

TRANSITION 2020–2021

Executive Actions to Restore Integrity and Accountability in Government

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With a foreword by Michael Waldman

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Foreword

American democracy urgently needs renewal. In the coming years, one of the great issues facing the country will be the presidency itself. A half century ago, in the wake of Watergate and Vietnam, laws and rules aimed to check the “Imperial Presidency.” Over the decades those limits eroded and then were finally cast off. The past three years have seen a refusal to honor oversight and a politicization of the executive branch. The president insists the Constitution gives him “the right to do whatever I want.” The abuse of power in Lafayette Park this summer was just the most visible, and most violent, example of shattered norms.

In this time of reckoning, a great task must be to reset the system of checks and balances and once again restore the presidency to its rightful place.

This volume includes the first set of recommendations for executive actions from the Brennan Center for Justice at NYU School of Law. These focus on enhancing ethics, transparency, and accountability; curbing political influence in law enforcement; enhancing the role of expertise and science throughout government; empowering congressional oversight; and preventing improper uses of emergency powers.

Congress must do its part to play its constitutional role. Courts, too, must step up.

But the president can lead, displaying what Alexander Hamilton called “energy in the executive,” this time not to grossly expand presidential power but to restore the office to its rightful role.

We the people have a duty as well: to insist that our leaders commit to the Constitution and make renewal of our democracy not just one issue among many but also a central task for our nation.

Michael Waldman
President
Brennan Center for Justice

Introduction

Our democracy is at a critical juncture. The Covid-19 pandemic has urgently underscored the need for a federal government that can focus on the public interest, is staffed by qualified professionals, and values expertise. Anything less will cost lives and put the nation's recovery at risk.¹

Even before the pandemic hit, the guardrails that for much of our history ensured an honest, effective federal government had been gravely weakened. There is no question that the norms and practices ensuring ethical governance and the rule of law have degraded substantially. Federal officials have increasingly abused their power by using law enforcement for political purposes, leveraging their positions for financial gain, undermining the role of objective science and research in policymaking, and appointing unqualified candidates to key government posts. Meanwhile, widespread voter suppression, foreign interference, the explosion of money in politics, and the weakening of Congress's role as a check on the executive branch have undermined many Americans' faith in our elections and political system — even before the pandemic posed new voting challenges.²

A bipartisan task force of former senior government officials convened by the Brennan Center for Justice has proposed a comprehensive legislative agenda to restore the checks that previously constrained executive action and prevented abuses of executive power. Even more significant, as their first order of business after retaking the House of Representatives on a strong reform platform, congressional Democrats last year introduced and passed a landmark pair of bills to fix our democracy and give every American a voice: H.R. 1, the For the People Act, and H.R. 4, the Voting Rights Advancement Act. And this fall, they introduced the Protecting Our Democracy Act, a legislative package designed to rein in abuse of executive power.

While legislation is undoubtedly needed, the next president doesn't have to wait for Capitol Hill to begin fixing the system. This report proposes 22 executive actions — executive orders, memoranda, and other directives³ — that would restore the integrity of government and strengthen our democracy. All are squarely within the president's authority.

To rebuild the guardrails that prevent the abuse of executive power, the president should issue orders and directives focusing on five areas: preventing improper political interference in law enforcement, strengthening ethics and conflict-of-interest rules, supporting the integrity of science and research in policymaking, promoting the appointment of qualified executive branch officials, and respecting Congress's role as a coequal branch of government. In each of these areas, Democratic and Republican administrations alike have recognized constraints, but as recent abuses show, the unwritten norms of conduct that previously ensured integrity in government can too easily be cast aside. Formal written rules are needed.

And to make our elections fairer, the president should issue orders and directives focusing on three additional areas: shoring up campaign finance enforcement and other safeguards, bolstering election security, and expanding access to the voter rolls.

Together, the actions detailed in this report would signal a clear break from the abuses of the recent past and would be a significant step toward restoring faith in American democracy. By highlighting the urgency of these issues, they could also help weaken the gridlock that so often plagues Congress.

There is plenty of precedent for executive actions of this sort.⁴ Many of these actions track the approach taken in legislation introduced in Congress in recent years or in the legislative recommendations of the Brennan Center's bipartisan task force.

The pandemic will eventually be overcome, but these realities will remain: All Americans, regardless of political orientation, want government officials to put the public interest ahead of their own political or personal gain. And all Americans want their voices and their votes to count. The next president has the power to move swiftly toward those goals.

I. Rule of Law

Proposal 1: The president should issue an executive order establishing clear standards for White House communications with law enforcement agencies.

THE PROBLEM:

Respect for the rule of law is a foundational principle of the American system of government. That's why every administration that has come since President Richard Nixon's "Saturday Night Massacre" has adopted a "limited contacts" policy that dictates which White House officials may communicate with Department of Justice (DOJ) personnel about active proceedings and how they may do so.⁵ The goal is to ensure arm's-length dealings between senior political officials and career law enforcement personnel, thereby constraining political interference in law enforcement. But the current White House has not followed its limited contacts policy, which has made it easier to improperly use the federal law enforcement apparatus against personal and political adversaries.⁶ For instance, the president's then Chief of Staff Reince Priebus had contacts with the Federal Bureau of Investigation (FBI) as part of the White House's effort to influence the DOJ's investigation into Russia's interference in the 2016 election through direct communications with people handling the matter.⁷

Other administrations have also committed violations in this area. President George W. Bush's administration dramatically relaxed its limited contacts policy, allowing more than 800 political officials to have contact with law enforcement personnel.⁸ This contributed to the U.S. attorney firings scandal, in which several U.S. attorneys were improperly dismissed for a perceived reluctance to advance the administration's political goals.⁹

NEEDED ACTION:

The president should issue an executive order requiring the White House, the DOJ, and other law enforcement agencies to create robust limited contacts policies and publish them.¹⁰ The policies should designate White House and agency officials who are authorized to communicate about specific enforcement matters undertaken by the DOJ and other law enforcement agencies. Publication of the policies would enable Congress to conduct over-

sight and address deficiencies.¹¹

The executive order should also require law enforcement agencies to maintain a log of contacts or communications with the White House about individual cases or investigations — including communications about litigants, subjects, targets, and witnesses — that details the people involved in the communication and the matter discussed.¹² There should be exceptions to the requirement to log contacts for those that are routine and necessary, such as contacts in which the White House seeks legal advice, those relating to a matter in which the United States is a defendant, and other ordinary contacts that do not concern specific cases or investigations.¹³

There is existing support in Congress for this approach. The Security from Political Interference in Justice Act, introduced last summer, would require the executive branch to publicly disclose its contacts policy and regularly submit reports to Congress on any inappropriate communications.

Proposal 2: The president should issue a memorandum to the Department of Justice affirming that special counsels may be removed only for cause.

