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STRENGTHENING PRESIDENTIAL ETHICS LAW

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Brennan Center for Justice *at New York University School of Law*

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INTRODUCTION

As is well known, President Donald J. Trump has decided to maintain ownership and effective control of his far-flung businesses despite potential conflicts of interest.[1] This decision broke with norms to which his predecessors of both parties had adhered for more than forty years. But it was not illegal. This paper explains why Congress must make it a priority to deal with presidential conflicts of interest and related gaps in our system of government ethics regulation, and sets forth three key priorities for reform.

Americans have worried about high-level self-dealing by government actors since the founding era.[2] When it comes to the president, however, it has never been clear how the law should address this problem. Before he took office, Mr. Trump himself famously declared that the president "can't have" a conflict of interest.[3] That is legally true, at least to the extent that the president and vice president are exempt from federal conflict of interest rules that prohibit officials from participating in certain government matters where they have a financial interest.[4] And while the Constitution itself contains express prohibitions on the president accepting certain questionable gifts or other payments — known as the foreign and domestic "Emoluments Clauses" [5] — nobody had ever tried to enforce these provisions in court until now. [6]

Before Mr. Trump was elected, these issues rarely drew significant attention. Among other reasons, presidents took voluntary steps to avoid even the appearance of impropriety. For example, since the 1970s every president until Mr. Trump placed his assets other than "plain vanilla holdings" (personal residences, cash, treasury notes, shares in diversified mutual funds, etc.) in a "blind trust" that hid their contents from him and was administered by an independent trustee.[7] They did so because they understood that even the appearance of decisions tainted by financial self-interest undermines the president's legitimacy.[8]

But such steps were entirely voluntary. And while the president is subject to certain disclosure rules under the federal Ethics in Government Act (EIGA), loopholes in those rules make it comparatively easy to avoid full disclosure of assets, sources of income, and debts that could impact official decision-making.

Even if there were stronger rules, moreover, it is unclear who would enforce them. The Office of Government Ethics (OGE), which sets the rules for other Executive Branch personnel, has relatively little enforcement authority and no real independence from the president. And even if OGE had more power and autonomy, it lacks the resources to do very much. The office has fewer than 80 employees and a $16 million budget.[9]

Long ignored by many in Washington, these issues are now hotly debated. Notable experts — including the most recent OGE director — say that the current federal ethics regime simply does not work in key respects.[10] But how should it be reformed?

The surge of interest in government ethics on the part of members of Congress and reform advocates has not yet translated into a coherent policy agenda. The problem here is not a lack of generally-applicable standards: Federal conflict of interest rules are actually quite detailed.[11] They have been in place in some form since the Progressive Era, with significant expansions in the wake of Watergate and other scandals in the 1970s and 1980s.[12] But the federal ethics regime has a gaping loophole at the very top, and suffers from inconsistent enforcement given the absence of a strong regulator.

To deal with these problems, we need a package of legislative reforms. The package should include three key components:

Close the presidential loophole. Congress should amend the federal conflict of interest statute to cover the president and vice president, just as parallel laws in the states and in peer democracies cover governors, presidents, and prime ministers. Contrary to prevailing assumptions, there is a strong constitutional case that Congress has the power to do so.

Such a change is unlikely to keep the executive branch from functioning effectively. After all, presidents going back more than four decades took voluntary steps to avoid potential conflicts without any appreciable impact on their official duties. While the president and vice president should not necessarily be subject to the exact same conflict rules as other officials, neither should they continue to receive a free pass from generally-applicable ethical standards.

Expand the scope of financial disclosure. Congress should also amend federal ethics disclosure requirements for high-level officials to include, among other things, the income, assets, and debts of any closely-held (non-publicly-traded) business in which the official or an immediate family has a substantial interest.[13] Currently, these entities are mostly exempt from disclosure, allowing significant potential conflicts to escape public scrutiny.[14]

Improve administration and enforcement of federal ethics law. Congress should also provide for better administration and enforcement of federal ethics law in the executive branch. To start, it should afford OGE the same autonomy from the president that it has conferred on other independent agencies, clarify that OGE's rules are binding on all executive branch officials, and enhance the agency's oversight over ethics officials in other federal agencies. It is also critical to step up civil enforcement of federal ethics law, either by creating a new enforcement division within OGE or assigning civil enforcement to a separate body. These changes will require funding increases relative to OGE's current miniscule budget.

Certain elements of these reforms are already part of various bills pending before Congress.[15] They could easily be combined into a single package. Together, they would represent a significant step toward fixing the most pressing shortcomings in federal ethics law and enforcement. That in turn would help to renew our nation's longstanding commitment to the ideal of public service as a public trust, leaving our democracy stronger in the years to come.

UNDERSTANDING THE STAKES

When President Trump announced that he would be keeping effective ownership and control of his businesses, the director of OGE at the time, Walter Shaub, said the decision was inconsistent "with the tradition of our presidents over the past 40 years."[16] But traditions are not inviolable for their own sake — they must serve an actual purpose. Why is this one so important?

Historical Context

The founders understood that the president must answer, first and foremost, to the American people. This is why the Constitution requires the president to be paid a government salary and actively forbids him or her from receiving "any other emolument from the United States, or any of them" in the Domestic Emoluments Clause.[17] As Alexander Hamilton explained, "power over a man's support" equals "a power over his will."[18] The framers wanted that power to be vested in the nation as a whole, not some faction or other grouping of interests within it. Similar reasoning undergirds the prohibition in the Foreign Emoluments Clause against all U.S. officials — including the president — receiving "any present, emolument, office, or title, of any kind whatsoever, from any king, prince, or foreign state" without the consent of Congress.[19] The idea of a foreign state competing with the people for the president's loyalty was intolerable to the framers, who vested Congress with the authority to prevent it from happening by withholding consent.

President Trump's Potential Conflicts

President Trump's decision to keep ownership and control of his extensive business holdings has given rise to exactly the type of circumstance the framers hoped to avoid. These business interests intersect with the president's official duties in many different spheres, creating at least an appearance of distorted decision-making. And not only by Mr. Trump. When an official as powerful as the president has a personal financial interest in so many government decisions, there is a risk that every official below him will be tempted to govern with an eye toward the commander-in-chief's bottom line.

They may even do so unconsciously. Although there is relatively little empirical research on conflicts of interest in the public policy realm, the topic has received extensive attention in scientific and medical research.[20] The research shows that even when conflicted subjects make a deliberate effort to be fair, bias still infects their decision-making:

> *Psychological research suggests that people are prone to having optimistic biases about themselves. Judgments about what is fair or ethical are often biased in a self-serving fashion, leading even ethical people to behave poorly by objective standards. Self-serving bias is unconscious and unintentional, and people often fall prey to it even when they do not want to do so and they do not know they are doing it. The bias works by influencing the way in which information is sought and evaluated when the decision maker has a stake in the conclusion.*[21]

In other words, an official who awards a contract to a company he or his superior owns may sincerely believe the company was the best for the job — just as an official who declines to regulate an industry in which she or her boss holds stock may believe she is following the best course as a matter of policy. In both cases, however, the presence of a conflict raises questions that undermine the integrity of the decision. As the Supreme Court put it in upholding a conflict of interest prohibition more than fifty years ago, "an impairment of impartial judgment can occur in even the most well-meaning men [or women] when their personal economic interests are affected by the business they transact on behalf of the government."[22]

Mr. Trump's far-flung businesses have already raised many such questions, even before he took office.

For instance, one of the Trump Organization's marquee properties is the Trump International Hotel in Washington, D.C. located in Washington's Old Post Office Building. The Trump Organization leases it from the General Services Administration (GSA). This arrangement essentially makes the president both landlord and tenant.[23]

Before President Trump took office, some procurement experts asserted that his continued stake in the hotel would violate the terms of its lease, which bars any government official from benefiting from the agreement — although other experts disagreed.[24]

The situation created enough ambiguity that GSA launched an examination, which was still pending when the president was sworn in.[25] Less than eight hours later, the White House ousted the individual GSA had designated as acting head, replacing him with a regional administrator who had worked on the Trump transition staff. While all presidents seek to take charge of the federal government upon inauguration by putting their own people in place, the speed of this relatively low-tier appointment raised many eyebrows.[26]

In March, the GSA reported it had found no problems with the lease. However, its letter opinion failed to analyze several critical facts about the hotel's ownership structure,[27] and the agency has subsequently struggled to defend its decision before Congress.[28] The matter is now under review by GSA's Inspector General.[29] It is impossible at this stage to know what role the president's personal interests had in the agency's decision, but the situation at least appears highly problematic.

In the meantime, the hotel has attracted numerous patrons with interests before the U.S. government — including foreign governments and industry groups looking for policy changes on everything from offshore drilling to the regulation of e-cigarettes.[30] They have helped make the hotel unexpectedly profitable for a new venture, with almost $2 million in profits in the first four months of 2017 although it had been projected to *lose* $2.1 million during the same period.[31]

The Washington hotel is but one of many examples.[32] For instance, as of April 2017, the Trump Organization had 157 trademark applications pending in 36 countries.[33] While there is no evidence to date of any foreign government using such requests as leverage, that is certainly a risk. When China granted all of the Trump Organization's trademark requests shortly after the president took office, one Washington trademark lawyer described the move to *The New York Times* as a "gift," adding: "Getting the exclusive right to use that brand in China against everyone else in the world? It's like waving a magic wand."[34]

Another source of concern is the president's largest known business creditor, Deutsche Bank (Germany's largest bank). In December 2016, Bloomberg estimated that the president and his companies owe the bank approximately $300 million.[35] Like any sizable financial institution, Deutsche Bank has numerous adverse dealings with federal regulators; it has paid well over $7 billion in fines and other sanctions since October 2016.[36] Future matters will inevitably raise the question of whether the bank's relationship with the president influences the regulatory treatment it receives.

