yes.

Ms. SPEIER. And there is no disclosure required as well. Is that correct?

Mrs. HOBERT FLYNN. I believe that's right.

Ms. SPEIER. So, in your estimation, would it be prudent for us to, one, limit the amount of contributions that a foreign individual can make to a 501(c)(4) and, two, that all of that be subject to disclosure?

Mrs. HOBERT FLYNN. I think it would be very important—you know, there are limits—there are bans on foreign nationals giving money in campaign contributions, and I think we should be looking at those kind of limits for—and then certainly disclosure for contributions to 501(c)(4)'s.

Ms. SPEIER. There are four Cabinet officials in this administration—the Secretaries of Health and Human Services, Veterans Affairs, Interior, and the EPA Administrator—who have all resigned amid evidence that they had forced American taxpayers to foot the bill for extravagant and unnecessary travel expenses.

And I would like to ask Mr. Mehrbani if you can speak to the impact these resignations have had on the ability of the executive branch agencies to function effectively and how we can relieve ourselves of the abuse that some of these Secretaries of various Cabinet posts were engaged in?

Mr. MEHRBANI. Thank you. I'm going to refer back to something that I think multiple members of this panel said earlier, which is that leadership on ethics issues really sets the tone, from my experience, for the rest of staff at an agency. And that leadership should actually be coming from the White House. And there have been multiple practices over, spanning multiple decades by Republican and Democratic administrations and Presidents that have done just that to make sure that they are avoiding even the perception of a conflict of interest or using their position for private gain. That's a bedrock principle in our democracy. And the bill, the H.R. 1, enshrines many of these practices into law and I think would

serve as the good first step for preventing some of what we've seen over the last couple of years.

Ms. SPEIER. I yield back.

Mr. DESAULNIER. Thank you.

I now recognize Mr. Higgins from Louisiana.

Mr. HIGGINS. Thank you, Mr. Chairman.

Mr. Chairman, in the spirit of bipartisanship, let me say I agree that H.R. 1 should be divided into its component parts because perhaps it could be argued that there's some worthwhile legislation written in here. But as a totality of circumstance, one word describes this thing: wrong. Just wrong.

This bill is exactly reflective of why our Founding Fathers passionately debated after the Revolutionary War prior to the formation of our Federalist Society and central government, it passionately debated whether or not this thing could even work. If we could have a Federalist Society and a union of States with a strong central government and still maintain individual rights and freedoms.

My colleague across the aisle mentioned Russia. Russia has been mentioned several times today. This bill resembles Russian Government policy. Most of us here have taken an oath before we became Congressmen and Congresswomen. I took an oath as an Army soldier. I took an oath as a police officer, a sheriff's deputy. You panelists before us are courageous to come before this committee where many very serious decisions will be made, debates shall be engaged. But most of you have taken an oath as well.

And may I say that the oaths that I took in my life were not to a company commander or a general or a sheriff or a chief or a marshal; they were to the Constitutionalist principles that my oath represented.

Mr. Smith, does our First Amendment protect freedom of speech?

Mr. SMITH. I think that goes without saying.

Mr. HIGGINS. Does H.R. 1 abridge the freedom of speech?

Mr. SMITH. Pardon. Pardon, I didn't hear that.

Mr. HIGGINS. Would you agree that H.R. 1 abridges the freedom of speech?

Mr. SMITH. Oh, yes, yes.

Mr. HIGGINS. Absolutely. It gives almost total partisan government control over the freedom of political speech in a representative republic where these freedoms have been paid for by the blood of patriots past. Are we worthy to be the Americans that occupy this body? Did our Founders intend, Mr. Smith, for there to be an expiration date on our First Amendment rights? Any panelist?

Mr. SMITH. No.

Mr. HIGGINS. Of course not. That expiration date will come if H.R. 1 passes.

Mr. Smith, I'd like to ask you, according to the tone that my colleagues have expressed here, Americans watching this would think that they stand for the abolishment of big money in political campaigns. According to my research, the Association of Trial Lawyers gave Democrat candidates in 2018 \$2.2 million while they gave Republican candidates about 130 grand. This is not a bill of the people, by the people, and for the people; it's a bill of trial lawyers, for trial lawyers, and by trial lawyers.

It greatly restricts the freedoms of speech of Americans assembled as nonprofit organizations or individual citizens. It hides behind titles that are quite misleading in an era when we know that many Americans that have the right to vote yes, but don't get past headlines.

I'd like to specifically ask in my time remaining, Mr. Smith, for you to address, explain to us all, please, what coordinated spenders are—this is quite troubling to me. I've read your testimony and those of your colleagues, the panelists. Incorporated nonprofits, defined as coordinated speakers, would be banned from spending money on speech.

This is directly contrary to judicial decisions past. Please, in my remaining time, 40 seconds, explain to America what that is.

Mr. SMITH. In my prepared remarks, I have a number of examples, and the way this works is, of course, most groups that people belong to, the ACLU, the NRA, Right to Life, Planned Parenthood, the NAACP, are incorporated, and if corporations can't make any coordinated expenditures because those are treated as contributions—and so just to give some examples, if a member were to purchase a ticket to a fundraiser for one of these organizations for \$100 or \$150 and, five years later, that member declared his candidacy for the Senate, that organization could not make any expenditures, not only directly advocating his election or defeat, but even talking about the candidate in ways that might be deemed by someone to be——

Mr. HIGGINS. In my remaining 5 seconds, yes or no, would this have a chilling effect on the freedom of speech of Americans assembled from sea to shining sea?

Mr. SMITH. Absolutely.

Mr. HIGGINS. I yield back, Mr. Chairman.

Mr. DESAULNIER. I thank the gentleman. I thank you for taking our allotted time.

I now recognize myself for five minutes.

This is a fascinating conversation. I want to thank Mr. Sarbanes for his leadership on this. He's put incredible hours into it, and I appreciate it. I've seen him in action across the country talking to electeds of both parties.

What this really is about is power. Mrs. Hobert Flynn, in 1970, when John Gardner started your organization, a Republican who served a Democratic administration, it was about power then; it's about power now. And we've grown. Clearly, there is growing research that says that Congress does not reflect the average person, and it reflects more people who contribute and have influence on both sides.

From my opinion and many others, that has contributed significantly to our income inequality and the lack of opportunity, particularly for younger people. Would you address sort of the historical perspective from Common Cause and John Gardner's admonition, which is, as you recall, holding power accountable over time?

Mrs. HOBERT FLYNN. Yes. Thank you. You know, the challenge here is that what we're talking about is the ability of wealthy interests to speak louder than the rest of the American people, and that's what we object to. What we are doing is not actually putting in place anything that violates anybody's freedom of speech. We're

talking about simple things like disclosure, a voluntary system of small donor reform.

Candidates do not have to participate. And the fact is, you know, how this will be funded depends on the system. In Connecticut, they used unclaimed assets to fund the public financing system. The difference is that people who are not wealthy and not connected to special interests can run for office. They have a competitive chance. They don't have to be connected to wealthy interests. And then, once elected, they are free to serve based on what their constituents want, and they don't have wealthy interests coming up and saying: Hey, this is what I need you to do; I need this tax break or something else.

It frees them.

And so what you see in those kinds of systems is that people govern differently. I saw a palpable difference with lobbyists who were treated by freshman who ran under the program, they didn't think they were powerful; they treated them: You can tell me information, but you have no control, no monetary control.

So they can enact what is best in the best interests of their citizens.

Those are the kinds of things we need to look at. A comprehensive approach also deals with ethics. So you may have this system set up that people can choose to run in or not, but if, in the end, they're taking money through the backdoor and gifts and money that goes to their businesses, they still could have corruption problems. So you need to look more broadly at these issues.