THE PROBLEM:

Special counsels are typically appointed to handle the most politically sensitive cases, often including probes of the president or other top government officials. As a result, attempts or threats to fire a special counsel — which by their nature seek to influence investigative outcomes — do particular damage to the goal of unbiased law enforcement.

President Trump tried to fire Special Counsel Robert Mueller during his investigation into Russian interference in the 2016 election, backing off only when the White House counsel threatened to quit.¹⁴ The effort to fire Mueller flew in the face of DOJ regulations, which specify that special counsels may be removed only for "misconduct, dereliction of duty, incapacity, conflict of interest, or for good cause."¹⁵ Before Trump, President Nixon committed similar abuses in seeking to fire the special prosecutor probing the Watergate scandal. The Department of Justice's move to drop charges against President Trump's former national security adviser, Michael Flynn,

who pleaded guilty to lying to the FBI during Special Counsel Robert Mueller’s investigation,¹⁶ and the president’s continued meddling in politically sensitive prosecutions — including by firing the U.S. attorney for the Southern District of New York, whose office is investigating matters involving the president and his close associates — underscore the continuing need to ensure that such investigations are insulated from political pressure.¹⁷

NEEDED ACTION:

The next president should issue a memorandum affirming that special counsels are not to be removed without cause.¹⁸ This would buttress the existing DOJ regulations in this area. The Special Counsel Independence and Integrity Act, introduced in the Senate in 2018, takes the same approach, establishing for-cause removal protection for special counsels.¹⁹

Proposal 3: The president should issue a memorandum laying out standards ensuring that inspectors general are insulated from political pressure.

THE PROBLEM:

Inspectors general are executive branch watchdogs charged with investigating waste, fraud, and abuse. By law, the president is required to communicate in writing the reasons for the removal of an inspector general to both houses of Congress 30 days before the removal.²⁰ Notwithstanding statutory protections to maintain the independence of inspectors general, the president has attacked and removed several of them in apparent retaliation for their scrutiny of alleged misconduct by senior government officials, including himself. He fired the intelligence community inspector general, who had notified Congress about the whistleblower complaint that formed the basis of the president’s impeachment.²¹ More recently, he fired the State Department’s inspector general at the recommendation of the secretary of state, whom the inspector general was investigating for allegedly having a staffer perform personal errands for him. The president

provided only a vague explanation — that he had lost confidence in the inspector general — and replaced him with an ambassador who has close ties to Vice President Pence.²²

The president has also thwarted inspector generals’ scrutiny of his administration’s response to the Covid-19 pandemic. He demoted the inspector general charged with overseeing the administration of the \$2 trillion coronavirus stimulus package and then nominated a lawyer from the White House Counsel’s Office to serve as an inspector general to oversee the spending of \$500 billion in stimulus funds at the Treasury Department.²³ And when the acting inspector general for the Department of Health and Human Services released a report showing widespread shortages of personal protective equipment and Covid-19 testing kits in hospitals, President Trump claimed the report was a “fake dossier” and accused its author of disloyalty. The president subsequently nominated a permanent inspector general to take her place.²⁴

Trump is not the first president to receive criticism for his treatment of inspectors general. President Ronald Reagan fired all of the inspectors general that President Jimmy Carter had appointed. Faced with political backlash from Congress, he eventually reappointed several of them.²⁵ Presidents George W. Bush and Barack Obama caused controversy when they removed inspectors general.²⁶ But Trump’s blatant assaults on independent executive branch oversight are unprecedented and underscore the importance of insulating inspectors general from political pressure.

NEEDED ACTION:

The president should issue a memorandum establishing standards and procedures for the selection and, when necessary, removal of inspectors general. These standards should demonstrate a commitment to these watchdogs’ independence. At a minimum, the memorandum should lay out qualifications for inspector general candidates, to ensure that skilled, experienced, nonpartisan officials serve in these roles. It should express the president’s commitment to expeditiously nominate inspector general candidates when vacancies arise and to appoint only career officials from executive branch inspector general offices to serve as acting inspectors general. The memorandum should also articulate how, if it is necessary to remove an inspector general, the president will comply with the statutory requirement to provide advance written justification to both houses of Congress.

Proposal 4: The president should issue an executive order directing the DOJ to report to Congress on the bases for pardons and clemency orders for the president's associates.

THE PROBLEM:

The president's pardon power serves to ensure that "inflexible adherence" to the law does not itself become a source of injustice.²⁷ Presidents have also used pardons to heal national wounds, as when President Gerald Ford pardoned President Nixon.²⁸ Recent presidents have increasingly used their pardon power in ways that undermine, rather than advance, these goals. President Trump has pardoned political allies.²⁹ He also considered pardoning two former campaign aides — Paul Manafort and Michael Flynn — which would have likely persuaded them not to testify, thereby reducing Trump's own criminal liability.³⁰ This is a particularly dangerous use of the pardon power.

Other recent presidents have pardoned donors and benefactors, such as when President Bill Clinton pardoned financier Marc Rich.³¹ President George W. Bush likewise pardoned real estate developer Isaac Toussie, though he immediately rescinded the pardon following press reports that Toussie's father had donated tens of thousands of dollars to Republicans.³² There have also been acts of clemency for former colleagues, like Bush's commutation of the prison sentence of Vice President Dick Cheney's chief of staff, Scooter Libby, and President George H. W. Bush's pardons of officials involved in the Iran-Contra affair.³³ Two presidents have even considered pardoning

themselves — a blatant affront to the principle that no one is above the law. In 1974 President Nixon explored the idea before resigning over Watergate.³⁴ And President Trump has asserted an "absolute right" to pardon himself.³⁵ These uses of the pardon power create the impression of a separate set of rules for the powerful and well connected.

NEEDED ACTION:

The president should issue a memorandum directing the DOJ to send detailed reports to Congress about pardons and clemencies in cases in which the recipient has had a personal, professional, or financial relationship with the president or one of the president's family members or business associates. The reports should explain how the administration considered the factors that the DOJ's Office of the Pardon Attorney has developed in evaluating the pardon or clemency application.³⁶ This would make the public confident that the pardon power is being used to further justice and for other public purposes. And if the president were to flout the reporting requirement, it would give Congress an avenue to demand an explanation for the deviation from standard practice.

The memorandum should also reaffirm the opinion of the DOJ's Office of Legal Counsel that a president cannot issue a self-pardon.³⁷

There is ample support and precedent for greater transparency in the pardon process.³⁸ From 1885 to 1932, presidents submitted reports to Congress about pardons and clemencies they granted. These reports included an explanation for the grants, as well as whether there was disagreement between the president and the pardon attorney or the attorney general in their assessment of the applications, and whether the applications went through normal channels.³⁹ Governors in 14 states are required to provide reasons for pardons they issue.⁴⁰ Legislation has been introduced in Congress recently that aims to increase the transparency and prevent abuse of the pardon power.⁴¹

II. Ethics in Government

Proposal 5: The president should issue an executive order concerning ethics enforcement by the Office of Government Ethics.