Then there is the case of Vornado Realty Trust, whose chairman Steven Roth is the president's fellow real estate billionaire and long-time business partner. Two of Mr. Trump's most lucrative holdings are minority stakes in Vornado office buildings in New York and San Francisco — with the president receiving about $22 million in annual cash flow, according to outside estimates.[37] The payouts are determined by Vornado.[38] Meanwhile, Vornado recently took a controlling interest in another company that functions as the U.S. government's largest landlord in the Washington, D.C. area.[39] "I know Trump. I've known for him for a very long time," is all Roth would say about his relationship with the president on a February earnings conference call.[40]

Even the president's decisions regarding where he spends his time raise questions — specifically his frequent visits to Trump-owned properties, which charge the government for a variety of services while also using the prospect of rubbing shoulders with the president to attract paying members and guests.[41]

Finally, conflicts of interest in the administration are not limited to the president. According to the nonprofit group Public Citizen, as of August 2017, almost a quarter of the president's appointees were former lobbyists, many of whom are overseeing portfolios concerning the same issue areas on which they previously lobbied for industry (often without bothering to obtain the waivers required by the president's own executive order).[42] And a number of other officials — including Commerce Secretary Wilbur Ross,[43] Education Secretary Betsy DeVos,[44] and White House advisors Ivanka Trump and Jared Kushner[45] — still have extensive business holdings they could be in a position to boost as policymakers.

Broader Implications

The president and his appointees would no doubt deny that they have done anything improper. And many decisions in which they have a personal interest might indeed have legitimate rationales. The problem is that without sufficient safeguards, it becomes virtually impossible to discern where the public interest ends and a leader's self-interest begins.

Such doubts can undermine the basic integrity of democratic governance. Multiple studies have found that perceptions of high-level corruption "reduce citizen support for democratic political institutions across mature and newly established democracies around the globe."[46] Widespread acceptance of Vladimir Putin's increasingly autocratic regime in Russia, for instance, is at least partly attributable to rampant corruption under his predecessor Boris Yeltsin.[47] Disgust at endemic corruption among the political elite also played a role in the emergence of Hugo Chavez's brand of left-wing majoritarian absolutism in Venezuela, which has now brought the country to the brink of collapse under his successor.[48]

The irony, of course, is that both the Putin and Chavez governments turned out to be at least as corrupt as their predecessors'.[49] This is perhaps the biggest risk of having no clear safeguards at the highest levels — not that official self-dealing will spark opposition, but that it will become normalized.

As the theorists Gerald and Naomi Caiden wrote almost forty years ago in the wake of Watergate: "Corruption does not disappear when it becomes entrenched and accepted: rather, it assumes a different form, that of *systemic* as opposed to *individual* corruption."[50]

Where systemic corruption has taken root, exploitation of public office for private gain is the norm rather than the exception — part of what scholars call a "corrupt equilibrium" in which economic success depends primarily on political connections.[51] That almost inevitably goes hand-in-hand with other abuses of power, as the political elite harnesses the coercive authority of the state to entrench its spoils.[52] Taken to extremes, the model for government becomes less that of a modern democracy than of a traditional autocracy, "where state authority flows from the personality of the ruler" (or his family or party).[53]

We are not at this point in the United States. Indeed, for all the rhetoric accusing President Trump of aspiring to dictatorship or his opponents of being part of the "deep state," a full-scale collapse of our democratic institutions into authoritarian rule remains a remote prospect.[54]

Yet confidence in our institutions does hover near record lows,[55] with large majorities telling pollsters that elected leaders cater to the wealthy and powerful and ignore the needs of ordinary citizens.[56] In other countries, such feelings have produced significant democratic deterioration even as some trappings of democracy, like periodic elections, remained.[57] Recent scholarship suggests that the United States is hardly immune from these patterns.[58]

The framers understood such risks, which is why preventing systemic corruption became one of their principal concerns.[59] Yet despite their efforts, systemic corruption was still a very real problem in the decades after the founding, with powerful political cliques often hoarding lucrative monopolies, government contracts, and other benefits for themselves and their allies. Such practices were not truly stamped out until the mid-nineteenth century (setting the stage for Progressive Era efforts to combat bribery, conflicts of interest, and other instances of individual corruption).[60] As informal guardrails intended to prevent abuse of power at the top fall away, the possibility of a long-term retreat from the progress we have made over the past 150 years should be deeply concerning.

In fact, even the appearance of retreat poses significant risks. Our own early history aside, in the modern era the United States has been a global leader and "norm entrepreneur" in combating corruption around the world.[61] These efforts are not merely altruistic; there is broad consensus that promoting better governance in other nations advances our own long-term economic and security interests.[62] Tolerating breaches of the public trust at home undermines these efforts by opening us up to charges of hypocrisy. Without U.S. leadership in this area, millions of people around the world will be worse off — many of our own citizens included.

SOLUTIONS

So how should Congress respond? There is a certain amount that it can do through its traditional oversight of the executive branch, including the president's personal conduct.[63] But ad hoc oversight is not enough. There must also be legislative reform. Three overarching changes stand out:

Close the Presidential Conflict of Interest Loophole

First, Congress should close the loophole exempting the president and vice president[64] from the general standards of conduct established under federal conflict of interest law. This one simple fix would compel future presidents to take concrete steps to minimize the risk of having their personal financial affairs interfere with their official duties, which every president for more than forty years before Mr. Trump did voluntarily.[65]

Federal law is an outlier in exempting the president from all conflict of interest rules. Most states, for instance, do not exempt their governors.[66] Peer democracies that have adopted national conflict of interest laws — such as Canada, Mexico, and France — do not exempt their leaders either.[67]

In fact, although the current federal prohibition on conflicts of interest was codified in 1961 — and based on rules dating back to the Progressive Era — an explicit exemption for the president and other high-ranking officials did not exist until 1989.[68]

The logic behind the exemption for the president and vice president first appeared in a 1974 Department of Justice opinion letter, authored by then future judge Laurence H. Silberman. The Silberman letter argues that, due to his constitutional role, the president cannot recuse himself from specific matters in which he might have a personal financial interest, which is the standard remedy for conflicts.[69] Any effort to force a president to do so or take other steps to avoid conflicts would "give rise to serious questions of constitutionality" as either a violation of the doctrine of separation of powers, or an impermissible attempt to impose additional qualifications on the office apart from those set forth in Article II of the Constitution.[70]

Silberman's approach became the official legal position of the Department of Justice (DOJ) — although a subsequent opinion by future Supreme Court Justice Antonin Scalia noted 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, "whether or not they technically apply."[71] OGE adopted DOJ's view in 1983,[72] and Congress codified it in 1989.[73]

The views set forth in the Silberman letter received scant attention until recently, since presidents and vice presidents going back to the 1970s all took significant voluntary steps to avoid potential conflicts.[74] Closer scrutiny, however, suggests that Congress would be on firmer ground applying federal conflict of interest law to the president than Silberman had assumed.

Without question, "[t]he President occupies a unique position in the constitutional scheme" of the United States.[75] As the Supreme Court has observed, the American presidency "concentrates executive authority in a single head in whose choice the whole Nation has a part.... In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear."[76]

The uniqueness of the presidency in our system and the breadth of the president's responsibilities have led the Court to find that the occupant of the office must have immunity from certain kinds of legal actions. For example, absent an express congressional authorization, the president is immune from many civil damages suits arising from official acts (though not from suits arising from his or her private conduct).[77]

At the same time, "the president, like all other government officials, is subject to the same laws that apply to all other members of society."[78] It is well-established, for example, that the president can be required to comply with a subpoena for personal testimony or the production of documents in his or her personal possession.[79] Likewise, few would suggest that broad prohibitions against official misconduct like bribery or obstruction of justice are unconstitutional as applied to the president (though whether it is possible to prosecute a sitting president is a different matter[80]).

In all such cases, the ultimate question is whether the potential impact on the president's ability to carry out his or her duties is "justified by an overriding need to promote objectives within the constitutional authority of Congress."[81]

As a general matter, conflict of interest rules plainly further Congress's legitimate objectives. They serve a vital function in preventing officials from "advancing their own interests at the expense of the public welfare."[82] Self-dealing of this sort is, according to the Supreme Court, "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 … engage in activities which arouse suspicions of malfeasance and corruption."[83]

There is no basis to think that such concerns apply less to the president than to other officials; if anything, the stakes are far higher. The framers worried greatly about presidential corruption, especially in the realm of foreign affairs.[84] They drafted several constitutional provisions — including the explicit congressional consent language in the Foreign Emoluments Clause — to afford Congress an active role in ensuring that like all other officials, the president would govern in the interests of the American people rather than in his or her own financial interests. [85]

Moreover, it bears remembering that conflict of interest law does not cover all self-interested official conduct, or even all government decisions that could be of direct financial benefit to the decision-maker. The law focuses on specific matters in which a decision-maker or other participant has a financial interest that is distinguishable from that of some broad category of the general public.[86] For example, an official can almost certainly work on tax reform legislation even if it would lower her effective tax rate. But she probably cannot participate in the determination to award a contract to a company that she partly owns.