You also need not only to lift the voice of small donors but lift the voice of all Americans so that they can vote and have a voice in their democracy. And so that's why you see these voting measures that are so incredibly important to make it easier, and actually it ends up saving money when you move to online voter registration. There are checks in place so that you're not capturing illegal immigrants in voting.

So what we want to see is a chance to have, you know, independent agencies, and the Federal Election Commission is one that is flawed, that has not worked, and you've had Republicans block enforcement of the law. We need agencies that enforce the law with integrity. And so you can have things like blue ribbon commissions like they talk about in this bill. There are other models to look at in Wisconsin with the Government Accountability Board; in Connecticut, with bipartisan and independence involved. So it is a holistic approach to try and ensure that people's voices are heard in our democracy.

Mr. DESAULNIER. Just an editorial comment. I'm constantly reminded as a former history major, the history around us when Teddy Roosevelt talked about the malefactors of great wealth, and the influence of trusts in the Congress. And what that led to is the inequality that we now rival at this point in time.

Mr. Shaub, just briefly, could you elaborate on the positive aspects of making you, your former position, directly be able to respond, to report to Congress and some trouble we have had with OGE getting written responses that both the Republicans and Democrats have been frustrated by?

Mr. SHAUB. Yes, I think one of the problems is that OGE's two sister agencies, the Merit Systems Protection Board and the Office of Special Counsel, can communicate directly with Congress, but OGE has to go through the political approval process through the White House's Office of Management and Budget, which means that OGE doesn't have the ability to alert Congress of problems or give them answers to the information they're seeking. And we've seen inspectors general and those other two agencies I've mentioned use this ability to great effect to protect the government's integrity.

Mr. DESAULNIER. Thank you.

I yield the remainder of my time. Our next speaker is Mr. Gibbs from Texas—Ohio.

Mr. GIBBS. Ohio. Texas is a great State, though.

Mr. DESAULNIER. It's hard to miss. Ohio.

Mr. GIBBS. Thank you to our witnesses. First of all, I want to say, on Ohio, I think the process is working pretty good. I know Mrs. Flynn talked about long lines. A number of years ago, when I was in the State senate, we passed some legislation, no-excuse absentee ballots; voting, you can get 30 days before the election. A lot of people are doing that. You don't—so there's no—we don't have lines anymore, and we don't need a Federal holiday so you can go vote. You got 30 days to go vote. If you can't vote in 30 days by mail or by absentee, that just raises a lot of interesting questions about your voting, your abilities.

Also, in Ohio, the secretary of State, the practice has been to send out two or three weeks before absentee ballots will be mailed out to every registered voter in Ohio saying: Hey, if you want to let us know; here is an application for an absentee ballot. Send it in; we'll send you an absentee ballot.

Pretty simple.

So, Mr. Smith, going through, I got some questions here. It is my understanding that this bill authorizes a three-judge panel here in the U.S. District Court in the District of Columbia to redraw congressional districts in the States. Is that in the bill?

Mr. SMITH. I believe that's correct, but again, that's outside of the area that I'm most focused on.

Mr. GIBBS. Okay. It's just bizarre that we have federalism and States' rights, that we'd have a three-judge panel here in Washington, DC, a one-size-fits-all for all the rest of the 50 States. So that's a big problem with the bill.

Also, as we have a discussion that authorizes Federal employees, the poll workers, and pay them and all that. We obviously don't need that in Ohio. We have a good system, a bipartisan system. And every county board has two Republicans, two Democrats, and at every precinct that the polls workers, it's 50/50 bipartisan. When they count the ballots, it's all bipartisan, and that's probably why you haven't heard a lot of problems in Ohio, like other States.

Mr. GIBBS. You know, it's also interesting what we saw—what the IRS did a few years ago targeting conservative groups. Mr. Smith, do you think that this bill would actually open up a can of worms or give more empowerment to bureaucrats here in Washington, DC, where we can see abuse of that type in the future?



Mr. SMITH. We often say, you know, the purpose of disclosure is for the people to monitor their government, but it's not for the government to monitor their people. And this gives a lot more information to government. And a lot of it is intended, you know, opens up the possibility of that sort of retaliation or, alternatively, the on-line harassment and so on that private individuals can engage in.

Mr. GIBBS. I appreciate that.

Mr. SMITH. That's a long way of saying yes.

Mr. GIBBS. I got that. Also, in the bill, as was talked up by my colleague Mr. Meadows from North Carolina, the 6-to-1 payment of Federal taxpayer dollars. So, if you have a \$200 contribution, you get \$1,200 taxpayer dollars. I don't see how that is a good thing, where in the Constitution or anywhere it says that. I could be a taxpayer; I don't want my money going to my opponent, say, my tax dollars. So it's a big fundamental problem with that. I have major concerns, and I think that opens up a can of worms that is really a huge problem.

I also wanted to ask: You hear so much attack on political action committees, PACs. Mr. Smith, you may be the best one to answer this, I don't know, anybody that wants to answer it. Where do political actions committees get their money?

Mr. SMITH. Political action committees get their money from individuals, traditional PACs do. Now, super-PACs, as they're called, can take money from corporations and unions, but they are not able to contribute directly to candidates or to coordinate anything with candidates.

Mr. GIBBS. I appreciate that. I make the point because I got attacked because I take political action money, but it comes from businesses in my district, a lot of it. It comes from associations. You know, everybody has somebody lobbying for them in D.C. If you're a member of a retirement association, any organization, you got a lobbyist here.

Mr. SMITH. And to be more precise, if I could interrupt, Congressman. It actually comes from the involuntary contributions from the employees of those businesses and trade associations.

Mr. GIBBS. That's absolutely right, unlike another entity on the labor side that's not voluntary. So that's a point that I think is really important that needs to be made, that this money is coming—that people voluntarily support, they could be insurance agents supporting the company they work for; they could be members of a farm organization, supporting what the organization is out there advocating for, and they support that. If they didn't support it, they wouldn't give the money because it's voluntary. So this attack on this and then to put the provision in this bill, if you take political action money—I believe it's in the bill—you don't get the 6-to-1 match. I believe that's correct in the bill. So it's definitely a partisan bill and targeted for their partisan activities.

I yield back.

Mr. SARBANES.[Presiding.] The chair recognizes Ms. Ocasio-Cortez for five minutes.

Ms. OCASIO-CORTEZ. Thank you, Chair. So let's play a game. Let's play a lightning round game. I'm going to be the bad guy, which I'm sure half the room would agree with anyway, and I want to get away with as much bad things as possible, ideally to enrich

myself and advance my interest, even if that means putting my interests ahead of the American people.

So, Mrs. Hobert Flynn—oh and, by the way, I have enlisted all of you as my coconspirators, so you're going to help me legally get away with all of this. So, Mrs. Hobert Flynn, I want to run. If I want to run a campaign that is entirely funded by corporate political action committees, is there anything that legally prevents me from doing that?

Mrs. HOBERT FLYNN. No.

MS. OCASIO-CORTEZ. Okay. So there's nothing stopping me from being entirely funded by corporate PACs, say, from the fossil fuel industry, the healthcare industry, Big Pharma; I'm entirely 100 percent lobbyist PAC funded. Okay. So let's say I'm a really, really bad guy, and let's say I have some skeletons in my closet that I need to cover up so that I can get elected.

Mr. Smith, is it true that you wrote this article, this opinion piece for The Washington Post entitled "Those payments to women were unseemly. That doesn't mean they were illegal"?

Mr. SMITH. I can't see the piece, but I wrote a piece under that headline in the Post, so I assume that's right.

MS. OCASIO-CORTEZ. Okay. Great. So green light for hush money. I can do all sorts of terrible things. It's totally legal right now for me to pay people off. And that is considered speech. That money is considered speech. So I use my special-interest-dark-money-funded campaign to pay off folks that I need to pay off and get elected.