A. The president’s executive order should confirm that OGE rules apply to White House staff and should require ethics waivers to be shared with OGE.

THE PROBLEM:

For nearly 40 years after the creation of the Office of Government Ethics (OGE) in 1978, White House staff in both Republican and Democratic administrations complied with OGE’s ethics rules aimed at avoiding conflicts of interest and ethics violations in the federal government. The assumption was always that these rules applied to the White House; in fact, former OGE Director Walter Shaub opined that they do.⁴²

That changed shortly after President Trump took office. When presidential counselor Kellyanne Conway urged television viewers to purchase Ivanka Trump–branded products, then OGE Director Shaub recommended disciplinary action. In response, then Deputy White House Counsel Stefan Passantino asserted that many OGE regulations did not apply to employees of the Executive Office of the President.⁴³ Shaub characterized this assertion as “extraordinary” and “incorrect.”⁴⁴

NEEDED ACTION:

The president should issue an executive order clarifying that OGE’s regulations apply to White House staff. The president should implement additional measures to ensure White House officials’ accountability in the administration of ethics rules. The White House is permitted to issue waivers that exempt officials from certain ethics rules. While it may be in the country’s best interest to grant waivers in certain cases, excessive use of waivers can thwart the purpose of these rules. The president’s executive order should contain a requirement that a written copy of every waiver of more than de minimis conflicts be transmitted to OGE within 30 days of issuance. This effort to increase transparency and OGE oversight of the process will deter misuse of ethics waivers.

H.R. 1, the landmark democracy reform bill, would accomplish similar goals by strengthening OGE and estab-

lishing transparency requirements to ensure that all issued ethics waivers are made available to OGE and the public.

B. The president’s executive order should notify OGE that the president and vice president will comply with conflict-of-interest law.

THE PROBLEM:

Before the Trump administration, presidents voluntarily complied with conflict-of-interest law, which does not apply to them. President Trump has instead chosen to keep control of his personal business interests while in office.⁴⁵ This has raised numerous questions about the president’s policy decisions. To give a recent example, the fact that the president owns a stake in a pharmaceutical company that manufactures a malaria drug he has touted as a treatment for Covid-19, despite a lack evidence to support this claim, calls into question his motivation for promoting this drug.⁴⁶

NEEDED ACTION:

The president’s executive order should include a statement that the president and the vice president will comply with conflict-of-interest law and should direct OGE to assist with their compliance.⁴⁷ This will ensure that the immense powers of the president are not wielded for personal benefit and that conflicts of interest do not undermine public confidence in the administration’s decision-making. The executive order should reaffirm the president’s commitment to divesting from conflicting assets and to maintaining holdings in either nonconflicting assets or a qualified blind trust. The memorandum should also set forth situations in which divestment is not necessary, 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.

This type of reform is also the subject of pending legislation that has passed the House of Representatives: H.R. 1 would require the president and vice president to divest from financial interests that pose conflicts of interest.

C. The president’s executive order should contain a commitment to remove OGE’s director only for cause.

THE PROBLEM:

Although there is strong bipartisan precedent for appointing nonpartisan experts rather than political allies to the position of OGE director, there is no law barring the firing

of a director by a president angered by OGE investigations into the administration.⁴⁸ In light of other politicized firings carried out during the current administration and previous ones, it is not hard to imagine this occurring. Indeed, in a sign of the tension that can develop between an OGE director and an administration, Walter Shaub resigned from the post after efforts by the Trump administration to limit his authority, as well as groundless accusations against him of political bias from the president's allies.⁴⁹

NEEDED ACTION:

To bolster OGE's independence and ability to enforce federal ethics rules, the president's executive order should include a commitment that the OGE director will not be removed from office except for cause.

Congress and the courts have recognized the need for the leaders of other watchdog agencies, such as the Securities and Exchange Commission and the Federal Election Commission, to be insulated from political pressure.⁵⁰ And H.R. 1 contains a provision that would strengthen the role of the OGE director.⁵¹

Proposal 6: The president should issue a memorandum to the Internal Revenue Service and White House staff committing to disclose tax returns on an annual basis.

THE PROBLEM:

Before Trump, every sitting president since Nixon had voluntarily disclosed his tax returns.⁵² Trump has refused to honor this long-standing presidential practice and has fought legal efforts to obtain the documents.⁵³

Tax return disclosure is important because it deters the president from taking advantage of the numerous opportunities to profit from his office. This is a particular threat in Trump's case because, departing from past presidential practice, he has held on to his stake in his global business empire. In addition, tax return disclosure confirms that presidents pay their fair share in taxes and do not exert undue influence on the Internal Revenue Service (IRS).⁵⁴ Finally, tax return disclosure is an important symbol of a commitment to transparency and the principle that no one is above the law.

NEEDED ACTION:

The president should issue a memorandum to the IRS stating the president's and vice president's commitment to annually disclose their personal tax returns and the tax returns of any privately held businesses in which they have a controlling interest. The memorandum should direct White House staff to post the returns on the White House's website. The memorandum should also include a commitment from the president and vice president to comply with IRS requests and procedures relating to the mandatory annual audit of their taxes.⁵⁵

Tax return disclosure has supporters across the political spectrum.⁵⁶ The bipartisan Presidential Tax Transparency Act of 2017 and H.R. 1 would both require the president and vice president to disclose their tax returns for the 10 most recent taxable years.

Proposal 7: The president should issue an executive order requiring an ethics pledge from executive branch appointees.

THE PROBLEM:

Every president since John F. Kennedy has issued an ethics executive order or memorandum to establish standards of ethical conduct for executive branch appointees.⁵⁷ The orders aim to reduce private sector influence on government activities by, among other things, placing restrictions on lobbyists entering government and appointees leaving government to lobby.⁵⁸ But several scandals in the Trump administration have raised questions about the extent to which Trump's ethics order is being followed. For instance, a political appointee at the National Labor Relations Board issued a decision in a major case about unfair labor practices, changing precedent on the issue, even though his former law firm had represented an employer in the original ruling.⁵⁹ And the Interior Department's inspector general is investigating whether six Trump appointees at the department discussed policy matters with their former employers or clients.⁶⁰

In addition, the lack of standards in President Trump's order for the issuance of ethics waivers has made the waiver process susceptible to abuse.⁶¹ The president issued around the same number of waivers to White House staff in the first four months of his administration as President Obama did during his entire eight years in office, one study found.⁶² The Trump administration also drew criticism from the then director of OGE by issuing ethics waivers in secret.⁶³ As a result, 281 lobbyists are reported to have served in government during the first

two years of the Trump administration — four times more than the number who served during the first six years of the Obama administration.⁶⁴

NEEDED ACTION:

The president should issue a robust executive order requiring executive branch appointees to sign an ethics pledge at the time of their appointment. The order should bar appointees from accepting gifts from lobbyists while in office and participating in matters involving parties that are directly or substantially related to their former employers and clients. In addition, to slow the revolving door between government service and the private sector, especially lobbying, the ethics pledge should include standards for when and how lobbyists can come into government service, as well as for the issuance of ethics waivers. The pledge should require appointees who leave government service to abide by agency-specific post-employment restrictions on communications with their former agencies for two years. And appointees leaving government to lobby should be barred from lobbying government officials for the remainder of the administration in which they served.