In addition, the presence of a conflict only requires the official to refrain from "personal and substantial" involvement in the particular matter.[87] According to OGE, "personal and substantial involvement" means "more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue."[88] Among other things, OGE's regulations make clear that an official who oversees a government unit and can "determin[e] which matters she will work on" may comply with the law by simply "ensuring that she does not participate" in the specific matter in question.[89]

Given these limits to the scope of conflict of interest law, the Silberman letter probably overstates the degree to which a process like voluntary recusal is unavailable to the president in many circumstances. The president is already removed from the vast majority of routine government matters. Moreover, by longstanding convention, even certain high-profile decisions — like whether to investigate or indict a well-known criminal defendant or award a major contract to a particular bidder — are supposed to be off-limits.[90] (President Trump's periodic disregard for such unwritten rules has attracted criticism from across the ideological spectrum.[91]) While, as far as the constitution is concerned, the president is still responsible for such matters, past presidents were excluded from them for all practical purposes. It is likely that a similar screen could be adopted for many matters in which the president has a direct financial interest and that do not require his or her participation. (This should be even easier for the vice president, whose only constitutionally-mandated responsibilities are to preside over the Senate and be ready to serve as president).

Moreover, recusal is not the only option for dealing with potential conflicts.[92] An alternative is to sell problematic holdings,[93] with the proceeds either invested in ways that do not raise conflict concerns or placed in a qualified blind trust insulated from the beneficiary's control and knowledge.[94] This is what other presidents before Mr. Trump did, including several with substantial business interests.

For all of these reasons, there is a strong argument that Congress can — and should — close the presidential loophole in federal conflict of interest law.[95] But that does not mean the president and vice president should be subject to the exact same requirements as other officials.[96]

For one thing, as two of the highest-profile political figures in the nation, they will inevitably become targets of frequent and often baseless accusations of impropriety that distract from their responsibilities. To avoid this prospect, any new law should specify that if the president or vice president takes the same steps to avoid potential conflicts as presidents going back to the 1970s, that will serve as an absolute bar to liability.[97] In other words, a president or vice president who limits his or her personal holdings to cash, diversified mutual funds (including retirement accounts), private residences, and other assets OGE has determined pose no substantial conflict risk — with all other property going into a qualified blind trust — would be in definitive compliance with the law.[98]

It may also be appropriate to exempt certain responsibilities from conflict of interest rules. For example, the Constitution gives the president sole authority to sign or veto federal legislation, and requires the vice president to serve as the Senate's presiding officer.[99] OGE already considers work on broad legislation "directed to the interests of a large and diverse group of persons" to be outside the scope of conflict of interest law.[100] However, given that both the president and vice president have indispensable, constitutionally assigned roles in the legislative process — and depend on Congress to yield results — it would be appropriate to provide that their actions in connection to the proposal, consideration, or passage of legislation cannot violate conflict of interest law.

Finally, the president and vice president, as elected officials, have no superior officers who can waive potential conflicts, as allowed by federal statute and OGE rules.[101] To compensate for the lack of a waiver option, Congress could establish a monetary threshold below which presidential and vice-presidential conflicts would be considered immaterial and not prohibited.[102]

Fix Federal Ethics Disclosure Rules

Any reform package should also strengthen federal income, asset, and debt disclosure requirements for high-ranking officials.

While disclosure alone cannot erase conflicts of interest, it is still an important tool for mitigating corruption and allowing the public to act as a check on high-level self-dealing.[103]

Current requirements under EIGA, while helpful, are incomplete, most notably because they allow filers to use closely-held companies to shield many of the details of their financial affairs.[104] Almost all of President Trump's holdings are tied up in such entities. He is not required to disclose their ultimate sources of revenue (e.g., the names of customers, lessees, licensees, clients, etc.), the nature and extent of their debts, or the identities of any co-owners or other business partners (although he appears to have done so voluntarily in some cases).[105]

In addition, EIGA only requires income, asset, and debt values to be reported in very broad ranges — such as "$5,000,001-$25,000,000." This can mask suspicious fluctuations that might suggest a particular asset is being used as a front for bribery or influence peddling.[106]

The inadequacy of these disclosures has led many to call on the president to reveal his personal tax returns,[107] something that all of his predecessors going back to the 1970s did.[108] Yet, as shown in a prior Brennan Center analysis, it is highly unlikely that a personal tax return, or even the returns of all the president's many companies, would provide a comprehensive picture of the his income, assets, liabilities, and business associations — all necessary to determine the full extent of his potential conflicts.[109] That is simply not the purpose for which such documents are created.

It still makes sense to require that the president disclose at least some tax records, for the simple purpose of verifying that he or she is paying their fair share in taxes.[110] But rather than attempting to use tax returns as a back-door to accessing other critical information, a better approach is to fix the existing EIGA disclosure regime. Among other things,[111] EIGA should be amended to require (except where the filer has used a blind trust): 1) disclosure of the assets, ultimate sources of income, liabilities, and co-members or owners of any non-publicly-traded entity in which the filer has a substantial interest; 2) more precise estimates for the value of particular assets, sources of income, and debts, rather than the broad ranges currently allowed; and 3) the sale of any asset with respect to which the filer cannot or does not wish to provide the information described above.[112]

To help balance out these new regulatory provisions, Congress should significantly raise and index to inflation EIGA's monetary disclosure thresholds for assets and income (which have not been updated since the 1970s), and consider exempting certain classes of income unlikely to pose any conflict risk.[113]

Strengthen Administration and Enforcement of Ethics Rules in the Executive Branch

Finally, it is essential for the executive branch to have strong, independent ethics regulators — which is not how anyone would describe OGE today.

OGE was established in 1978,[114] and made into a separate agency in 1989.[115] While many assume it to be independent of the president,[116] there are no actual constraints on the president's ability to remove OGE's director, as there are for other independent regulators.[117] Moreover, the agency has limited power to actually enforce federal ethics law. Its weakness was on display in the controversy White House Counselor Kellyanne Conway sparked by endorsing Ivanka Trump's clothing and accessories brand on Fox News.[118] This was a clear violation of OGE's regulations, but the White House refused to impose any sanction on Conway over then-Director Shaub's strenuous objection; White House attorneys even questioned whether OGE's rules applied to White House staff (an argument no other administration has ever made).[119] Apart from protesting, there was nothing Shaub could do.[120]

The irony is that most executive branch employees are subject to quite extensive ethical rules. There is simply no mechanism to enforce them at the highest levels when political leadership lacks interest in doing so.

To fix this problem OGE needs "an urgent makeover."[121] It may also be necessary to empower other bodies to pursue activities like real civil enforcement of ethics rules, which are potentially in tension with OGE's historic mission of ensuring voluntary compliance.

The following changes are essential:

Greater Independence for OGE's Director. Above all, it is imperative that Congress provide that the director of OGE may only be removed "for cause." For-cause removal is the legal *sine qua non* of agency independence, and it is the best guarantee against a president firing the OGE director out of political or personal self-interest.[122] The director or her designee should also be authorized to submit budgetary requests directly to Congress as other independent agencies do, rather than going through the Office of Management and Budget.[123]

Along with making the director independent, there should also be some additional guarantee that future directors will be committed to robust, nonpartisan enforcement of federal ethics law. For instance, Congress could establish a blue ribbon advisory panel to vet potential nominees, along the lines of the body that has been proposed to vet potential commissioners on the Federal Election Commission.[124]

More Authority for OGE Within the Executive Branch. Congress must also clarify that OGE rules bind all executive branch officers and employees, including White House staff.[125] In its current form, all OGE can do is act as an adviser to designated agency ethics officers (DAEOs) in the various executive branch departments, who typically work under political appointees within the various agencies (although many DAEOs are required to report suspected ethics violations to the agency's inspector general).[126] To strengthen uniform interpretation of the rules, OGE should have greater oversight over these officials, including the authority to review their determinations regarding potential conflicts of interest.[127] OGE should also have final authority over any waivers of statutory or regulatory ethics requirements (currently such authority rests with thousands of individual supervisors across the federal government),[128] and be required to make this and other information relevant to potential conflicts of interest publicly available on its website.[129]

Stronger Civil Enforcement. It is also essential that OGE or another body be given real civil enforcement authority parallel to that of most other independent regulatory agencies. This would include the power to conduct investigations, including through the issuance of subpoenas, and the power to either levy civil penalties directly or seek them in federal court when violations are discovered.[130] Currently both criminal and civil enforcement power in this area resides with the Department of Justice, which rarely pursues any but the most serious violations.[131]

One option is for OGE itself to take on this role, which would call for the creation of a separate enforcement division within the agency (similar divisions exist within other independent regulators). However, OGE's former director, Walter Shaub, has argued that the role of enforcer would be a poor fit for an agency whose mission has traditionally centered on promoting voluntary compliance.[132] An alternative is to vest civil enforcement authority in a different independent agency, such as the Office of Special Counsel (whose mission could be expanded from its current narrow focus on enforcing federal personnel rules and whistleblower protections) or a newly-created body.

These are all feasible options, with the caveat that if OGE is not responsible for civil enforcement it should still be able to refer matters to the enforcing body.[133] Also, that body should not be part of DOJ, given DOJ's lack of formal independence from the president and track record of pursuing only egregious criminal violations.

Budget. OGE's current $16 million budget is miniscule by federal standards.[134] The Federal Election Commission, which administers and enforces federal campaign finance law, has more than 300 employees and a budget of over $71 million.[135] Similar resources — potentially divided between OGE and any other body entrusted with civil enforcement of ethics rules — are needed to competently administer and enforce federal ethics law. Even a substantial increase relative to OGE's current budget would still amount to less than a rounding error with respect to the total federal budget of more than $4 trillion.[136]

CONCLUSION

These common-sense reforms would go a long way toward fixing key weaknesses in federal ethics regulation that recent controversies have exposed. They should be a priority regardless of who sits in the Oval Office. Mr. Trump is hardly the first president with significant business interests, nor is he likely to be the last — in fact, far wealthier individuals like Facebook founder Mark Zuckerberg and former New York City Mayor Michael Bloomberg have been floated as potential 2020 presidential contenders.[137] And while the Trump administration has been unwilling to strictly enforce federal ethics rules, it did not create the underlying structural weaknesses in today's regulatory regime.