So now I'm elected, and now I'm in, I've got the power to draft, lobby, and shape the laws that govern the United States of America. Fabulous.

Now, is there any hard limit that I have, perhaps Mrs. Hobert Flynn, is there any hard limit that I have in terms of what legislation I'm allowed to touch? Are there any limits on the laws that I can write or influence, especially if I'm—based on the special interest funds that I accepted to finance my campaign and get me elected in the first place?

Mrs. HOBERT FLYNN. There's no limit.

MS. OCASIO-CORTEZ. So there's none. So I can be totally funded by oil and gas. I can be totally funded by Big Pharma, come in, write Big Pharma laws, and there's no limits to that whatsoever?

Mrs. HOBERT FLYNN. That's right.

MS. OCASIO-CORTEZ. Okay. So—awesome. Now, Mr. Mehrbani, the last thing I want to do is get rich with as little work possible. That's really what I'm trying to do as the bad guy, right? So is there anything preventing me from holding stocks, say, in an oil or gas company and then writing laws to deregulate that industry and cause—you know, that could potentially cause the stock value to soar and accrue a lot of money in that time?

Mr. MEHRBANI. You could do that.

MS. OCASIO-CORTEZ. So I could do that. I could do that now with the way our current laws are set up? Yes?

Mr. MEHRBANI. Yes.

MS. OCASIO-CORTEZ. Okay. Great.

So my last question is—or one of my last questions, I guess I'd say, is it possible that any elements of this story apply to our current government and our current public servants right now?

Mr. MEHRBANI. Yes.

Mrs. HOBERT FLYNN. Yes.

Ms. OCASIO-CORTEZ. So we have a system that is fundamentally broken. We have these influences existing in this body, which means that these influences are here in this committee shaping the questions that are being asked of you all right now. Would you say that that's correct, Mr. Mehrbani or Mr. Shaub?

Mr. MEHRBANI. Yes.

Ms. OCASIO-CORTEZ. All right. So one last thing.

Mr. Shaub, in relation to congressional oversight that we have, the limits that are placed on me as a Congresswoman compared to the executive branch and compared to say the President of the United States, would you say that Congress has the same sort of standard of accountability, is there more teeth in that regulation in Congress on the President, or would you say it's about even or more so on the Federal?

Mr. SHAUB. In terms of laws that apply to the President?

Ms. OCASIO-CORTEZ. Uh-huh.

Mr. SHAUB. Yes, there's almost no laws at all that apply to the President.

Ms. OCASIO-CORTEZ. So I'm being held and every person in the body is being held to a higher ethical standard than the President of the United States?

Mr. SHAUB. That's right because there are some Ethics Committee rules that apply to you.

Ms. OCASIO-CORTEZ. And it's already super legal, as we have seen, for me to be a pretty bad guy. So it's even easier for the President of the United States to be one, I would assume?

Mr. SHAUB. That's right.

Ms. OCASIO-CORTEZ. Thank you very much.

Mr. SARBANES. Mr. Roy of Texas is recognized for five minutes.

Mr. ROY. Thank you, Chairman.

Mr. Smith, I wondered if you might have any comments on the questioning by my colleague from New York. You seem to have a few notes you were writing down. Do you have anything you want to say after that discussion?

Mr. SMITH. Well, I would say there are a couple things, for example, that would not be—she asked, is there anything that could apply here? There are certain things that could not apply here. For example, the whole point of article that she held up that I wrote said that you cannot use your campaign funds to make those kinds of payments; that would be illegal personal use.

Campaign funds are not dark money. They are totally disclosed, so they are not dark money. It's worth noting, by the way, that earlier it was mentioned that dark money constituted about \$1.7 billion. I believe that figure is incorrect by a factor of about a 500 percent. Dark money constitutes about 2 to 4 percent of the total spending in U.S. elections and has always been involved in U.S. elections.

So those are just a couple of points. I did kind of chuckle at the question, is it possible—asked of us—that these influences are—that this money is influencing the questioning here. To that, I'd say that's something you have to ask yourselves if you're being influ-

enced and see what you think. If you are, you might question yourselves. If you're not, you might question this hearing.

Mr. ROY. A couple of questions about super-PACs, as they are often referred to. Are Federal candidates allowed to coordinate directly with the super-PAC or have anything to do legally with its formation?

Mr. SMITH. No, they are not at the current time.

Mr. ROY. With respect to super-PACs, is this a particularly partisan problem, or would you say both parties have super-PACs funding elections and funding candidacies?

Mr. SMITH. Both do, I believe. I'm not 100 percent sure on this. I believe historically they have leaned more Republican but in the last election cycle leaned more Democratic. I'm not 100 percent sure of that, but it's certainly a bipartisan issue.

Mr. ROY. So, if we deploy the famous "let me google that for you" and we got this to come up to say, well, a bunch of headlines you googled that say Democrat super-PAC spending \$3 million for Menendez in New Jersey; super-PAC money dominated 2018 election in Colorado, and Democrats controlled in the cash race; Democratic super-PAC translates ads to Spanish after seeing election day search trends, and if we went through and through and through, we would see that this is not a particularly partisan question or problem; it's just a baseline. Is that right, Mr. Smith?

Mr. SMITH. I think that's right.

Mr. ROY. And when we think about what we're dealing with with respect to campaign finance, are you familiar with doxing?

Mr. SMITH. In the sense of outing people online, if that's what you're referring, yes, generally.

Mr. ROY. So, for example, are you familiar with a Twitter account called Every Trump Donor?

Mr. SMITH. No, I'm not.

Mr. ROY. Which tweeted out one by one the names, hometowns, occupations, employers of people who contributed as little as \$200 to the President's campaign, each tweet following a particular formula. My point being and the question for you is: When we talk about campaign disclosures, are we aware of the negative impacts that you have on forcing American citizens in exercising their free speech to have that information be disclosed? Whether that's good policy or not might be debatable, but are there negative consequences to that with respect to free speech, given you're an expert on free speech?

Mr. SMITH. There are. And there are definitely studies that have shown that disclosure does tend to decrease participation. Now, that doesn't mean, as you point out, that it's not worth it, but it certainly has costs. So we have to be careful in how broad we let that disclosure become.

Mr. ROY. Thank you.

Mrs. Hobert Flynn, just a quick question. Did I hear correctly earlier in one of your exchanges with one of my colleagues here that you consider proof of citizenship as one of the barriers to voting or one of the obstacles for people to be able to vote, a proof of citizenship, is that one of the ones that you outlined?

Mrs. HOBERT FLYNN. Yes. That it appeared—it is used, you know, at many polling places that people just attest to that. To

have to come up with the paperwork is a burden for many Americans.

Mr. ROY. As well as you outlined photo ID, early voting changes, if you're restricting early voting from being longer to shorter and election day registration, that's the position. And the reason I ask is because, when we look at obstacles to voting, we know that the Voting Rights Act was a paramount piece of legislation to ensure people have access to the polls. We also know that the Voting Rights Act ran into constitutional problems in *Shelby County v. Holder*, for very good reason. If you look at what the majority wrote, the Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem, in the face of unrelenting and ingenious defiance of citizens constitutionally protected right to vote, section 5 was necessary to give effect to the 15th Amendment in particular regions of the country. This is *South Carolina v. Katzenbach*.

And today, this is now Justice Thomas writing in a concurrence: Today our Nation has changed. The conditions that originally justified section five no longer characterize voting in the covered jurisdictions.

Mr. Smith, are you aware that, in this legislation, there is an attempt to bring section 5 back with respect to preclearance, and could you comment at all on that and what that might mean?