Recognizing that it sometimes benefits the country for the president to appoint people despite conflicts of interest, the ethics executive order should outline circum-

stances under which its requirements can be waived. The waivers should be made in writing, and OGE should publish an annual list of appointees who have received waivers. The establishment of criteria for the issuance of waivers, as well as the recording and publication of their issuance, will build accountability into the waiver process.

Past administrations have implemented many of the elements outlined above. Several recent executive orders have required appointees to sign ethics pledges as a condition of their employment and have included provisions to reduce private sector influence on government activities.⁶⁵ For instance, several have banned gifts from lobbyists, placed restrictions on lobbyists entering government and appointees leaving government to lobby, and barred appointees from representing foreign principals upon leaving office.⁶⁶ President Obama's ethics order required that OGE publish an annual report about the order's administration and a list of appointees entering and exiting public service who received waivers from the pledge's requirements. It also included a consistent standard for issuing waivers.⁶⁷

So essential are presidential ethics pledges to supporting ethical conduct that both houses of Congress recently passed, and the president signed, the Presidential Transition Enhancement Act, which mandates the practice for members of presidential transition teams.⁶⁸

III. Scientific Integrity

Proposal 8: The president should issue a memorandum requiring agencies to adhere to robust scientific integrity standards.

A. The president’s memorandum should articulate scientific integrity standards for agencies to follow.

THE PROBLEM:

There has been a serious erosion of scientific integrity in government in recent years. As has been well documented, examples abound from multiple administrations and include instances of political officials suppressing scientific reports and retaliating against researchers whose analyses are politically inconvenient.⁶⁹ The issue is coming to a head during the Covid-19 pandemic. The current administration’s response to the health crisis has revealed a shocking disregard for government experts’ advice. For instance, the vice president — who has a track record of putting ideology above people’s health — vets all statements from federal health officials about the disease.⁷⁰ The administration also reportedly required Covid-19 meetings to be treated as classified, further restricting government scientists’ ability to advise the public about the disease.⁷¹ White House officials excised from a Covid-19 plan health experts’ recommendation that elderly and physically infirm people avoid air travel.⁷² And there are reports of administration officials retaliating against government workers who raise concerns about the government’s handling of the crisis.⁷³

As has become painfully obvious in the last few months, scientific integrity matters because government decision-making based on unbiased scientific and technical research keeps us safe and healthy. When science is suppressed or manipulated, it can have grave economic, environmental, and health consequences.

NEEDED ACTION:

The next president should issue a memorandum requiring agencies to establish and adhere to robust scientific integrity standards, which must include, at a minimum,

- the right of agency scientists to review content released publicly in their names or that significantly

relies on their work as government scientists, so that they can respond to changes to, or inaccurate representations of, their work;

- a clear, consistent, and predictable procedure for agency approval of government scientists’ publications, presentations, and participation in scientific conferences;
- a procedure for handling disagreements about scientific methods and conclusions;
- designation of nonpolitical agency officials with relevant scientific expertise to monitor and support scientific integrity; and
- routine scientific integrity training for all relevant agency personnel.

There is precedent for this. Under President George W. Bush, a spate of incidents occurred in which political officials censored scientists’ work and ordered experts to change their analyses to justify the administration’s policy objectives.⁷⁴ In response, President Obama issued a memorandum calling for the maintenance of “the highest level of integrity in all aspects of the executive branch’s involvement with scientific and technological processes.”⁷⁵ By the end of his administration, at least 24 federal agencies had scientific integrity policies.⁷⁶ These policies have provided an avenue for addressing scientific integrity issues during the current administration. For instance, during the “Sharpiegate” episode, President Trump falsely claimed that a hurricane would hit Alabama.⁷⁷ This set off a chain of events in which the secretary of commerce reportedly threatened to fire top National Oceanographic and Atmospheric Administration (NOAA) officials if they did not repudiate a statement from the National Weather Service about the hurricane’s actual trajectory.⁷⁸ In response, NOAA’s acting chief scientist immediately announced that he was “pursuing the potential violations” of the agency’s scientific integrity policy.⁷⁹

Bipartisan momentum is building in Congress to codify scientific integrity standards and procedures. The Scientific Integrity Act, introduced in March 2019, was voted out of the House Science Committee with robust bipartisan support, has cosponsors from both parties, and passed the House of Representatives as part of the Heroes Act.⁸⁰

B. The president’s memorandum should direct agencies to publish policies that regulate contacts between political officials and career researchers during critical stages in regulatory development and the preparation of scientific reports for Congress and the public.

THE PROBLEM:

The vice president’s vetting of health officials’ statements during the Covid-19 pandemic illustrates the potential for political officials to interfere with government scientists’ advice. In a pattern predating the pandemic, senior officials have pressured researchers to alter or suppress their conclusions in order to create a false narrative of support for the administration’s political agenda. To give one example among many, aides to the Environmental Protection Agency (EPA) administrator directed agency researchers to alter the conclusion of their study of the economic benefits of protecting wetlands from pollution.⁸¹

NEEDED ACTION:

The president’s scientific integrity memorandum should require agencies to ensure that political officials do not exert improper influence over career subject-matter experts. To that end, this memorandum should direct agencies to publish policies that lay out when and how political officials can communicate with career researchers about substantive research issues during the technical stages of regulatory development and the preparation of scientific reports for Congress and the public. Agencies should be required to maintain and publish a log of such contacts between political officials and career researchers.

Some administrations have adopted policies that limit White House contacts with agencies about pending regulatory matters.⁸² And some agencies require disclosure of communications by the White House in the rulemaking record if they are of substantial significance and clearly intended to affect the ultimate decision.⁸³

C. The president’s memorandum should prohibit manipulation and suppression of government research, as well as discrimination and retaliation against government researchers on the basis of their scientific conclusions.

THE PROBLEM:

In recent years, government research has increasingly been subjected to manipulation and suppression for improper reasons, and those who perform that research have increasingly faced retaliation for their politically inconvenient work.⁸⁴ Recent episodes of alleged retaliation against federal workers who have raised concerns about the government’s handling of the Covid-19 crisis underscore the danger that such misconduct poses to our health and safety. That is why the president should mandate that politically motivated manipulation and suppression of government research, as well as discrimination and retaliation against government researchers on the basis of their scientific conclusions, will not be tolerated.