Of course, the challenges our political system faces today extend far beyond conflicts of interest in government. Many other issues — ranging from the breakdown of our campaign finance system, to the revolving door between the federal government and industries it regulates, to other ills like voter suppression and extreme partisan gerrymandering — have contributed to the current crisis of confidence in government. Only by re-establishing meaningful guardrails to constrain abuses of power in each of these areas can we hope to ensure the long-term health of our political system. But while the proposals set forth here will not fix everything, but they are an important part of the solution. They deserve to be a priority as Congress looks to shore up our democratic institutions.

ENDNOTES

[1] Rather than divesting or otherwise meaningfully insulating himself from his business empire, President Trump has opted to place his assets in a revocable trust created "to hold assets for [his] exclusive benefit." His son Donald Trump Jr. and Trump Organization executive Allen Weisselberg were appointed trustees, and the President can remove them at any time. Rosalind S. Helderman and Drew Harwell, "Documents Confirm Trump Still Benefiting from His Business," *Washington Post*, February 4, 2017, https://www.washingtonpost.com/politics/documents-confirm-trump-still-benefiting-from-his-business/2017/02/04/848fdd5a-eae0-11e6-bf6f-301b6b443624_story.html?utm_term=.d0f32e1e94cd. The Chairman of the Advisory Board of the Trump trust is Mr. Trump's other son, Eric, who runs the Trump organization with Donald Jr. He told *Forbes* Magazine that he will provide President Trump with financial updates about the business, "likely quarterly." Jennifer Calfas, "Eric Trump Says He'll Give the President Quarterly Updates on Business Empire," *Fortune Magazine*, March 24, 2017, http://fortune.com/2017/03/24/eric-trump-president-business-organization/. Since then, the President reportedly altered his trust to allow him to withdraw money from his businesses without public disclosure at any time. Peter Overby, "Change to President Trump's Trust Lets Him Tap Business Profits," *NPR*, April 3, 2017, http://www.npr.org/2017/04/03/522511211/change-to-president-trumps-trust-lets-him-tap-business-profits.

[2] *See, e.g*., Zephyr Teachout, "The Anti-Corruption Principle," *Cornell Law Review* 94 (2009): 374; James D. Savage, "Corruption and Virtue at the Constitutional Convention," *Journal of Politics* 56 (1994): 176-7.

[3] Caleb Melby and John Voskuhl, "Trump Says 'Can't Have a Conflict of Interest' as President," *Bloomberg*, November 22, 2016, https://www.bloomberg.com/news/articles/2016-11-22/trump-says-he-can-t-have-a-conflict-of-interest-as-president.

[4] *See* 18 U.S.C. §§ 202(c), 208. Members of Congress and federal judges are also exempt, though subject to their own detailed ethical codes intended to prevent most conflicts of interest. *See* COMM. ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHIC MANUAL (2008 EDITION), http://oce.house.gov/pdf/2008_House_Ethics_Manual.pdf; "Code of Official Conduct," Rules of the House of Representatives – 114th Congress, accessed September 19, 2017, https://ethics.house.gov/publication/code-official-conduct; SELECT COMM. ON ETHICS UNITED STATES SENATE, SENATE ETHICS MANUAL (2003 EDITION), https://www.ethics.senate.gov/downloads/pdffiles/manual.pdf; "Code of Conduct for United States Judges," United States Courts, last revised March 20, 2014, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges; *Code of Conduct for Judicial Employees*, UNITED STATES COURTS, last revised March 20, 2014, http://www.uscourts.gov/sites/default/files/vol02a-ch03_0.pdf.

[5] U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. II, § 1, cl. 7.

[6] Three lawsuits have recently been filed against President Trump under the Emoluments clauses. Brooke Seipel, "Nearly 200 Democrats Sue Trump, Citing Emoluments Clause Violation," *The Hill*, June 14, 2017, http://thehill.com/blogs/blog-briefing-room/news/337710-nearly-200-democrats-file-emoluments-lawsuit-against-trump; Aaron C. Davis, "D.C. and Maryland Sue President Trump, Alleging Breach of Constitutional Oath," *Washington Post*, June 12, 2017, https://www.washingtonpost.com/local/dc-politics/dc-and-maryland-to-sue-president-trump-alleging-breach-of-constitutional-oath/2017/06/11/0059e1f0-4f19-11e7-91eb-9611861a988f_story.html?utm_term=.52eaa0f43209; Joshua Matz, "New Hotel-Owner Plaintiff in CREW Emolument Lawsuit," *Take Care*, May 11, 2017, https://takecareblog.com/blog/new-hotel-owner-plaintiff-in-crew-emolument-lawsuit.

[7] Jack Maskell, *The Use of Blind Trusts by Federal Officials*, Cong. Research Serv., (2005), 4-6, *available at* http://congressionalresearch.com/RS21656/document.php; *see also, e.g.*, John F. Berry, "Troubled Carter Peanut Warehouse is Up for Sale," *Washington Post*, February 14, 1979, https://www.washingtonpost.com/archive/politics/1979/02/14/troubled-carter-peanut-warehouse-is-up-for-sale/e1a1e82f-9707-43c7-97cc-c3a0c2713094/?utm_term=.e26cd6665af3; Ronald Reagan, "Announcement of the Formation of a Blind Trust to Manage the President's Personal Assets," January 30, 1981, in Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=44168; http://www.nytimes.com/1981/02/23/us/reagan-s-worth-put-at-4-million.html; David Lauer, "Clintons Putting Financial Assets Into Blind Trust," *Los Angeles Times*, May 20, 1993, http://articles.latimes.com/1993-05-20/news/mn-37415_1_blind-trust; *see also*. Recent presidents have also generally tried to avoid the appearance of participation in specific government matters involving an immediate family member. *See, e.g.*, Nathaniel C. Nash, "President Defends His Son's Integrity In Savings Inquiry," *New York Times*, July 12, 1990, http://www.nytimes.com/1990/07/12/business/president-defends-his-son-s-integrity-in-savings-inquiry.html.

[8] For example, revelations that President Richard 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 downfall in Watergate. Stephen Mihm, "Nixon's Failed Effort to Withhold His Tax Returns," *Bloomberg*, August 2, 2016,

https://www.bloomberg.com/view/articles/2016-08-02/nixon-s-failed-effort-to-withhold-his-tax-returns.

[9] See "Legislative Affairs & Budget," United States Office of Government Ethics, accessed September 19, 2017, https://www.oge.gov/web/oge.nsf/Legislative%20Affairs%20&%20Budget; "About OGE," United States Office of Government Ethics, last accessed September 19, 2017, https://www.oge.gov/web/oge.nsf/About+OGE.

[10] Walter M. Shaub Jr., "How to Restore Government Ethics in the Trump Era," *New York Times*, July 18, 2017, https://www.nytimes.com/2017/07/18/opinion/walter-shaub-how-to-restore-government-ethics-in-the-trump-era.html?mcubz=0&_r=0.

[11] To be sure, there are gaps that could stand to be filled, several of which were highlighted by former OGE Director Shaub in a recent set of policy proposals. *See* Walter Shaub, *Policy Proposals on Ethics* (November 9, 2017) 20-25, *available at* http://www.campaignlegalcenter.org/news/press-releases/walter-shaub-s-13-ways-improve-government-ethics.

[12] *See* Kathleen Clark, "Do We Have Enough Ethics in Government Yet? An Answer from the Fiduciary Theory," *University of Illinois Law Review* (1996): 64-66. Even though high-level misconduct was usually the impetus for each successive wave of reform, the burden of new rules has fallen mostly on ordinary federal employees. Rank-and-file federal workers are, if anything, over-regulated, at least on paper. *Id.* at 91.

[13] *See also* Daniel Weiner and Lawrence Norden, *Presidential Transparency: Beyond Tax Return*, Brennan Center for Justice, 2017, http://www.brennancenter.org/publication/presidential-transparency-beyond-tax-returns.

[14] It may also be advisable to require certain nonprofit organizations to which an official has close ties to disclose information about their contributors, as the Brennan Center will propose in a forthcoming paper.

[15] Presidential Conflicts of Interest Act of 2017, S.B. 65, 115th Cong. (2017); Presidential Conflicts of Interest Act 2017, H.R. 371, 115th Cong. (2017); Presidential Tax Transparency Act, H.R. 305. 115th Cong. (2017); Office of Government Ethics Independent Act of 2017, H.R. 3462, 115th Cong. (2017); White House Ethics Transparency Act of 2017, H.R. 2762, 115th Cong. (2017).

[16] Remarks of Walter M. Shaub, Jr., U.S. Office of Government Ethics, at the Brookings Institution (January 11, 2017), *available at* https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf.

[17] U.S. CONST. art. II, § 1, cl. 7.

[18] See *Federalist*, no. 73 (Alexander Hamilton).

[19] U.S. CONST. art. I, § 9, cl. 8; *see also* David J. Barron, "Application of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Price," 33 Op. O.L.C. 1,4 (2009) (opining that Foreign Emoluments Clause "surely" applies to the president).

[20] For example, in 2009 the Institute of Medicine of the National Academy of Science published a 390-page report entitled, *Conflict of Interest in Medical Research, Education and Practice*. See Bernard Lo and Marilyn J. Field, ed., *Conflicts of Interest in Medical Research, Education, and Practice*, Institute of Medicine (Washington, DC: The National Academies Press, 2009), https://doi.org/10.17226/12598.