Mr. SMITH. As you are out of time, I'll just note that, yes, that is true. And I think that the Supreme Court's concern was that the formula applied from data from 1964 and simply needs to have updated to reflect modern realities, and this bill I don't believe makes any effort to do that.

Mr. ROY. That is correct. Thank you.

Mr. SARBANES. Congresswoman Pressley of Massachusetts is recognized for five minutes.

Ms. PRESSLEY. Thank you very much, Mr. Chairman.

This has been a very interesting hearing. Charges of radicalism, accusations of motives of partisanship, but never a peep or outrage about partisan gerrymandering which has benefited your party for decades. That is really convenient and rich and hypocritical.

H.R. 1 has been described as a wish list by the Democrats. Well, you've got us there: a wish list for an inclusive expanded democracy and electorate.

Characterizations of H.R. 1 as a power grab. You got us again. Guilty. We wouldn't have to grab back the power for the people if through policy you weren't complicit in or perpetuating the disenfranchisement and marginalization of the people and disproportionately people of color and disproportionately Black people.

Representative John Lewis reminds us that if your vote didn't matter, they wouldn't work so hard to take it from you. This is the House of Representatives. We are sent here as Representatives of our districts and a greater democracy. And at the core of democracy and the root word of "demos" is to engage more voices, to engage more voices and to empower them in this democracy.

I am really at a loss for words. I am embarrassed and hurt by the dog whistles, by the vitriol and the venom in this space, and the smugness. It is stunning and unconscionable.

Disappointment and outrage about a Federal holiday for election day, early voting, and mail-in voting, the rights of formally incarcerated restored. According to the Sentencing Project, 6.1 million Americans have lost their right to vote due to felony disenfranchisement laws, laws that disproportionately impact communities of color.

Ms. Flynn, the United States ranks 26th among the lowest of all established democracies around the world in voter turnout. Certainly belies characterizations of American exceptionalism. Could you speak to the passage of H.R. 1 and the establishment of a Federal voting holiday, how this would help to broaden turnout, particularly for voters who have historically been disenfranchised? Could you also speak to how many developed countries follow this practice, and how it has impacted their turnout?

Mrs. HOBERT FLYNN. Yes. I apologize. I do not have information—but I will share it with the committee—about other countries. But I will say that a Federal holiday can make a huge difference for many Americans who cannot afford to take a day off of work to get to the polls, or as we have seen, Common Cause and the Lawyer's Committee and many other voting rights groups, to election protection during the election season. And we saw long lines in States across the country.

We had machines that were breaking down or switching votes. We had machines that did not work, and so people have long lines. People cannot afford—many people cannot afford to wait in line for three, four, five hours at a polling place. Many have to get back to work.

Ms. PRESSLEY. Thank you.

Mrs. HOBERT FLYNN. So a Federal holiday would make a big difference.

Ms. PRESSLEY. Thank you very much.

Mr. Amey, so we have spoken a great deal about lobbying corruption. I'd like to speak about the corruption of contractors. Mr. Amey, in your written testimony, you discuss the crisis of the rampant revolving door where ranking officials commonly enter cushy jobs for the very contractors they were charged with overseeing on behalf of taxpayers.

Last year, your organization issued an investigative report that Tracey Valerio, former senior official for ICE, less than three months after leaving government service, she was hired by the GEO Group, ICE's largest single private prison and detention center, which brought in more than \$327 million in the last year alone. She even served as an expert witness for the company in a lawsuit that alleged violations of minimum wage laws and other inhumane treatment of immigrant detainees.

Mr. Amey, in your expert opinion, is it ethical for a senior government contracting office to go work for the very entity she was overseeing just months before?

Mr. AMEY. The quick answer is no. And that's—the law is created that has cooling-off periods, and so there's no cooling-off period, a one-year, a two-year, or a permanent ban. H.R. 1 would move a lot of those to two years, I think which would be beneficial. There's even disagreement in our community whether one year—

you know, what is the appropriate time to kind of cool off so that your contacts aren't there?

But this is also something that President Trump brought up. When he was a candidate, he talked about, I think it was Boeing at the time, but he went on record saying that people who give contracts should never be able to work for that defense contractor. This isn't a bipartisan—this is a bipartisan issue. This is something we can resolve. The laws are already on the books. We just need some extensions and some tweaking of those to improve them and allow people to cool off and not be able to provide a competitive advantage to their new employer or favor them as they're in office and they're walking out the door.

Ms. PRESSLEY. So you do believe that extending this cooling-off period and strengthening these prohibitions would protect the integrity of the process and help to rein in these flagrant abuses?

Mr. AMEY. One hundred percent. And one of the nice things with H.R. 1 is there's an extension of a cooling-off period for people coming into government service. Currently it exists, and it's one year. This will move it to 2, and I think that's probably a better place to be, that you shouldn't be handling issues that involve your former employer or clients.

Ms. PRESSLEY. One final question. How might these cozy relationships between government officials and corporate leaders or private contractors help to boost profits for these prison and detention centers?

Mr. AMEY. Well, certainly they go with a lot of information when they go over to the private sector, but it also allows them to get back into their former office and within their former agency and call on them. As you were just pointing out, access is everything in this town. And so if you can get your phone calls answered, if you can get emails read, if you can get meetings, at that point, not only with Members of Congress but with agency heads, that can determine who gets contracts. I mean, it does trickle down from the top, and we need to make sure that we prevent as many, like, actual and also appearances of conflicts of interest we can.

Ms. PRESSLEY. Thank you so much. I yield.

Ms. HILL.[Presiding.] Sorry. This is my first time up here.

I'd like to recognize Mrs. Miller from West Virginia for five minutes.

Mrs. MILLER. Thank you, Madam Chairman.

To all of you, thank you so much for being here today.

Mr. Smith, in your testimony, you discussed the language utilized by groups that mention either Federal candidates or elected officials which promotes, attacks, supports, or opposes, otherwise known as PASO. It is my understanding that H.R. 1 uses this highly subjective qualifier as a standard for all communications.

With that in mind, given the broad use of PASO in H.R. 1, what kind of chilling effect do you believe this will have on free speech in our country?

Mr. SMITH. I think it will have a substantial chilling effect, and I think that's why the Supreme Court in a number of opinions dating back for almost a half a century has said that the standards used to regulate speech have to be clear and closely tied to elections, that this kind of vague standard does not work. For a long

time, they used the standard of express advocacy. You had to say vote for or vote against, support, defeat. Later, the Court expanded that a little bit to anything that was susceptible of no other reasonable meaning than a request to vote for a candidate and, even then, only if it erred within 60 days of an election. So I think this kind of broad standard is almost certainly unconstitutional, and it's unconstitutional precisely because it chills so much speech that goes outside of efforts to elect candidates, our ability just to talk about issues and civic affairs.

Mrs. MILLER. Well, that pretty much the leads into my second question which was what impact would the passage of this legislation have on those groups that are not political but may put out policy-oriented communications?

Mr. SMITH. It would be very serious, and I've given a number of examples in the written testimony. I will just say that I should add to this, of course, that the bill includes personal liability for officers and directors of some of these organizations. So, you know, you almost have to be crazy to let your organization get anywhere close to this promote/support/attack/oppose standard. And, again, what does that mean? I suggest, you know, again, a government union might take out an ad maybe in a month, right or three weeks from now saying: Don't let President Trump—we shouldn't have to pay because he wants his wall in Mexico, you know, so tell him to re-open the government.

Is that an attack on President Trump? That's the kind of thing that folks would not know and would make people very hesitant to run that kind of an ad.

Mrs. MILLER. So it is a personal risk as well?