NEEDED ACTION:

The president’s scientific integrity memorandum should establish an executive branch-wide prohibition on this misconduct and require agencies to establish procedures to investigate allegations and remedy wrongdoing.

The executive branch has taken similar measures before. Many scientific integrity policies lay out agency procedures to address this misconduct.⁸⁵ Analogously, in 2000 the White House Office of Science and Technology Policy (OSTP) issued the Federal Policy on Research Misconduct, which lays out standards for agency mechanisms to address fabrication and falsification in federally funded scientific research.⁸⁶ And the Scientific Integrity Act would prohibit this type of misconduct.⁸⁷

Proposal 9: The president should issue a memorandum requiring completed government research to be publicly accessible, with protections against suppression and removal from public access.

THE PROBLEM:

The Trump administration has restricted public access to politically inconvenient government research and data by slow-walking it, removing it from public view, and suppressing it outright. Early in the Covid-19 crisis, the Centers for Disease Control and Prevention removed from public access data about the number of Americans who had been tested for and died of the disease.⁸⁸ This fits into a pattern that predates the current emergency. For instance, the Treasury Department removed from its website an economic analysis that undercut the administration's claims that reducing the corporate tax rate would primarily benefit workers.⁸⁹ Department of Agriculture officials withheld a news release about a groundbreaking discovery that rice loses vitamins in a carbon-rich environment — a potentially serious consequence of climate change for the 600 million people worldwide whose diet consists mostly of rice — and sought to prevent dissemination of the research.⁹⁰ And White House and EPA officials suppressed a report about toxic chemicals after a White House official warned that releasing it would be “a public relations nightmare.”⁹¹

Withholding or removing completed taxpayer-funded research and data from public access hinders scientific progress and puts the health of the American people, the environment, and the economy at risk. Further, by suppressing critical economic, agricultural, epidemiological, and ecological data, political officials can manipulate public support for their policies and avoid responsibility for negative consequences.

NEEDED ACTION:

The president should issue a memorandum requiring agencies to establish standard procedures for the collection and prompt online disclosure of data and completed, peer-reviewed research.⁹² To deter government officials from withholding valuable research that may be politically inconvenient, the memorandum should direct agencies to clearly delineate standards for withholding government-funded research and data and record the reasons

for withholding specific research products. To address politically motivated removal of scientific research and data from public access, the memorandum should also require agencies to develop standards for revising federal websites, as well as for removing public access to research.

There have been several recent efforts to ensure public access to government research. During the Obama administration, federal agencies were required to create public access plans to proactively make available government-generated scientific data and peer-reviewed, published research.⁹³ However, a November 2019 Government Accountability Office report found that fewer than half of the agencies required to establish public access plans had done so.⁹⁴ Recently enacted legislation requires government data assets to be made publicly available in electronic form.⁹⁵ And legislation that would mandate the timely release of government research has been introduced with bipartisan cosponsorship in the last several Congresses.⁹⁶

Proposal 10: The president should issue an executive order requiring disclosure of the expert regulatory analysis that underlies agency rulemaking, as well as substantive alterations made by political officials.

THE PROBLEM:

Political officials have increasingly altered or suppressed career experts' analyses of proposed regulations in order to hide politically inconvenient facts about the consequences of their policy decisions. For instance, when career employees at the Department of Labor produced an economic analysis showing that a proposed “tip pooling” rule would cause restaurant workers to lose billions of dollars in wages, senior department staff ordered them to revise the analysis to support the Trump administration's agenda.⁹⁷ When even the revised economic analysis showed that the proposal would have negative economic consequences, senior political staff reportedly suppressed the analysis and pushed ahead with their policy agenda.⁹⁸

NEEDED ACTION:

The president should issue an executive order requiring

agencies to publish the nonpolitical expert analysis underlying regulatory actions as part of the administrative record. The order should also require that substantive alterations of the regulatory analysis that are made by or at the suggestion of political officials be published in the administrative record, along with an explanation of the changes made to the analysis.

President Clinton issued an order requiring disclosure of proposed rules that agencies submit to the White House, as well as changes made there.⁹⁹ The order proposed here would modestly extend those transparency requirements. The Scientific Integrity Act contains provisions that would guard against censorship of government research and strengthen the integrity of the policymaking process.¹⁰⁰

Proposal 11: The president should issue an executive order to restore high-quality science advisory committees.

THE PROBLEM:

Federal policy benefits from the knowledge of subject-matter experts not only within but also outside the government. For this reason, hundreds of advisory committees have been created — by either statute or agency leaders — to provide expert advice to policymakers. But increasingly, political interference has threatened these committees. During the current administration, committee vacancies have not been filled, and several committees have not met, in violation of their charters.¹⁰¹ Perhaps more troubling, agency officials have dismissed subject-matter experts from committees and filled their seats with replacements only from Republican state governments and representatives from regulated industries.¹⁰² Several of these new appointees hold views outside the scientific mainstream on topics such as climate change and the health effects of exposure to toxic chemicals.¹⁰³ In addition, the EPA has banned agency grant recipients from serving on advisory committees, depriving itself of expert input.¹⁰⁴ And President Trump issued an executive order requiring executive branch departments and agencies to reduce the number of advisory

committees by one-third in less than four months and imposing an arbitrary government-wide cap of 350 non-statutorily-required advisory committees.¹⁰⁵ As a result of this assault on advisory committees, many agencies either do not receive any independent science advice or receive advice skewed in favor of political leaders' agendas or the interests of regulated industries.

NEEDED ACTION:

The president should issue an executive order that lays out procedures, consistent with the requirements of the Federal Advisory Committee Act (FACA), to ensure that science advisory committees fulfill their missions, that members have the requisite expertise, and that members have no conflicts of interest. Agencies should be required to

- publish the criteria for evaluation of nominees and the names and roles of key officials involved in the selection process;
- establish procedures to ensure that vacancies are filled promptly;
- increase scrutiny of conflicts of interest for advisory committee participants, including examining past professional affiliations and research funding;
- publish information on committee websites about when meetings are scheduled to take place, meeting notes, and explanations for meeting cancellations; and
- provide a public explanation from the agency leader when a science advisory committee's term is not renewed.

In addition, the order should repeal President Trump's executive order capping the number of science advisory committees and should direct agency heads to determine whether to restore the committees that have been cut. The order should also lift the EPA's ban on committee participation for those receiving an agency grant.