[21] Jason Dana, "How Psychological Research Can Inform Policies for Dealing with Conflicts of Interest in Medicine," in *Conflict of Interest in Medical Research, Education, and Practice*, ed. Bernard Lo and Marilyn J. Field (Washington DC: National Academies Press, 2009), 364.

[22] United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1961).

[23] Steven L. Schooner and Daniel I. Gordon, "Trump Leases His D.C. Hotel From a Government Agency He'll Soon Be in Charge of," *Washington Post*, November 15, 2016, https://www.washingtonpost.com/posteverything/wp/2016/11/15/trump-needs-to-give-up-his-trump-hotel-lease-right-now/?utm_term=.dce68a5e25da.

[24] *Id.*; *but see* Isaac Arnsdorf, "Trump Could Keep D.C. Hotel Despite Conflict of Interest," *Politico*, December 3, 2016, http://www.politico.com/story/2016/12/trump-could-keep-dc-hotel-despite-conflict-of-interest-232144.

[25] Charles S. Clark, "GSA Will Examine Ethics Issues Around Trump's D.C. Hotel Lease," *Government Executive*, November 17, 2016, http://www.govexec.com/contracting/2016/11/gsa-will-examine-ethics-issues-around-trumps-dc-hotel-lease/133262/.

[26] Isaac Arnsdorf, "Trump Picks Leader for Federal Agency Overseeing His D.C. Hotel," *Politico*, January 26, 2017, http://www.politico.com/story/2017/01/trump-picks-gsa-leader-oversee-hotel-234233.

[27] The letter asserts that the president would not personally benefit from the lease because no proceeds from the hotel would be distributed to the revocable trust in which he has placed his assets. Letter from Kevin M. Terry, Contracting Officer, General Services Administration, to Donald J. Trump, Jr. (March 23, 2017), https://cdn.govexec.com/media/gbc/docs/pdfs_edit/032317cc1.pdf. However, it appears the trust's share of proceeds will be credited to its capital account, increasing the President's ownership stake in the hotel. *Id.* at 7. Moreover, another owner of the hotel is a trust controlled by the President's daughter Ivanka, whose husband Jared Kushner had already become a senior White House official (since then Ms. Trump has also taken a high-profile job in her father's administration). *Id* at 5.

[28] Jason Miller, "GSA Struggles to Explain Lease Decision about Trump hotel to House Lawmakers," *Federal News Radio*, Mary 24, 2017, https://federalnewsradio.com/leasing-property-management/2017/05/gsa-struggles-to-explain-lease-decision-about-trump-hotel-to-house-lawmakers/.

[29] Charles S. Clark, "GSA's Management of Trump Hotel Lease Under Review by Agency Watchdog," *Government Executive*, August 30, 2017, http://www.govexec.com/oversight/2017/08/gsas-management-trump-hotel-lease-under-review-agency-watchdog/140639/.

[30] Chas Danner, "Foreign Diplomats Are Apparently Lining Up to Do Business at Trump's D.C. Hotel," *New York Magazine*, November 19, 2016, http://nymag.com/daily/intelligencer/2016/11/diplomats-are-lining-up-to-do-business-at-trumps-d-c-hotel.html; Jonathan O'Connell and Mary Jordan, "For Foreign Diplomats, Trump Hotel is Place to Be," *Washington Post*, November 18, 2016, https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.481a5380037d; Alex Altman, "Donald Trump's Suite of Power," *Time*, accessed October 20, 2017, http://time.com/donald-trumps-suite-of-power/; David A. Fahrenthold, Amy Brittain, and Matea Gold, "Trump's Divisive Presidency Reshapes A Key Part of His Private Business," *Washington Post*, September 17, 2017, https://www.washingtonpost.com/politics/trumps-divisive-presidency-reshapes-a-key-part-of-his-private-business/2017/09/17/b2892628-98a8-11e7-87fc-c3f7ee4035c9_story.html?hpid=hp_hp-top-table-main_trumpbusiness-405pm%3Ahomepage%2Fstory&utm_term=.8ba924e4df11.

[31] Fahrenthold, et al., "Trump's Divisive Presidency Reshapes A Key Part of His Private Business."

[32] The Global Anticorruption blog has assembled a comprehensive list of the President's apparent conflicts, which is updated regularly. *See* "Tracking Corruption and Conflicts in the Trump Administration," *The Global Anticorruption Blog*, last updated December 1, 2017, https://globalanticorruptionblog.com/profiting-from-the-presidency-tracking-corruption-and-conflicts-in-the-trump-administration/; *see also* Jeremy Venook, "Trump's Interests vs. America's, Dubai Edition," *The Atlantic*, last updated August 9, 2017, https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382/; Carolyn Kenney and John Norris, "Trump's Conflicts of Interest," Center for American Progress, June 14, 2017, https://www.americanprogress.org/issues/security/news/2017/06/14/434171/trumps-conflicts-interest/; "Trump's Conflicts of Interest," Sunlight Foundation, accessed September 20, 2017, https://sunlightfoundation.com/tracking-trumps-conflicts-of-interest/; Joel Eastwood, Coulter Jones, and Julia Wolfe, "Trump, His Children, and 500+ Potential Conflicts of Interest," *Wall Street Journal*, January 19, 2017, http://www.wsj.com/graphics/donald-trump-potential-conflicts-of-interest/.

[33] Sharon LaFraniere and Danny Hakim, "Trump's Trademark Continues Its March Across the Globe, Raising Eyebrows," *New York Times*, April 11, 2017, https://www.nytimes.com/2017/04/11/us/politics/trump-trademark-ethics.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0.

[34] *Id*.

[35] Keri Geiger, Greg Farrell, and Sarah Mulholland, "Trump May Have a $300 Million Conflict of Interest with Deutsche Bank," *Bloomberg*, December 22, 2016, https://www.bloomberg.com/news/articles/2016-12-22/deutsche-bank-s-reworking-a-big-trump-loan-as-inauguration-nears.

[36] In October 2016, the bank paid $200 million to settle allegations it violated sanctions by doing business with Iran and Syria. Ben Protess and Peter Eavis, "Deutsche Bank Is Expected to Settle Sanctions Violation Case For At Least $200 Million," *New York Times*, October 28, 2015, https://www.nytimes.com/2015/10/29/business/dealbook/deutsche-bank-is-expected-to-settle-sanctions-violation-case-for-dollar200-million.html. In early January it paid $7.2 billion to settle Justice Department charges stemming from the mortgage-backed securities debacle. Steven Arons, David McLaughlin, and Greg Farrell, "Deutsche Bank Completes at $7.2 Billion U.S. Mortgage Pact," *Bloomberg*, January 17, 2017, https://www.bloomberg.com/news/articles/2017-01-17/doj-deutsche-bank-agrees-to-pay-7-2b-for-misleading-investors. As recently as May, the bank paid $41 million to the Federal Reserve for having inadequate protections against money laundering. Jesse Hamilton and Steve Arons, "Deutsche Bank Fined $41 Million for Money-Laundering Lapses," *Bloomberg*, May 31, 2017, https://www.bloomberg.com/news/articles/2017-05-30/deutsche-bank-pays-41-million-fine-for-money-laundering-faults.

[37] See Alexandra Berzon and Peter Grant, "One of Government's Largest Landlords, Vornado, Pays Millions Each Year to Trump Company," *Wall Street Journal*, February 18, 2017, https://www.wsj.com/articles/one-of-governments-largest-landlords-pays-millions-each-year-to-trump-company-1487241001.

[38] *Id.*; "Vornado Pays Trump Organization Millions Each Year," *The Real Deal*, February 16, 2017, https://therealdeal.com/2017/02/16/vornado-pays-trump-organization-millions-each-year/.

[39] Vornado Realty Trust, "Vornado to Spin Off Its Washington, DC Business and Merge It with The JBG Companies," press release, October 31, 2016, http://www.vno.com/press-release/lb7zjybqoa/vornado-to-spin-off-its-washington-dc-business-and-merge-it-with-the-jbg-companies.

[40] Berzon and Grant, "One of Government's Largest Landlords, Vornado, Pays Millions Each Year to Trump Company."

[41] Sam Petulla, "Tracking President Trump's Visits to Trump Properties," *NBC News*, August 10, 2017, https://www.nbcnews.com/politics/donald-trump/how-much-time-trump-spending-trump-properties-n753366; Brooke Seipel, "Secret Service Has Spent $35,000 on Gold Cart Rentals Since Inauguration: Report," *The Hill*, April 14, 2017, http://thehill.com/blogs/blog-briefing-room/news/328942-secret-service-has-spent-more-than-35000-on-golf-cart-rentals; Drew Harwell and Amy Brittain, "Taxpayers Billed $1,092 For An Official's Two-Night Stay at Trump's Mar-a-Lago Club," *Washington Post*, September 15, 2017, https://www.washingtonpost.com/politics/taxpayers-billed-1092-for-an-officials-two-night-stay-at-trumps-mar-a-lago-club/2017/09/15/e3e5dfdc-97c6-11e7-82e4-f1076f6d6152_story.html?utm_term=.9ed637e62ebe; Laura M. Holson, "At the 'Summer White House,' You Are Never Far From a Trump Photo," *New York Times*, June 3, 2017, https://www.nytimes.com/2017/06/03/style/president-trump-national-golf-club-bedminster-summer-white-house.html.

[42] Craig Holman, "Lobbyists, More Lobbyists, But Few Waivers: Trump's Inconvenient Ethics," *Huffington Post*, August 7, 2017, http://www.huffingtonpost.com/entry/59888eece4b0aedb751c5865.