Mr. SMITH. Yes. Yes. Not only a risk, plus, it would be a risk, by the way, as well to the tax status of some of the organizations involved. Many of these organizations might have some type of tax status. 501(c)(3) organizations would have to be very careful because if they engage in speech that is now defined as political speech, 501(c)(3) organizations can't engage in political speech. They would jeopardize their tax-exempt status. So that's another reason that these organizations would stay far clear of commenting on any kind of public issue.

Mrs. MILLER. Thank you very much. I yield back my time.

Mr. MEADOWS. Would the gentlewoman yield?

Ms. HILL. I yield to—wait. I'm sorry. Yes, I yield.

Mr. MEADOWS. Okay. I thank the chairman. I thank the chairman.

I want to commend, and actually, Ms. Flynn, I want to come to you briefly. You're a nonpartisan group. Is that correct?

Mrs. HOBERT FLYNN. Yes, it is.

Mr. MEADOWS. All right. Mr. Shaub, you are here representing CREW. Is that correct?

Mr. SHAUB. Yes.

Mr. MEADOWS. You're a nonpartisan group?

Mr. SHAUB. Yes.

Mr. MEADOWS. So is there anything to be learned by your board members and who they contribute to and—because you say you're nonpartisan, yet, Mr. Shaub, if I look at all your board and who they contribute to, I think the lone donation to a Republican was



\$250 to John McCain. But yet hundreds of thousands of dollars from your board members to all kinds of Democrat operatives and causes across the way. So is there anything to be drawn from your board supporting those causes to suggest that you're partisan or not?

Mr. SHAUB. No. No.

Mr. MEADOWS. All right. So I'm confused a little bit, Mr. Shaub. If we can't draw that conclusion, then how in the world can we draw conclusions about other related entities in the government based on their association or lack thereof of other individuals?

Mr. SHAUB. Entities in the government?

Mr. MEADOWS. Yes. I mean, you're making all kinds of accusations that—with the chairwoman's permission, let me finish the one question very quickly.

So, in that, your board is inherently left-leaning based on their political contributions, and you're saying that that has no input or direction on what your organization stands for. Is that your sworn testimony here today?

Mr. SHAUB. It's a nonpartisan group, yes.

Mr. MEADOWS. All right. I yield back.

Ms. HILL. Mr. Khanna from California is recognized for five minutes.

Mr. KHANNA. Thank you, Madam Chair.

I want to thank John Sarbanes and Chairman Cummings for their leadership.

Mr. Smith, you're a student of history, I can tell, so I want to read you a quote and see if you can guess which President said this: It is well to provide that corporations shall not contribute to Presidential or national campaigns and, furthermore, to provide the publication of both contributions and expenditures. However, no such law would hamper an unscrupulous man of unlimited means from buying his way into office. There is a very radical measure which would, I believe, work to substantial improvement in our system of conducting a campaign, although I am well aware that it will take some time for people. So to familiarize themselves with such a proposal, the need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of campaigns.

"Campaigns" was a paraphrase, but that's the point. Do you know who said that?

Mr. SMITH. I believe that's Teddy Roosevelt.

Mr. KHANNA. It is Teddy Roosevelt. Do you disagree with Teddy Roosevelt?

Mr. SMITH. Yes, I do.

Mr. KHANNA. Do you disagree with the establishment of the public funding for Presidential campaigns?

Mr. SMITH. I do think that has been ineffective and not a good idea. I also disagree with Ben Tillman who sponsored the original Tillman Act for T.R.

Mr. KHANNA. Did President Reagan participate under the Presidential funding campaign?

Mr. SMITH. Yes, he did.

Mr. KHANNA. Would you say that it's fair to say there were some strong conservatives elected under the Presidential funding campaign?

Mr. SMITH. Yes, there were.

Mr. KHANNA. I was struck by your Statement that, quote, the subsidy will most likely drive donors away from moderating forces exerted by parties.

Is it your view—and I mean, it's a legitimate view, that there's a debate in democracy. My view is the American people are really smart, great, and I trust the popular will. Is it your view that the donors, which are 5 percent, sort of have an elite sort of a Republican function to moderate the will of the American public?

Mr. SMITH. No. My view is the public is very smart too, which is why I trust them at the ballot box to make good decisions.

Mr. KHANNA. But why do you say—you don't say the voters will have a moderating force. You're saying that the donors are going to have this moderating force. I just want to see what particular attributes do you give these donors? I mean, look, Our Founders, there were some Founders who believe that there should elites who put a check on the popular will. And I just, I mean, it would an honest view if you said people who give 2,700 or 5,400 have—that in your view, they're smarter or better and that they need to have a check on Americans. And my view is that Americans are very smart, and I trust them more.

Mr. SMITH. It's not really necessary for you to put words in my mouth, Mr. Khanna. I did not say those things.

But what I do think is the case is that there's empirical evidence that shows that small donors tend to be more polarized than large donors, and that's just a question of empirical evidence. Now, if you want to ignore the facts, you're free to do that. That doesn't mean that donors or the public are stupid. Voters are very smart, and again, I trust them at the ballot box to make the right decisions.

Mr. KHANNA. But why do you think that we need large donors to have an influence? I guess that's my question. I mean, you're basically saying they're 5 percent of the country we can agree that have these large donors. You're saying they have a force for good in our democracy.

Mr. SMITH. I don't think that we need them to play that role. I think that, on the other hand, the idea that we're going to benefit simply by trying to make sure that we do a 6-to-1 match for small donors is not going to have the results that people think it will have.

Mr. KHANNA. I'm not talking about that. I'm just trying to understand your view because I think this is what drives a lot of the view. It's that there are fundamentally people who believe that these 5 percent of donors have some influence on our democracy that you say is less polarizing. I mean, what does that mean? Why is it that we can't—

Mr. SMITH. My view is that it is generally a matter of bad policy and tremendous risk and a violation of the First Amendment to try to limit people's ability to speak out, to contribute to candidates, to join groups that engage in the political process.

Mr. KHANNA. But you think that Theodore Roosevelt was violating the First Amendment as well?

Mr. SMITH. I think he was incorrect, yes.

Mr. KHANNA. But just on this modernization. I mean, forget the First Amendment argument. I want to understand the polarization argument.

Mr. SMITH. Uh-huh.

Mr. KHANNA. Why is that you think 95 percent of the country needs to be moderated? I mean, what is it—

Mr. SMITH. I don't think that. What I think and what the empirical evidence shows is that is small donors, which is a small percentage of the total country, tend to be more polarizing in their views and in their donations than are others. Ask—

Mr. KHANNA. No, but if you have public financing, you wouldn't have largest donors. Then is your only concern the First Amendment concern, or do you think that these large donors are playing some positive influence in our democracy?

Mr. SMITH. No, I don't think they're playing a particularly positive influence. In some cases, they are, by the way, and in some cases, they're not. I don't think as a group they are uniformly playing a positive role or a negative, just I don't think small donors are uniformly playing a positive role or a negative role, and I don't think every member of this committee is uniformly positive or negative. We're individuals. We play individual roles.

Mr. KHANNA. Thank you.

Ms. HILL. I recognize Mr. Jordan from Ohio for five minutes.

Mr. JORDAN. Thank you, Madam Chair.

Mr. Shaub, how long were you at OGE?

Mr. SHAUB. A total of just short of 14 years.

Mr. JORDAN. And how long were you the chairman?

Mr. SHAUB. Well, I was never—

Mr. JORDAN. Director. Excuse me.

Mr. SHAUB. Director? Four and a half, I think.

Mr. JORDAN. Four and a half years as director. And when did that end?

Mr. SHAUB. July 2017. I don't remember the exact date.

Mr. JORDAN. So the end of the Trump administration, you were still functioning as Director for six months, seven months. Okay. Tell me exactly how things work at OGE. You provide counsel and advice to folks in the executive branch of the government on ethical concerns they may have. Do they come to you, or do you go to them? How does it typically work?