There is precedent for these measures. Indeed, many agencies voluntarily adhere to similar practices.¹⁰⁶ And in 2019, the House of Representatives passed amendments to strengthen FACA along these lines, with bipartisan support.¹⁰⁷ The legislation has cosponsors from both parties in the Senate.¹⁰⁸

IV. Accountable and Qualified Government Officials

Proposal 12: The president should issue a memorandum to agency heads and the White House Presidential Personnel Office committing to filling vacancies in positions requiring Senate confirmation and increasing transparency about compliance with the Federal Vacancies Reform Act.

THE PROBLEM:

The Senate confirmation process provides a significant structural safeguard in our system of checks and balances.¹⁰⁹ Dividing authority for key personnel decisions between two branches of government serves as a check on each and promotes the careful selection of qualified candidates to important positions of public trust.¹¹⁰

There are approximately 1,200 positions that require Senate confirmation (known as PAS positions).¹¹¹ Rather than nominating qualified people to fill these positions, the Trump administration has left many of them vacant or has filled them with temporary, “acting” officials. Three and a half years into the administration, about one-third of key positions requiring Senate confirmation are still not filled with Senate-confirmed personnel, even though the Senate was controlled by the president’s party.¹¹² Moreover, at least a dozen agencies — including two cabinet departments — were run by non-Senate-confirmed acting officials.¹¹³ Indeed, the pace of President Trump’s nominations is the slowest of any president in at least 40 years.¹¹⁴

Long-term vacancies and overreliance on acting officials remove an important congressional check on executive abuse and harm the effectiveness of government programs.¹¹⁵ The significance of having qualified, permanent officials in leadership positions has become clear as the federal government struggles to respond to the Covid-

19 crisis with nearly half of its scientific leadership positions vacant and the Department of Homeland Security led by a cadre of acting officials.¹¹⁶

The Federal Vacancies Reform Act of 1998 (FVRA) governs the president’s ability to designate an acting official to serve in an office requiring Senate confirmation.¹¹⁷ Congress has long recognized the need to provide presidents with this “breathing room in the constitutional system for appointing officers.”¹¹⁸ But importantly, Congress placed strict limits on the length of time acting officials may temporarily serve in these positions. Unfortunately, the FVRA lacks an effective mechanism by which to enforce these limitations.¹¹⁹ Recent presidents have exploited loopholes and ambiguities in the FVRA to install acting officials in important positions well beyond the statutorily defined time limits, though none as frequently or egregiously as President Trump.¹²⁰ These tactics, whether intentional or not, have abrogated the Senate’s advice and consent authority.

NEEDED ACTION:

The president should issue a memorandum making clear a commitment to expeditiously filling vacant PAS positions with permanent appointees and directing the White House Presidential Personnel Office and agency heads to work collaboratively and productively to that end. The memorandum should also direct executive branch agencies to increase transparency about the status of all PAS vacancies and appointments made pursuant to the FVRA. At a minimum, the president should require agencies to regularly report this information to their congressional committees of jurisdiction. This directive would not overly burden agencies; they could provide up-to-date information on agency websites, much as they provide timely information in their online Freedom of Information Act libraries.

Such an order would recognize the importance of Congress’s role in ensuring that key executive branch personnel are qualified to wield the awesome powers of their office and are accountable to elected representatives charged with oversight of those offices. It would also help to restore what we believe was one of the driving purposes of the FVRA: to prevent presidents from circumventing Congress to fill PAS positions. It would provide more transparency and accountability to the process for temporarily filling leadership positions, reducing the likelihood of abuse. It would also create additional public accountability that would further motivate presidents to quickly nominate qualified candidates for critical positions.

Proposal 13: The president should issue a memorandum directing the White House Presidential Personnel Office to adopt a tiered background investigation system for nominees.

THE PROBLEM:

The nomination and confirmation process is arduous and slow, taking five times longer than it did 40 years ago.¹²¹ While a large part of the delay is attributable to Senate procedures — and partisan politics when the Senate and the White House are controlled by different parties — there are many cumbersome steps within the executive branch that occur prior to a candidate’s nomination. One study attributes 80 percent of the time between the occurrence of a vacancy and the final Senate disposition of a nomination to the White House’s search and vetting process.¹²²

Nominees must complete voluminous forms for the White House vetting process, which includes the Office of Government Ethics (OGE) conflict-of-interest analysis and a background investigation conducted by the FBI.¹²³ The longest delays in the executive branch are ascribed to the time it takes candidates to fill out these forms and for the FBI to conduct its investigation.¹²⁴ All nominees, including those for part-time boards and commissions as well as nominees for full-time positions who will never access classified information, are required to go through “full field” background investigations that are more extensive than those required for top-secret security clearances.¹²⁵ The forms require candidates to disclose personal information about the past 15 years of their lives, including the dates for all international travel and everywhere they have lived, worked, or studied.¹²⁶ And the investigations take, on average, six to eight weeks to complete.¹²⁷ The process contributes to lengthy vacancies throughout the executive branch, creating instability in leadership and harming the government’s ability to perform essential functions.

NEEDED ACTION:

The president should issue a memorandum directing the White House Presidential Personnel Office (PPO) to implement a tiered background investigation process for nominees. Nominees to the cabinet or other sensitive positions would remain subject to the most rigorous

investigations.¹²⁸ But nominees for part-time positions and jobs without national security implications could go through less extensive FBI vetting. If an issue is uncovered during the less extensive review, investigators should be authorized to perform a more comprehensive or supplemental investigation. Such an order would increase the speed of the nominations process, reduce unnecessary scrutiny, and make the nomination process less onerous to qualified candidates. It would also free up FBI resources to be used for more pressing matters and contribute to more effective functioning of the executive branch.

This has been tried before. In the final year of the Obama administration, the PPO began requesting more limited investigations for nominees to part-time positions that did not require a security clearance and did not have national security-related responsibilities, and there is no evidence that the quality or suitability of nominees suffered.¹²⁹ Additionally, the bipartisan Working Group on Streamlining Paperwork for Executive Nominations has called for this reform.¹³⁰

Proposal 14: The president should issue a memorandum directing White House personnel to follow the anti-nepotism statute.

THE PROBLEM:

In 2017 the DOJ’s Office of Legal Counsel (OLC) concluded that the anti-nepotism statute does not apply to presidential appointments for positions in the White House.¹³¹ In so doing, the OLC reversed several of its earlier opinions, which had counseled Presidents Carter, Reagan, and Obama not to appoint family members to White House positions. Taking advantage of the 2017 ruling, President Trump appointed his daughter, Ivanka Trump, and son-in-law, Jared Kushner, to senior positions in the White House despite their lack of government experience or relevant qualifications.¹³²

These nepotistic practices communicate that top government officials need not comply with standard ethics rules and that family connections are more important than expertise or experience at the highest level of government. Additionally, they threaten the White House’s decision-making process by giving power and influence to unqualified people who may prioritize the president’s and the family’s personal interest over the public good.