[43] Ross still owns a shipping company that does business in China, even as he oversees trade negotiations with that country. Jacob Pramuk, "Wilbur Ross Holds Stake in Shipping Firm That Could Present China Conflict," *CNBC*, April 4, 2017, https://www.cnbc.com/2017/04/04/trump-news-wilbur-ross-stake-in-shipping-firm-may-pose-china-conflict.html. Ross also retains investments in another shipping company that does regular business with a Russian energy firm whose owners include Vladimir Putin's son-in-law and an oligarch on the U.S. sanctions list. Mike McIntire, Sasha Chavkin, and Martha M. Hamilton, "Commerce Secretary's Offshore Ties to Putin's 'Cronies,'" *New York Times*, Nov. 5, 2017, https://www.nytimes.com/2017/11/05/world/wilbur-ross-russia.html.

[44] One of DeVos's family trusts reportedly has indirect stakes in a company that operates a chain of for-profit colleges, and in Discovery Communications, which produces educational materials sold to schools across the country. Emma Brown and Danielle Douglas-Gabriel, "Betsy DeVos's Ethics Review Raises Further Questions for Democrats and Watchdogs," *Washington Post*, January 24, 2017, https://www.washingtonpost.com/news/grade-point/wp/2017/01/24/betsy-devoss-ethics-review-raises-further-questions-for-democrats-and-watchdogs/?utm_term=.ab0f2e05584a.

[45] Kushner and Ms. Trump "remain the beneficiaries of a sprawling real estate and investment business still worth as much as $740 million, despite their new government responsibilities." Jesse Drucker, Eric Lipton, and Maggie Haberman, "Ivanka Trump and Jared Kushner Still Benefiting From Business Empire, Filings Show," *New York Times*, March 31, 2017, https://www.nytimes.com/2017/03/31/us/politics/ivanka-trump-and-jared-kushner-still-benefiting-from-business-empire-filings-show.html?mcubz=0&_r=0. Ms. Trump also has intellectual property applications pending around the world. On the day of Chinese President Xi Jinping's visit to the Mar-a-Lago, for example, the Chinese government granted her new trademark rights for her line of handbags, jewelry and spa services, even though the applications had been pending for a fraction of the time it usually takes to issue new trademarks in China. Jackie Northam, "China Defends Trademark Grants For Ivanka Trump Products," *NPR*, April 19, 2017, http://www.npr.org/sections/thetwo-way/2017/04/19/524765086/china-defends-trademark-grants-for-ivanka-trump-products.

[46] Christopher T. Anderson and Yuliya V. Tverdova, "Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies," American Journal of Political Science 47, no. 1 January (2003): 91, 92.

[47] *See, e.g.*, Rajan Menon, "How the Tumultuous '90s Paved the Way for Putin's Russia," *New York Times*, April 10, 2017, https://www.nytimes.com/2017/04/10/books/review/who-lost-russia-cold-war-peter-conradi.html (reviewing Peter Conradi, *Who Lost Russia?* (London: Oneworld, 2017)).

[48] Gustavo Coronel, *Corruption, Mismanagement, and Abuse of Power in Hugo Chavez's Venezuela*, Cato Institute (November 27, 2006) 3-5, https://www.cato.org/publications/development-policy-analysis/corruption-mismanagement-abuse-power-hugo-chavezs-venezuela.

[49] *See, e.g.*, Alexander Baunov, "How Putin Made Political Corruption Great Again," *The Atlantic*, July 7, 2017, https://www.theatlantic.com/international/archive/2017/07/putin-trump-clinton-establishment-russia/532821/; Adam Withnall, "Vladimir Putin 'Corruption': Five Things We Learned About the Russian President's Secret Wealth," *The Independent*, January 26, 2016, http://www.independent.co.uk/news/people/vladimir-putin-corruption-five-things-we-learned-about-the-russian-presidents-secret-wealth-a6834171.html; Rory Carroll, "Hugo Chavez Revolution Mired by Claims of Corruption," *The Guardian*, April 18, 2010, https://www.theguardian.com/world/2010/apr/18/hugo-chavez-revolution-corruption-claims; Coronel, *Corruption, Mismanagement, and Abuse of Power in Hugo Chavez's Venezuela*.

[50] Gerald E. Caiden and Naomi Caiden, "Administrative Corruption," *Public Administration Review* 37, no. 3 (1977): 301, 306.

[51] Amanda Taub, "How 'Islands of Honesty' Can Crush a System of Corruption," *New York Times*, December 9, 2016, https://www.nytimes.com/2016/12/09/world/asia/south-korea-brazil-argentina-impeachment.html; Matthew Yglesias, "We Have One Hundred Days to Stop Donald Trump from Systemically Corrupting our Institutions," *Vox*, November 16, 2016, http://www.vox.com/policy-and-politics/2016/11/17/13626514/trump-systemic-corruption; *see also* Ray Fisman and Naomi A. Golden, *Corruption: What Everyone Needs to Know* (Oxford: Oxford University Press, 2017), 5-15.

[52] *Id; see also, e.g.*, Karen Dawisha, "The Putin Principle: How It Came to Rule Russia," *World Affairs* (May/June 2015), http://www.worldaffairsjournal.org/article/putin-principle-how-it-came-rule-russia (describing relationship between corruption and erosion of democracy in Russia).

[53] *See* Susan Rose-Ackerman, "Democracy and `Grand' Corruption," *International Social Science Journal* 48 (2008): 365 - 380, https://doi.org/10.1111/1468-2451.00038.

[54] *See* Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (2018) (forthcoming), at 34, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776.

[55] "Public Trust in Government: 1958-2017," Pew Research Center, May 3, 2017, http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/.

[56] Laurie Kellman and Emily Swanson: "AP-NORC Poll: Three-quarters in US Say They Lack Influence," *Associated Press*, July 13, 2017, https://apnews.com/c3188d43486b4ae29dd33f7d6c3d9735/AP-NORC-Poll:-Three-quarters-in-US-say-they-lack-influence.

[57] Legal scholars Aziz Huq and Tom Ginsburg have argued that constitutional democracy has "three institutional predicates": 1) free and fair elections; 2) robust protections for speech and association; 3) stable and predictable rule of law and legal institutions. Huq and Ginsburg, "How to Lose a Constitutional Democracy," at 9. Under this framework, a system in which the

rule of law and protections for speech and association eroded would have suffered significant democratic deterioration even if it still conducted regular free elections. *Id*.

[58] *See* Roberto Stafan Foa and Yascha Mounk, "The Danger of Deconsolidation: The Democratic Disconnect," *Journal of Democracy* 27, no. 3: 9-10, 13 (July 2016), *available at* https://www.journalofdemocracy.org/article/danger-deconsolidation-democratic-disconnect; Huq and Ginsburg, "How to Lose a Constitutional Democracy," at 77 (suggesting constitutional democracy in the United States has fewer legal safeguards than many assume).

[59] *See Federalist*, no. 57 (James Madison), nos. 67, 69, and 70 (Alexander Hamilton).

[60] *See* John Joseph Wallis, *"*The Concept of Systemic Corruption in American History*,"* in *Corruption and Reform: Lessons from America's Economic History*, eds. Edward L. Glaeser and Claudia Goldin (Chicago: University of Chicago Press, 2007): 45, 65.

[61] Roger P. Alford, "A Broken Windows Theory of International Corruption," *Ohio State University Law Journal* 73, no. 5 (2012): 1253-82.

[62] "Democracy, Democratic Governance, and Transparent Institutions in the American Interest," Center for American Progress and Center for Strategic and International Studies, January 18, 2013. https://www.americanprogress.org/issues/democracy/reports/2013/01/18/50085/democracy-democratic-governance-and-transparent-institutions-in-the-american-interest/.

[63] There is certainly a long history of Congress using oversight to pressure presidents and other high-ranking executive branch officials to abide by important norms of governance even in the absence of any legal obligation. These include Clinton-era investigations into Democratic fundraising practices and the receipt of gifts by the President and First Lady, *see, e.g.*, Brooks Jackson, "Lincoln Bedroom Guests Gave $5.4 Million," *CNN*, February 26, 1997, http://www.cnn.com/ALLPOLITICS/1997/02/26/clinton.lincoln/; "Clinton Gifts Called 'Disturbing,'" *CBS*, February 12, 2002, http://www.cbsnews.com/news/clinton-gifts-called-disturbing/; Raymond Hernandez, "G.O.P. Inquiry Lists Gifts To Clintons in White House," *New York Times*, October 10, 2002, http://www.nytimes.com/2002/10/10/us/gop-inquiry-lists-gifts-to-clintons-in-white-house.html; and investigations into the George W. Bush administration's inappropriate firing of U.S. attorneys and other efforts to interfere with prosecutorial independence, *see, e.g.*, Dan Eggen and Paul Kane, "Gonzales: 'Mistakes Were Made,'" *Washington Post*, March 14, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300776.html; Dan Eggen and Paul Kane, "Gonzales Hospital Episode Detailed," *Washington Post*, May 16, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051500864.html.

[64] The scope of the vice president's official duties varies greatly depending on the administration. However, because the vice president needs to be ready to assume the presidency at a moment's notice, it makes sense to subject her or him to the same legal and ethical requirements.

[65] *See* note 6.