Mr. SHAUB. It typically works—you know, you're talking about the prevention mechanism. It typically works that the official initiates the interaction and comes seeking guidance for something that they want to do, or to find out if they, you know, need to do something. The only other way where it comes involuntary is through the financial disclosure system where they're required to file these reports. OGE reviews them and often works back and forth with—

Mr. JORDAN. How did it work with the President of the United States? Did his lawyers come to you, or did you look into his financial disclosures or both?

Mr. SHAUB. Yes. They came to us. We had been working with them since—well, I'm not sure when he first became a candidate. It was—

Mr. JORDAN. His lawyers reached out to you at some point while he was a candidate and then continued to reach out to you while he was President-elect and I assume while he was President.

Mr. SHAUB. That's right.

Mr. JORDAN. All three stages.

Mr. SHAUB. That's right.

Mr. JORDAN. And on November 30, 2016, while it was then President-elect Trump, you did a series of tweets about your interactions with the President's legal team. Is that accurate?

Mr. SHAUB. We—

Mr. JORDAN. I've got them right here. I'll read them if you want.

Mr. SHAUB. No, no. I'm trying—it's the characterization of about their what?

Mr. JORDAN. Their interactions with OGE.

Mr. SHAUB. And I believe they were about divestiture and about our encouraging them to divest.

Mr. JORDAN. Did you send them out on your official account?

Mr. SHAUB. My official, no. We sent them out on the Office of Government Ethics official account.

Mr. JORDAN. That's what I mean, right.

Mr. SHAUB. Yes.

Mr. JORDAN. You tweeted these out?

Mr. SHAUB. That's right.

Mr. JORDAN. Had you ever tweeted out anything dealing with anyone else who had sought your counsel and advice?

Mr. SHAUB. We'd only had the account for about three years, and I don't think we—

Mr. JORDAN. It's a yes or no question. So the only guy you ever tweeted about who you had been dealing was the President-elect of the United States of America, right?

Mr. SHAUB. Yes.

Mr. JORDAN. You said things like this: We told your counsel we would sing your praises if you divested. We meant it.

You're tweeting out for the whole world private conversations you've had with someone who sought your advice, their legal counsel. You said: As we discussed with your counsel, divestiture is a way to resolve these conflicts.

Then you did this one: OGE applauds the total, in parentheses, divestiture decision—mocking the President-elect.

Mr. SHAUB. No. We were not mocking.

Mr. JORDAN. Then why did you put it in parentheses?

Mr. SHAUB. Because it was, I think, a quote.

Mr. JORDAN. You said you had never done this before, never tweeted out about anyone else in the executive branch who sought your advice and counsel on how they can deal with ethical issues. This was the only individual you ever tweeted out about.

Mr. SHAUB. I think that's a mischaracterization to describe it as confidential advice. OGE's position that a President should—

Mr. JORDAN. I didn't saying anything about confidential. All I said is this the only guy you ever tweeted about?

Mr. SHAUB. All right. I thought I heard you said confidential at one point.

Mr. JORDAN. I did not. And you said you did tweet about the President-elect, no one else.

Mr. SHAUB. That's right.

Mr. JORDAN. Do you find that unusual?

Mr. SHAUB. Do I find it—I find everything about the past two and a half years unusual.

Mr. JORDAN. No, no, no. I'm not saying that. Do you find it unusual that—what I'm saying is—well, let's say it this way: Do you think it was a professional decision that the guy who is the head of the Office of Government Ethics, when you're going to give information to the public only about one individual, and you've never done it in your 14 years at OGE and four years as Director?

Mr. SHAUB. Well again, you said disclosed information. I didn't share information. This was from 1983, was when OGE—

Mr. JORDAN. Well, wait. What were you trying to convey? What were you trying to convey in these tweets?

Mr. SHAUB. That the President should divest as OGE had been telling him.

Mr. JORDAN. Couldn't you tell his lawyers?

Mr. SHAUB. We did tell his lawyers.

Mr. JORDAN. Well, then why did you tweet about it?

Mr. SHAUB. We had reached a dead end, and I wasn't convinced that our communications were reaching him.

Mr. JORDAN. You're talking to his lawyers. His lawyers reached out to you first. You're communicating the advice that you think is what they need to do, and yet you go tweet about it?

Mr. SHAUB. We were trying to nudge him toward with divestiture. He had just issued a Statement that he was going to achieve total—you have the phrase there. I don't have the phrase, and I don't want to say it wrong.

Mr. JORDAN. OGE applauds the total divestiture decision. Bravo.

Mr. SHAUB. He said something like completely separate or completely resolve conflicts of interest. I don't want to claim I remember the quote exactly, and so what we were trying to do—we had two choices: interpret that as unclear or give him—I mean, you know, doubt him or give him the benefit of the doubt that what he said was true. We made a decision to choose to take him at his exact literal words because only divestiture—

Mr. JORDAN. You made a decision to tweet out conversations you had with the President-elect's counsel when they were seeking advice and guidance from you, and you had never, ever done that before.

Ms. HILL. Thank you, Mr. Jordan.

I recognize myself for five minutes, and I'd like to yield two minutes to Ms. Tlaib from Michigan.

Ms. TLAIB. Thank you, Chairwoman Hill.

It's wonderful seeing you up there. I really appreciate this. You know, at this very moment I'm thinking about my teenage son who would be saying—we're talking about tweets right now, and he would say, "Seriously?"

But I just really want to talk about something incredibly serious which is the law the land: the United States Constitution. We all have a duty do uphold it. We're here to serve the American people, not this President. We serve them before anyone. And I just know since the Ethics in Government Act of 1978 was passed, Presidents of both parties have established blind trusts or limited their hold-

ings to the U.S. Treasuries, diversified mutual funds, all the assets, because of conflict of interest. And you just talked about divestiture. This is the Emolument Clause. This is an incredibly important clause that really protects the American people. No matter who is there, Republican, Democrat, it doesn't matter because it's really important to take that kind of influence out because everyone knows being President is a temporary gig because what happens afterwards, right?

You have someone that is still running The Trump Organization, many of them in the Cabinet right now and serving out of the White House. I am really asking for all of you to, please, even if it's just for a few seconds, to talk about the Emolument Clause, why it's there, and why it's important to really reiterate this because even beyond H.R. 1, this is current law now, and we're not upholding that law. We're not taking our oath that we just took five weeks ago seriously when we say this, and I'll tell you: I don't care if it was—is a Democrat thing or—I don't care. This is important to me that someone is making decisions based on the American people and not the best interests of a profit in mind or best interests of their company which they're going to go back after leaving that White House, go back into that. It is so critically important that we uphold the Emolument Clause. I would really like for you to speak about that.

Mr. SHAUB. Well, you know, the Founders of our Republic created a foundational document, the United States Constitution, and we've heard a lot today about the importance of that Constitution. The only conflict of interest provision that they felt they needed to include in that foundational document were the two Emoluments Clauses. And, you know, frankly, I wish they had put a whole lot more in, but those are the two they gave us, and those are the two that they felt were preeminent and needed to be in there.

Ms. HILL. One brief second.

Mr. MEHRBANI. Well, I was just going to say that I think the Emoluments Clause stands for the principle against self-dealing and using a public position to benefit yourself individually. I think you can draw connections from the Ethics in Government Act and other laws that have been passed on a bipartisan basis directly to the Emoluments Clause and other constitutional provisions, so it's something that we think about often.

Ms. HILL. Reclaiming my time. I just want to finish this by saying that I ran for Congress, and I know many of my colleagues did, because I believed that our political system was broken and in large part due to a complete lack of trust by our citizens in our government and in our democracy and that restoring that trust has to be our top priority. So I have a question for all of you, and I want to make sure that Mr. Smith answers this. Do you believe that increased transparency would help restore that trust?