The ethical implications of nepotistic appointments have been on display during the administration’s response to the Covid-19 pandemic. Kushner is a principal adviser

to the president in this crisis despite a lack of relevant qualifications. He runs a shadow task force, reportedly counseled his father-in-law that the disease was not that dangerous, and drafted the president's speech announcing a European travel ban — a speech that caused mass confusion and economic instability.¹³³ Recently a health insurance company with which Kushner and his brother have close financial ties developed a government website for the Department of Health and Human Services that could provide information about testing, potentially in violation of federal ethics law.¹³⁴

NEEDED ACTION:

The president should issue a memorandum directing White House personnel to comply with the federal anti-nepotism law and specifying that both the president and the vice president will comply with the law as well. This directive will be a symbol of the president's commitment to fairness and the public good, rather than favoritism and personal interest.

Presidential compliance with federal anti-nepotism law has bipartisan support — indeed, presidents of both parties complied with the OLC's advice before 2017. Legislation has been introduced to clarify that the anti-nepotism statute applies to White House appointments.¹³⁵

Proposal 15: The president should issue a memorandum that lays out reforms to the White House security clearance process.

THE PROBLEM:

Under President Trump, political considerations have been allowed to override legitimate security concerns in the White House security clearance process. For instance, two White House security specialists rejected an application for a top-secret security clearance for Jared Kushner

but were overruled by their supervisor, who approved the clearance.¹³⁶ Kushner's was one of at least 30 cases in which Trump administration officials received top-secret security clearances after career security experts were overruled.¹³⁷ And more than a year into the administration, a reported 30 to 40 White House officials were still operating with interim clearances.¹³⁸

Bringing politics into the clearance process threatens national security. Kushner operated with an interim clearance for more than a year and received access to highly classified information, despite reportedly being identified as a manipulable target by foreign adversaries.¹³⁹ Rob Porter, who resigned as White House staff secretary amid allegations that he had committed domestic abuse, held an interim security clearance for months.¹⁴⁰ Had White House officials been following standard protocol and conducted his background investigation promptly, his ability to access classified information would likely have been limited.¹⁴¹ And, providing perhaps the clearest evidence of Trump's disregard for the security clearance process, the current head of the PPO — which is responsible for evaluating prospective nominees' suitability for national security positions — was previously fired from a White House position because he reportedly was unable to obtain a permanent security clearance.¹⁴²

NEEDED ACTION:

The president should issue a memorandum that limits the length of time that White House officials may operate with interim clearances. The memorandum should also require that the director of the White House personnel security office be a career professional with expertise in the security clearance process.

Presidents from both parties have established procedures for issuing security clearances before.¹⁴³ After news broke about problems with the White House security clearance process, then White House Chief of Staff John Kelly discontinued long-term interim clearances that had been pending for approximately eight months or more.¹⁴⁴ (With Kelly's departure, it is unclear whether long-term interim clearances have remained prohibited in the White House.) And legislation has been introduced that would strengthen the White House security clearance process.¹⁴⁵

V. Congress’s Role as a Coequal Branch

Proposal 16: The president should issue a memorandum pledging to respect Congress’s intent and oversight role in the use of national emergency declarations.

THE PROBLEM:

Under the National Emergencies Act of 1976 (NEA),¹⁴⁶ the president may declare a national emergency, and the declaration unlocks enhanced powers contained in more than 100 provisions of law.¹⁴⁷ The NEA includes no definition of “national emergency” or substantive criteria for declaring one, but the legislative history makes clear that Congress intended for the power to be used only in the most urgent of crises.¹⁴⁸ To guard against abuse, the NEA originally included a “legislative veto” provision, allowing Congress to terminate emergency declarations with a concurrent resolution that would go into effect without the president’s signature.

In 1983, however, the Supreme Court held that legislative vetoes are unconstitutional.¹⁴⁹ Accordingly, to terminate an emergency declaration, Congress has to pass a law by a veto-proof supermajority — something that is nearly impossible in today’s hyperpartisan environment.

President Trump has taken advantage of this state of affairs. He declared a national emergency, though there was none, to secure funding for a wall along the southern border after Congress refused his budget request.¹⁵⁰ Although Congress on two occasions passed a joint resolution to terminate the emergency, the president issued vetoes that Congress was unable to override.¹⁵¹ President Trump again declared a national emergency in June 2020 for the purpose of imposing economic sanctions on International Criminal Court prosecutors and staff in retaliation for the court’s investigations into alleged post-9/11 war crimes by U.S. personnel.¹⁵² And he has threatened to declare national emergencies to impose tariffs on Mexico¹⁵³ and to order U.S. companies out of China.¹⁵⁴

NEEDED ACTION:

The president should issue a memorandum establishing criteria for declaring a national emergency. In keeping with Congress’s original intent, the president should commit to declaring emergencies only when unforeseen circumstances require immediate action to prevent grave

harm to public safety or other crucial national interests. The president should affirm that they will *not* declare a national emergency to take any action for which Congress has withheld support or funding. And they should pledge to seek congressional approval, in the form of a joint resolution, for any use of emergency powers (other than those that rely solely on the International Emergency Economic Powers Act, which presents unique considerations¹⁵⁵) that extends beyond 30 days.

The memorandum should also state the president’s intent to work with Congress to enact legislation, such as the ARTICLE ONE Act,¹⁵⁶ restoring Congress’s role as a check against abuse of emergency powers. Such legislation should provide that presidential national emergency declarations will expire after 30 days unless Congress passes a joint resolution of approval. Renewal of emergency declarations, which must occur after one year under current law, should also require congressional approval.

Proposal 17: The president should issue a memorandum establishing principles and practices for the disclosure of information to Congress.

THE PROBLEM:

Congress routinely requires access to executive branch information to perform its constitutionally assigned oversight role. Disputes have arisen when the executive branch has withheld information from Congress, citing executive privileges of various types. In general, courts have been reluctant to resolve these conflicts, leaving the two political branches to resolve the matter through a process of negotiation and accommodation.¹⁵⁷ In the past, this has proven a workable mechanism, albeit an imperfect one. Indeed, this year marked the first time that the Supreme Court addressed Congress’s authority to compel the disclosure of information from the president in cases where no accommodation can be reached (albeit in a case that didn’t involve executive privilege).¹⁵⁸

President Trump’s overall record of withholding information from Congress and refusing to reach any accommodation has been unprecedented.¹⁵⁹ Most notably, he refused to cooperate with Congress’s impeachment proceedings and ordered executive branch officials not

to comply with congressional subpoenas.¹⁶⁰ He has steadfastly refused to provide his tax returns to congressional committees.¹⁶¹ Administration officials have failed to appear when called by Democratic committee chairs to testify.¹⁶² Officials also have refused to answer questions on the basis of executive privilege in cases where no such privilege has been asserted by the president.¹⁶³ (Admittedly, this practice predates the Trump administration.) And the administration recently announced that it would cease in-person congressional intelligence briefings on election security.¹⁶⁴