[66] Most state conflict of interest laws either explicitly apply to the governor or contain language that unambiguously includes that office. *See e.g.*: Ala. Code §§ 36-25-1, 36-25-5; Alaska Stat. Ann. §§ 39.50.090, 39.50.200; Ariz. Rev. Stat. Ann. §§ 38-502.8, 38-503; Ark. Code Ann. §§ 21-8-402, 21-8-801 (West); Cal. Gov't Code §§ 87100, 87103, 87200 (West); Colo. Rev. Stat. Ann. §§ 24-18-102, 24-18-104, 24-18-108 (West); Conn. Gen. Stat. Ann. §§ 1-79, 1-84, 1-85 (West); Del. Code Ann. tit. 29, §§ 5805, 5812 (West); Fla. Const. art. II, § 8; Fla. Stat. Ann. § 112.313 (West); Ga. Code Ann. §§ 45-10-20 – 45-10-22 (West); Haw. Rev. Stat. Ann. §§ 84-3, 84-14 (West); Idaho Code Ann. §§ 74-402, 74-404 (West); Ind. Code Ann. §§ 4-2-6-1, 4-2-6-5.5, 4-2-6-9 (West); Iowa Code Ann. §§ 68B.2, 68B.2A (West); Kan. Stat. Ann. §§ 46-221, 46-233 (West); Ky. Rev. Stat. Ann. §§ 11A.010, 11A.020, 11A.040 (West); La. Rev. Stat. Ann. §§ 42:1102, 42:1112; MD GEN PROVIS §§ 5-101, 5-501; Mass. Gen. Laws Ann. ch. 268A, §§ 1, 6A (West); Mich. Comp. Laws Ann. § 15.303 (West); MI CONST Art. 4, § 10 (West); Minn. Stat. Ann. §§ 10A.01, 10A.07 (West); Miss. Code. Ann. §§ 25-4-103, 25-4-105 (West); Mo. Ann. Stat. § 105.452 (West); Mont. Code Ann. §§ 2-2-102, 2-2-104 (West); Neb. Const. art. III, § 16; Neb. Rev. Stat. Ann. § 49-1499.02 (West); Nev. Rev. Stat. Ann. §§ 281A.160, 281A.420 (West); N.H. Rev. Stat. Ann. §§ 21-G:22 - 23; N.J. Stat. Ann. §§ 52:13D-13, 52:13D-14 (West); N.M. Stat. Ann. §§ 10-16-2, 10-16-4 (West); N.Y. Pub. Off. Law §§ 73, 74 (McKinney); N.C. Gen. Stat. Ann. §§ 138A-3, 138A-31, 138A-35; Ohio Rev. Code Ann. § 102.04 (West); Or. Rev. Stat. Ann. § 244.020 (West); 65 Pa. Stat. and Cons. Stat. Ann. §§ 1102, 1103 (West); 36 R.I. Gen. Laws Ann. §§ 36-14-4, 36-14-7 (West); S.C. Code Ann. §§ 8-13-100, 8-13-700; Tex. Gov't Code Ann. §§ 572.002, 572.051; Utah Code Ann. §§ 67-16-9, 67-16-3 (West); Wash. Rev. Code Ann. §§ 42.52.010, 42.52.020, 42.52.030 (West); W. Va. Code Ann. §§ 6B-1-3, 6B-2-5 (West); Wis. Stat. Ann. §§ 19.42, 19.46 (West); Wyo. Stat. Ann. §§ 9-13-102, 9-13-103 (West).

[67] *See* Conflict of Interest Act, S.C. 2006, C 9 (Can.); Ley Federal de Responsabilidades Administrativas de los Servidores Públicos (Federal Law of Administrative Responsibilities of Public Servants), Diario Oficial de la Federación [DOF] 13-3-2002, últimas reformas DOF 28-05-2009 (Mex.); Loi 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique [Law 2013-907 of October 11th, 2013 on Transparency in Public Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2013, p. 16829 (Fr.).

[68] Pub. L. 101-94, § 401 (November 30, 1989); Josh Gerstein, "Trump Owes Ethics Exemption to George H.W. Bush," *Politico*, November 23, 2016, http://www.politico.com/story/2016/11/trump-bush-ethics-exemption-231773.

[69] *See* Letter from Laurence H. Siberman, Acting Att'y Gen., to the Hon. Howard W. Cannon, Chairman, Senate Comm. on Rules and Admin. (September 20, 1974), *available at* http://www.fas.org/irp/agency/doj/olc/092074.pdf.

[70] *Id.* at 4.

[71] Letter from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, to Kenneth A. Lazarus, Assoc. Counsel to the President (December 16, 1974), *available at* https://fas.org/irp/agency/doj/olc/121674.pdf.

[72] Letter from David H. Martin, Director, Office of Government Ethics, to a Deputy DAEO (October 20, 1983), *available at* https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories.

[73] Pub. L. 101-94, § 401 (November 30, 1989).

[74] During this time, the only president or vice president who did not limit his assets to "plain vanilla" holdings or use a blind trust was Nelson Rockefeller, who went through a lengthily confirmation process in which, among other things, he disclosed detailed financial records. *See* Linda Charlton, "Rockefeller Says His Assets Are Valued at $62-Million," *New York Times*, September. 20, 1974, http://www.nytimes.com/1974/09/20/archives/rockefellersays-his-assets-are-valued-at-62million-rockefeller.html?mcubz=0; Ron Elving, "*Fact Check: Trump Lawyer's Claim And Comparison To Rockefeller Is A Head Scratcher*," *NPR*, January 12, 2017, http://www.npr.org/2017/01/12/509413961/fact-check-trump-lawyers-claim-and-comparison-to-rockefeller-is-a-head-scratcher.

[75] Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

[76] Clinton v. Jones, 520 U.S. 681, 698 (1997) (quotations omitted).

[77] Nixon v. Fitzgerald, 457 U.S. at 758; *see also id.* at 762 (Burger, C.J., concurring) (allowing lawsuits for civil damages could "subject the President to harassment"); Clinton v. Jones, 520 U.S. at 709. Whether the immunity recognized in *Fitzgerald* extends to civil liability under federal ethics laws that do not expressly cover the president is something of a "gray area." Steve Vladeck and Benjamin Wittes, "Can a President's Absolute Immunity be Trumped?," *Lawfare Blog*, May 9, 2017, https://www.lawfareblog.com/can-presidents-absolute-immunity-be-trumped. In any event, the Court left open the possibility that Congress could expressly authorize civil liability for the president under certain circumstances, *id.* at 748 n.27, which Congress has already done in, for example, the Foreign Gifts and Decorations Act. Vladeck and Wittes, "Can a President's Absolute Immunity be Trumped?"

[78] Clinton v. Jones, 72 F.3d 1354, 1361 n.9 (8th Cir. 1994), *aff'd*, 520 U.S. at 681.

[79] United States v. Nixon, 418 U.S. 683, 713 (1974).

[80] Legal scholars have opined that the president cannot be subject to criminal prosecution while in office, although no court has ever ruled on the question. *See* Michael C. Dorf, "Would a Trump Self-Pardon Precipitate a Constitutional Crisis?," *Verdict*, July 26, 2017, https://verdict.justia.com/2017/07/26/trump-self-pardon-precipitate-constitutional-crisis; Martin London, "Spiro Agnew's Lawyer: Why President Trump Will Not Be Prosecuted for a Crime," *Time*, May 17, 2017, http://time.com/4783442/donald-trump-impeachment-crime-obstruction-justice/. Even if a sitting president cannot be prosecuted for official misconduct, a former president likely can. Famously, the threat of such prosecution is what led President Gerald Ford to pardon his predecessor Richard Nixon for crimes committed in connection to the Watergate scandal. John Berbers, "No

Conditions Set Action Taken to Spare Nation and Ex-Chief, President Asserts," *New York Times*, Sept 9, 1974; *see also* Jack Maskell, Conflict of Interest and 'Ethics' Provisions that May Apply to the President, Cong. Research Serv. (2016), 2-3.

[81] Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

[82] United States v. Mississippi Valley Generating Co., 364 U.S. at 548.

[83] *Id.* at 563.

[84] Teachout, "The Anticorruption Principle," at 365-66.

[85] *Id.* at 359. The Foreign Emoluments clause likely also would give Congress the power to restrict the president (and any other U.S. official) from holding assets that generate profit or other benefit from transactions or other relationships with a foreign state. It could be advisable to enact such a restriction, though it would not be a full substitute for closing the presidential loophole in the conflict of interest statute.

[86] *See* 5 C.F.R. § 2635.402(a)(3).

[87] 18 U.S.C. §208(a); *see also* "18 USC § 208: Acts affecting a personal financial interest," Office of Government Ethics, accessed November 16, 2017, https://www.oge.gov/Web/OGE.nsf/Resources/18+U.S.C.+%C2%A7+208:+Acts+affecting+a+personal+financial+interest.

[88] 5 C.F.R. § 2635.402(a)(4).

[89] 5 C.F.R. § 2635.402(c), Example 1.

[90] *See, e.g*., Andrew McCarthy, "Your Sentencing Advice is Not Helpful, Mr. President," *National Review*, November 4, 2017, http://www.nationalreview.com/article/453415/donald-trumps-death-penalty-remarks-could-harm-federal-prosecutions; Carrie Johnson, "Breaching The 'Wall': Is the White House Encroaching on DOJ Independence?" *NPR*, Oct 26, 2017, http://www.npr.org/2017/10/26/560046507/breaching-the-wall-is-the-white-house-encroaching-on-doj-independence; Isaac Arnsdorf, "Sessions Faces Decision on Politicizing Justice Department," *Politico,* Jan 9, 2017. https://www.politico.com/story/2017/01/jeff-sessions-attorney-general-justice-233382; Danny Vinik, "Trump's $440 Billion Weapon," *Politico*, Dec 22, 2016, https://www.politico.com/agenda/story/2016/12/trump-federal-contracts-weapon-000262.

[91] *See, e.g.*, McCarthy, "Your Sentencing Advice is Not Helpful, Mr. President."

[92] To be sure, recusal is the most common method for addressing conflicts on the part of lower-level staff who have discreet areas of responsibility, though even lower-level employees may be required to sell assets where continued ownership would effectively prevent the employee from doing her job. *See* Jack Maskell, *Financial Assets and Conflict of Interest Regulations in the Executive Branch*, Congressional Research Service, January 17, 2014, at 3, 12, https://fas.org/sgp/crs/misc/R43365.pdf.