Mr. SMITH. If you want to start with me, I would not agree with that as a blanket assertion.

Ms. HILL. You don't believe that transparency—

Mr. SMITH. I think there are cases where it does, and there are cases where it does not.

Ms. HILL. Can you give me one example where transparency would not restore trust in democracy?

Mr. SMITH. Well, for example, I think sometimes debates of this very organization are best held in private where you can stake out positions, give and take without having every absolutely conversation, for example, made public. I think, for example, that if people contribute small amounts to grassroots organizations, no, the public doesn't need to know that, and the harm outweighs the benefits, the threats to people, the fact that they often withdraw from political participation. So it's a case-by-case matter.

Ms. HILL. I'm not suggesting in any way that people need to hear every conversation. I'm saying the general mechanisms of transparency that we're asking for here in this bill is——

Mr. SMITH. Some of the transparency here is bad. I've outlined in that in my testimony.

Ms. HILL. Okay. I'll move on to the next.

Do you believe that transparency helps restore faith in democracy?

Mr. SHAUB. I think it's probably the most important tool we have to assure the American people that their leaders are acting in their interests.

Ms. HILL. Great. Do you all agree?

Mr. MEHRBANI. Yes. Sunlight is a good prophylactic.

Mrs. HOBERT FLYNN. Yes. And both in ethics measures and campaign finance reform measures as well.

Ms. HILL. Mr. Smith, do you believe at least that making it easier to vote would restore trust in our democracy?

Mr. SMITH. I think generally you don't want obstacles placed in the way of voting, but I don't think, again, everything making it easier to vote. For example, I would not favor having early voting begin a year before the election. So some things, yes, and some things, no.

Ms. HILL. What about making it national holiday to vote?

Mr. SMITH. Making it a national holiday? Let's put it this way. I don't think that's a real problem or that it has been shown to increase turnout or make it a whole lot easier to vote when it has been tried.

Ms. HILL. Well, I would say that for working class people who don't get paid time off, it would make it harder to try.

Mr. SMITH. It may, but I don't think the empirical data shows that it has an affect there.

Ms. HILL. Okay. Well, I would like to say that the former General Counsel and Acting Director of the Office of Government Ethics Don Fox sent a letter to the committee in support of H.R. 1. Public Citizen, the Declaration for American Democracy Coalition, and Indivisible have also written Statements in support, all of which I'm adding to the record.

[The information is provided in the Appendix section.]

Mr. AMEY. Madam Chair.

Ms. HILL. Mr. Amey, I recognize you.

Mr. AMEY. I just want to go back to the transparency. Obviously, I'm a big yes. And I just want to say it's not only for the American people, but it's Congress. Earlier today we heard I think it was Congresswoman Maloney mention that documents haven't been turned over to Congress. We found an ethics waiver that goes back to 2003, and it was an ethics waiver for someone over at HHS, at

CMS, that was working on the Medicare or Medicaid part B portion of the healthcare bill. There was a gentleman there that received a waiver, and it was a general waiver, and that's why putting waivers out and making them publicly available are important. But this Congress voted on that bill and supported it, and that gentleman refused to let a member of the staff turn over information to Members of Congress, and guess what? Within days, he went and worked for a lobbying shop and went to work for a company or a firm that represented drug companies. And so I just—it is important for the American public, but it is also important for the Senate and the House of Representatives to also have faith in the government and what information they're getting from government employees.

Ms. HILL. Thank you.

Mr. MEADOWS. Madam Chair, I ask unanimous consent that the record reflects that the President of the United States has consistently throughout his tenure donated his Presidential salary back to Federal agencies, as recent as this last quarter. And since much of this discussion is about his private benefit by his position, I want the record to reflect that he actually donates back his salary to Federal agencies.

I ask unanimous consent.

Ms. HILL. If there's no objection, so ordered.

Ms. HILL. I would like to close by thanking all of our witnesses again for participating today. It was helpful to hear the expertise of our witnesses and why Congress should take action on H.R. 1. H.R. 1 is a comprehensive package of reforms that we desperately need. And speaking as a recent citizen and not a Member of Congress, I strongly stand in support of this and, in fact, was running on these issues long before I knew that this was coming in the form of a package, and I know that that's the case for many of my colleagues as well.

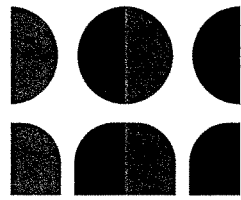
The reforms in the jurisdiction of this committee would make the executive branch more accountable and transparent. I urge all members of the committee to work with us in moving this legislation forward.

With that, the committee stands adjourned.

[Whereupon, at 1:30 p.m., the committee was adjourned.]

APPENDIX





**INDIVISIBLE**

**STATEMENT OF THE INDIVISIBLE PROJECT**

In support of H.R. 1, For the People Act of 2019

Submitted to the House Committee on Oversight and Reform

**February 6, 2019**

Chairman Cummings, Ranking Member Jordan, and Members of the Committee,

Indivisible is a movement of more than 5,000 local groups across the country organizing locally to resist the Trump agenda. We write in strong support of H.R. 1, and urge you to advance the For the People Act quickly as a bold, comprehensive package.

Our movement emerged out of the chaos and fear surrounding Donald Trump's election in 2016. But even as we continue to organize against Trump's agenda, we turn to an even greater task: defeating the forces that gave rise to Trumpism in the first place.

A healthy democracy would have rejected Trump like a healthy body rejects a virus. But that didn't happen, because the wealthy and powerful have spent decades rigging the system to consolidate their power by discouraging, disempowering and disenfranchising the electorate. And make no mistake: the same communities that are disproportionately affected by these power grabs are the same communities most attacked by the bigotry of the Trump agenda.

But we have a historic opportunity to change course. A mass grassroots movement, including many in the Indivisible movement, built a Blue Wave that carried a new Democratic majority into the House of Representatives. We are a young movement, and are still learning about what excites and sustains our field. But when we surveyed our thousands of groups on policy issues for the first time last fall, we discovered that democracy reform — voting rights, getting big money out of politics, and eliminating corruption from all levels of government — easily topped every other issue.

Perhaps this is why, on Jan. 3, we saw the largest-ever single day of action in our movement thus far. On the first day of the new Congress, our groups all over the country showed up in front of their Representatives' district offices to rally in support of H.R. 1's passage, and to demand that its reforms not be weakened or divided in the process.<sup>1</sup>

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<sup>1</sup> See e.g.: "Schuylkill Indivisible Holds a Rally for Democracy," *PA Homepage*, Jan. 3, 2019, <https://www.pahomepage.com/news/schuylkill-indivisible-holds-a-rally-for-democracy/1685882152>; "Activists Call on Re. Delgado to Support Democracy Reform," *WAMC*, Jan. 3, 2019, <https://www.wamc.org/post/activists-call-rep-delgado-support-democracy-reform>; "Nevada Protesters Urge Reform as Congress Begins New Session," *Public News Service*, Jan. 3, 2019, <https://www.publicnewsservice.org/2019-01-03/civic-engagement/nevada-protesters-urge-reform-as-congress-begin-s-new-session/a65110-1>; "Progressives Rally in Kingston for Democratic Reform Bill," *Mid-Hudson News*, Jan. 3, 2019, [http://www.midhudsonnews.com/News/2019/January/04/prog\\_rally\\_King-04Jan19.html](http://www.midhudsonnews.com/News/2019/January/04/prog_rally_King-04Jan19.html); "Activists Rally for House Ethics Bill Across the County and in Upstate NY," *Spectrum Local News*, Jan. 3, 2019, <https://spectrumlocalnews.com/nys/binghamton/politics/2019/01/03/hr1-rallies-in-upstate-ny>; "Coalition Group Calling on Congress to Pass Democracy Reform Bill," *WWLP*, Jan. 3, 2019, <https://www.wwlp.com/news/state-politics/coalition-group-calling-on-new-congress-to-pass-democracy-reform-bill/1685752029>; "Protesters Demand Action from Roseville Congressman as New Lawmakers Sworn In," *Fox 40*, Jan. 3, 2019.

Statement for the Record

In Support of H.R. 1, For the People Act of 2019

February 6, 2019

Submitted to the House Committee on Oversight and Reform

Dear Chairman Cummings, Ranking Member Jordan, and Members of the Committee,

Our organizations represent a diverse set of interests and have differing mandates and areas of focus, but we coalesce together around a shared goal of swiftly advancing the For the People Act, H.R. 1, as a bold and comprehensive package. We welcome the opportunity to offer our support before this committee.

We are members of the Declaration for American Democracy coalition, which seeks fundamental democracy reforms to create a government that is reflective, responsive and accountable. Our organizations applaud the committee for quickly turning its attention to this landmark legislation.

We believe it is essential for the House to act quickly to pass bold democracy reforms and to demonstrate a holistic approach in addressing a series of fundamental problems facing our democracy. We also believe the House must ensure that H.R. 1 is not weakened or divided in the process, and that it pass as a strong, comprehensive package of reforms.

The Declaration for American Democracy coalition believes:

- A strong democracy is one where voting is a fundamental right and a civic responsibility.
- A strong democracy serves the people rather than the private interests of public officials and wealthy political donors.
- A strong democracy is one where our influence is based on the force of ideas, not the size of our wallets.
- A strong democracy is one where people know who is trying to gain influence over our representatives, who is trying to influence our votes, and how and why policy is being made.
- A strong democracy works to respond to the needs of all people and their communities, building trust in governance and equity.

H.R.1 includes reforms essential to fixing our political system, including voting rights, money-in-politics, redistricting and government ethics reforms. These reforms are

interdependent on one another and must be addressed holistically if we are to truly address the threats to democracy.

Further, passing H.R. 1 as a bold and comprehensive package as the first order of business unlocks further potential to advance other legislative items in the session. By demonstrating that creating a democracy that is inclusive of and responsive to every American is the top priority, the House can help to shore up support for subsequent reforms.

A *Wall Street Journal/NBC News* poll<sup>1</sup> in advance of the 2018 midterm elections found that 77 percent of surveyed registered voters agreed that “Reducing the influence of special interests and corruption in Washington” is either the most important or a very important issue facing the country.

This was reflected by the views of 47 newly-elected Members who were among 107 Democratic challengers to write<sup>2</sup> during the campaign urging that sweeping reforms “be the very first item Congress addresses.” Many successful midterm campaigns centered the importance of bold democracy reforms, and voters who ushered in the new Congress now expect that the House deliver on those promises.

The American people know that Washington is not representing their best interests when millions of eligible voters cannot vote because they are not properly registered, when voting laws are used to disenfranchise millions of Americans, and when citizens are improperly purged from voter rolls. They recognize that specific communities are disproportionately targeted for voter suppression, including young people, communities of color, and LGBTQ+ individuals.

The American people know that Washington is not representing their best interests when wealthy Americans give huge contributions to Super PACs and dark money groups to influence our elections and to buy influence over government policies, at the great expense of ordinary Americans who are not empowered in the political process.

The American people know that Washington is not representing their best interests when congressional districts are drawn to achieve highly partisan results at the expense of fair representation – when representatives choose their voters rather than voters choosing their representatives.

The American people know that Washington is not representing their best interests when government ethics rules have major flaws that allow public office to be used for private gain, when they permit there to be a revolving door between government

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<sup>1</sup> “Corruption in Washington is a Top Concern for Voters, WSJ/NBC News Poll Shows,” *Wall Street Journal*, Sept. 24, 2018, <https://www.wsj.com/livecoverage/campaign-wire-2018-midterms/card/1537810213>.

<sup>2</sup> <http://endcitizensunited.org/wp-content/uploads/2018/10/A-Letter-for-Reform.pdf>

positions and private interests and when ethics rules are not subject to proper oversight and enforcement.

And the American people know that these problems result in a rigged system in Washington that is blocking substantive policies of great importance to ordinary Americans, such as more affordable healthcare, lower prescription drug prices, a fairer tax system and the like.

We call on you to quickly advance H.R. 1 as a strong and holistic package.

The 116<sup>th</sup> Congress has a historic opportunity to repair our broken political system and strengthen the integrity of our democracy, and we strongly urge the House to seize this moment.

Sincerely,

20/20 Vision

American Oversight

Blue Future + the Youth Progressive Action Catalyst

Brave New Films

Campaign for Accountability

Center for American Progress

Clean Elections Texas

Coalition to Preserve, Protect & Defend

Common Cause

Communications Workers of America (CWA)

Democracy 21

Democracy Matters

Democracy Spring

End Citizens United Action Fund

Every Voice

Franciscan Action Network

Indivisible

League of Conservation Voters

League of Women Voters

Let America Vote

MAYDAY America

MomsRising

NARAL Pro-Choice America

National Association of Social Workers (NASW)

National Council of Jewish Women

National Redistricting Action Fund

NETWORK Lobby for Catholic Social Justice

Network of Spiritual Progressives

Our Revolution

Patriotic Millionaires

People For the American Way

People's Action Institute

Progressive Turnout Project

Public Citizen

Sierra Club

Stand Up America

Tikkun

Truman National Security Project

Union of Concerned Scientists

Unitarian Universalist Association

URGE: Unite for Reproductive and Gender Equity

Voices for Progress

Wolf-PAC

February 5, 2019

The Honorable Elijah Cummings  
Chair, House Committee on Oversight and Reform  
United States House of Representatives  
2471 Rayburn House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman,

I am writing to voice my support for H.R. 1, "For the People Act of 2019," and specifically Titles VIII and X of H.R. 1. If enacted, this legislation will greatly enhance public confidence in the integrity of the United States Government. I served my country from 1982 until 2013, as an active duty officer in the United States Navy, as a member of the Senior Executive Service in the Department of the Air Force, as the General Counsel of the United States Office of Government Ethics (OGE), and as the Acting Director of OGE from 2011 until 2013. OGE was created in 1978 as one of many much needed post-Watergate reforms, along with public financial disclosure for senior government officials, including those of the President and the Vice President. H.R. 1 builds on those principles and 40 years of experience, and provides long-needed updates in ethics legislation.

While I was at OGE, I worked with both the Bush and Obama Administrations. Both President Bush and President Obama supported OGE and its mission and took steps to ensure their personal finances and interests were transparent to the public. This included releasing their personal income tax returns. Title X of the H.R. 1 will ensure that our current President, Vice President, and future occupants of those offices will, as a matter of law, make full disclosure of their financial interest and sources of income. These are important measures to codify into law.

Title VIII of the Bill also provides many much-needed updates to the authority of the Director of OGE to oversee and enforce ethics laws and regulations across the Executive Branch. Among those provisions of the Bill I support are those that extend the cooling off period between senior Executive Branch appointees and their former employers to two years. Additionally, H.R. 1 removes any ambiguity as to whether the Executive Office of the President is subject to certain provisions of the Ethics in Government Act and oversight by OGE. Finally, the Bill would codify into law important principles of transparency for Presidential transitions. These and many other provisions of the Bill will strengthen the integrity of our democracy, and I commend the Committee for engaging in this important work.

Thank you for this opportunity to comment on H.R. 1 and your support for ethics reform.

Sincerely,



Don W. Fox