[93] *Id.* at 12.

[94] *Id.* at 14-15.

[95] *See also* Kathleen Clark, "Congress Can and Must Restrict the President's Financial Conflicts of Interest," *New York Times*, December 7, 2016, https://www.nytimes.com/roomfordebate/2016/12/07/can-congress-end-donald-trumps-conflict-of-interest-exemption.

[96] This is already the case with respect to the limited restrictions that currently apply to them. For example, while the president and vice president are covered by gift limits, OGE regulations permit them to accept otherwise prohibited gifts when necessary due to "considerations relating to the conduct of their offices," including those of protocol and etiquette. 5 C.F.R. § 2635.204(j).

[97] Some have suggested simply requiring the president to take such steps. *See, e.g.*, Elana Schor, "Senate Dems Seek Divestment Blind Trust for Trump's Assets," *POLITICO*, December 15, 2016, https://www.politico.com/story/2016/12/donald-trump-blind-trust-232668. However, that could compel future holders of the office to divest from assets that pose no actual risk of a conflict of interest. Moreover, such a specific condition on the office of the president bears a closer resemblance to an additional

qualification in violation of Article II that applying to the president a generally-applicable statutory rule. *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798 (1995) (collecting other cases).

[98] *See generally* 5 C.F.R. §§ 2640.201-2640.203; 5 C.F.R. §§ 2634.401 – 2634.414.

[99] U.S. Const. art. I, § 7

[100] 5 C.F.R. § 2640.103(a)(1).

[101] 18 U.S.C. 208(b)(1) and 5 C.F.R. 2640.301(a).

[102] Materiality thresholds of this sort are common for all officials in many state conflict of interest regimes. *See, e.g.,* Cal. Gov't Code §§ 87103, 82033, 82030; Utah Code § 67-16-7.

[103] Maskell, *Financial Assets*, 9-10.

[104] Weiner and Norden, *Presidential Transparency: Beyond Tax Returns*.

[105] *Id.* at 2.

[106] *Id.* at 1 & n.7, 5.

[107] *Id*. at 1, 5.

[108] *Id.*

[109] *Id.* at 6.

[110] *Id.* at 3-5.

[111] Former OGE Director Walter has released several other recommendations to enhance transparency that merit careful study. Shaub, *Policy Proposals on Ethics*, at 20-25.

[112] Weiner and Norden, *Presidential Transparency: Beyond Tax Returns*, at 7. For all filers other than the president, OGE could be given authority to permit confidential rather than public disclosure with respect to a particular asset, upon an application from the filer under criteria OGE establishes by regulation.

[113] OGE already exempts certain assets from conflict of interest rules where the potential for an actual conflict appears too remote or inconsequential—for example, "diversified mutual funds" that own a variety of different companies in different industries. Maskell, *Financial Assets and Conflict of Interest Regulations in the Executive Branch*, at 3-4, 7. Income from such assets could probably be exempted from disclosure as well with little risk to the integrity of government. *See also* Shaub, *Policy Proposals on Ethics*, at 16.

[114] Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101,102 (1978).

[115] When it was created in 1978, OGE was housed within the Office of Personnel Management, but concerns over political interference led Congress to turn OGE into a separate agency when it was reauthorized in 1988. *See* Comm. on the Judiciary, Office of Government Ethics Authorization Act of 1996, H.R. Rep. No. 104-595, pt. 1 (1996).

[116] Letter from Walter M. Shaub, Jr. Director, Office of Government Ethics, to Hon. Thomas R. Carper, Ranking Member, Comm. on Homeland Security and Governmental Affairs, United States Senate (December 12, 2016) *available at* https://www.oge.gov/web/oge.nsf/Congressional%20Correspondence/092B59EFD6EC2760852580880072428 8/$FILE/Carper%20response.pdf?open.

[117] 5 U.S.C.S. app. § 401; Myers v. United States, 272 U.S. 52, 172 (1926) (holding "in the absence of constitutional or statutory provision otherwise," the President's removal authority is unencumbered).

[118] Fox & Friends, "Kellyanne Conway on Ivanka Trump's Fashion Line: 'Go Buy It Today!,'" *Fox News*, Feb. 9, 2017, http://insider.foxnews.com/2017/02/09/kellyanne-conway-ivanka-trump-retailers-go-buy-her-stuff.

[119]In a letter to Shaub following the incident, Deputy White House Counsel Stefan Passantino suggested that "many regulations promulgated by the Office of Government Ethics do not apply to employees of the Executive Office of the President." Letter from Stefan Passantino, Deputy Counsel to the President, Compliance and Ethics, to Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics, February 28, 2017, https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Oversight%20Response%20to%20Shaub%20re%20KAC.PDF. In contrast, previous administrations have "instructed employees that these OGE rules are binding rules for White House and other [Executive Office of the President] staff … The only exception is the President and in some cases the Vice President." Danielle Kurtzleben, "Experts Say White House's Conway Response Raises Major Ethical Questions," *NPR*, March 3, 2017, http://www.npr.org/2017/03/03/518371888/experts-say-white-houses-conway-response-raises-major-ethical-questions (quoting George W. Bush ethics counsel Richard Painter).

[120] *See* Letter from Walter M. Shaub, Jr., Director of the Office of Government Ethics, to the Hon. Jason Chaffetz, Chairman, Comm. On Oversight and Government Reform, and the Hon. Elijah E. Cummings, Ranking Member, Comm. On Oversight and Government Reform, Feb. 13, 2017, *available at* https://app.box.com/s/46c4uggxa2osxj9znpfw6deizggh1ijx.

[121] Meredith McGhee, "Post-Watergate Ethics Panel Needs Urgent Makeover," *The Hill*, June 29, 2017, http://thehill.com/blogs/pundits-blog/the-administration/339818-post-watergate-ethics-panel-needs-urgent-makeover.

[122] *See, e.g.*, Shaub, *Policy Proposals on Ethics*, at 3. An independent OGE under the direction of a single leader could be problematic under a recent D.C. Circuit panel ruling, since vacated pending a rehearing by the full court, that the Consumer Financial Protection Bureau's single-director structure is unconstitutional. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017). If the full court upholds the panel's reasoning with respect to the CFPB, any effort to reform OGE could require the creation of a multimember board to replace to replace the director.

[123] Shaub, *Policy Proposals on Ethics*, at 7.

[124] Restoring Integrity to America's Elections Act, H.R. 2034, 115th Cong. (2017).

[125] *Testimony on Subject of the Executive Branch Reform Act of* 2007, *Before the House Comm. on Oversight and Government Reform*, 110th Cong. 6 (2007) (testimony of Craig Holman, Ph.D., Legislative Representative for Public Citizen) (hereinafter "Holman Testimony"). This clarification could be accomplished by amending 5 U.S.C. app. § 402 to substitute the phrase "employee in the Executive Branch" for "employee in any executive agency." Shaub, *Policy Proposals on Ethics*, at 9.

[126] Typically, designated ethics officers are lawyers working under an agency's general counsel, who is either a political appointee or selected by the agency's political leadership. *See, e.g.*, U.S. Department of State, "Office of the Legal Adviser," accessed Nov 1 2017, https://www.state.gov/s/l/; U.S. Department of Justice, "Departmental Ethics Office," accessed Nov 1, 2017, https://www.justice.gov/jmd/departmental-ethics-office; General Services Administration, "Office of General Counsel Overview," accessed Nov 1, 2017, https://www.gsa.gov/about-us/organization/office-of-general-counsel-overview; U.S. Department of the Treasury, "About: General Counsel," accessed Nov 1, 2017, https://www.treasury.gov/about/organizational-structure/offices/Pages/Assistant-General-Counsel-for-General-Law,-Ethics-and-Regulation.aspx.

[127] Holman Testimony, 6; *see also* Shaub, *Policy Proposals on Ethics*, at 11-12.

[128] 18 U.S.C. § 208(b)(1)

[129] *See* Shaub, *Policy Proposals on Ethics*, at 18.

[130] Although the conflict of interest statute is a criminal statute, federal law also makes provision for the government to seek civil penalties for violations of the law. *See* 18 U.S.C. § 216(b).

[131] OGE's annual survey shows only seven prosecutions for violations of the federal conflict of interest statute in all of 2016, and only five prosecutions for all of 2015, with comparable numbers for earlier years. *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/OGE.nsf/0/FEB69F94825247F2852581750045FE2B/$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf; Walter M. Shaub, "2015 Conflict of Interest Prosecution Survey," (official memorandum, Washington, D.C.: Office of Government Ethics, 2016), https://www.oge.gov/Web/OGE.nsf/0/42DCFE53F8D2211F85257FFD0058DB04/$FILE/Clean%20FINAL%202015%20Prosecution%20Survey%207_26_16.pdf.

[132] Shaub, *Policy Proposals on Ethics*, at 14.

[133] *Id.* at 16 n.33.

[134] Consolidated Appropriations Act, Pub. L. 31-115, 131 Stat. 135 (2017).

[135] *Id.*

[136] *Id.*

[137] Shawn M. Carter, "More Signs Point to Mark Zuckerberg Possibly Running for President in 2020," *CNBC*, August 15, 2017, https://www.cnbc.com/2017/08/15/mark-zuckerberg-could-be-running-for-president-in-2020.html; Henry Goldman, "Michael Bloomberg Stays He Won't Run for President in 2016," *Bloomberg*, March 2016, https://www.bloomberg.com/news/articles/2016-03-07/michael-bloomberg-says-he-won-t-run-for-president-in-2016.

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