NEEDED ACTION:

The president should issue a memorandum that commits to working with Congress in good faith to provide the information it needs. Specifically, the memorandum should commit to the following principles and practices:

- The administration will withhold information in the first instance only if there is an applicable executive privilege *and* the official responsible for asserting the privilege has assessed that Congress does not have a specific need for the information.
- The administration will rely on an executive privilege only where a formal invocation of the privilege has been made.
- In a hearing, if a member of Congress asks an administration witness a question that could not reasonably have been foreseen and the witness believes the answer could reveal privileged information, the witness may postpone answering the question for seven days while a decision is made as to whether to invoke the privilege. If the privilege is not invoked, the witness will either answer the question in writing or, if the committee chair or ranking member prefers, appear before the committee again to answer in person.
- The administration will consider any assertion of an executive privilege to be the starting point for interbranch negotiations, with an eye toward reaching an accommodation that protects the interests protected by the privilege assertion while providing Congress with the information it needs.
- The administration will provide in-person briefings if requested by committee chairs or ranking members.

VI. Campaign Finance

Proposal 18: The president should issue an executive order requiring disclosure of political spending by government contractors.

THE PROBLEM:

Government contractors' political activity has grown rapidly in the past several election cycles. In 2014 the top 25 federal contractors gave more than \$30 million in disclosed contributions through their corporate PACs. In 2016 the 100 largest federal contractors spent \$289 million on political influence and were awarded contracts worth more than \$262 billion.¹⁶⁵ In the 2018 election cycle, the top 20 defense contractors alone made political contributions totaling close to \$30 million.¹⁶⁶

These are just the amounts that were disclosed. There are no mechanisms in place to deter companies from also contributing large sums to so-called dark money groups — political nonprofits that are allowed to keep their donors' identities secret.¹⁶⁷ Dark money groups spent \$126 million in the 2018 election cycle and funneled additional money through super PACs, which spent nearly \$818 million.¹⁶⁸ Large corporations likely supplied most of these funds.¹⁶⁹ Without full disclosure of political spending, it is nearly impossible to monitor the influence that political benefactors may wield over government officials.

NEEDED ACTION:

The president should issue an executive order requiring companies that have been awarded government contracts to disclose their political contributions, including contributions to dark money groups.¹⁷⁰ Such an order would help ensure that taxpayers' money is awarded to the contractors that offer the best services, not those that have bought the most influence in Washington. This is especially critical given the massive amounts of new spending in the Covid-19 relief package.¹⁷¹

Reform of this sort has been contemplated before. In 2011 the Obama administration drafted an executive order requiring companies and organizations bidding for federal contracts to increase their disclosure of political contributions, including contributions to dark money groups.¹⁷² When a draft of the order was leaked, Republicans in Congress opposed it.¹⁷³ In 2013, Congress passed a budget rider prohibiting federal funds from being used to recommend or require that entities *applying* for government contracts provide additional disclosure.¹⁷⁴

Congress did not, however, preclude spending funds to require federal contractors to disclose their political spending once a contract has been awarded. H.R. 1 would eliminate the budget rider, but until it passes, an executive order requiring disclosure after contracts have been awarded would help deter corruption and conserve government funds.

Proposal 19: The president-elect should adopt reasonable limits on inaugural committee donations.

THE PROBLEM:

Individuals and corporations can give unlimited donations to inaugural committees, which are appointed by the president-elect to organize the presidential inaugural ceremony and related activities.¹⁷⁵ This creates opportunities for wealthy donors to curry favor with an incoming administration.¹⁷⁶ For instance, at least 14 individual donors, who contributed an average of around \$350,000 each to President Trump's inauguration, were nominated for ambassadorships.¹⁷⁷ The risk of undue influence was heightened by the fact that the inaugural committee spent \$1 million at the president's Washington, DC, hotel, which allegedly charged inflated prices.¹⁷⁸ Subsequent scrutiny of the inauguration's financing has revealed errors and irregularities in records, raising questions about whether entries were fabricated to hide the true identities of donors.¹⁷⁹ Federal and local prosecutors have been investigating potential misconduct.¹⁸⁰

NEEDED ACTION:

The president-elect should instruct the inaugural committee to abide by reasonable limits on inaugural committee donations. Additionally, the president-elect should publicly commit to disbursing all inauguration funds within 12 months of the inauguration, with unused funds either being returned to donors or given to nonpolitical charities. Finally, the president-elect should promise that no inaugural funds will be spent at any businesses they own.

Past presidents-elect have voluntarily adopted restrictions on the size and sources of inaugural committee contributions. President Obama's 2009 inaugural committee did not accept money from corporations, political action committees, registered lobbyists, noncitizens, or registered foreign agents and placed a limit of \$50,000

per donor.¹⁸¹ These contribution limits were heralded as the most stringent in history, but they were not without precedent.¹⁸² For instance, in 1997 and 2001, Presidents Bill Clinton and George W. Bush, respectively, imposed a cap of \$100,000 on inaugural committee donations.¹⁸³ In 2005, President Bush raised the limit to \$250,000 for individuals, with higher limits for corporations.¹⁸⁴

Additionally, legislation has been introduced that would regulate these donations. H.R. 1 would limit donations to inaugural committees to \$50,000, require all donations over \$1,000 to be disclosed within 24 hours, prohibit inaugural committees from soliciting or accepting donations from corporations, prohibit donations to inaugural committees that are made by one person on behalf of another, and prohibit the use of money donated to an inaugural committee for non-inaugural purposes, other than donations to charity.¹⁸⁵

Proposal 20: The president should issue an executive order creating an advisory panel to select qualified nominees for the Federal Election Commission.

THE PROBLEM:

The Federal Election Commission (FEC) is charged with regulating campaign finance to safeguard the integrity of our elections. It has six commissioners, no more than three of whom can be from a single party; typically they are hand-picked by party leaders in the Senate, half by Democrats and half by Republicans. While strong campaign finance rules enjoy overwhelming bipartisan support among Americans as a whole, Republican leaders increasingly oppose most regulation and have put forward commissioners who fundamentally oppose the FEC's mission. Democratic appointees, meanwhile, have become, if anything, more supportive of regulation.¹⁸⁶ The result is that the FEC now deadlocks on most important campaign finance issues, failing to administer the law effectively.¹⁸⁷ For instance, the FEC deadlocked on 37.5 percent of regular enforcement cases in 2016, as compared with 4.2 percent in 2006 — a nearly ninefold increase.¹⁸⁸ That statistic significantly understates the problem, since most non-deadlocked votes involved housekeeping matters, minor violations, or the dismissal of frivolous complaints.¹⁸⁹ On significant enforcement matters, the FEC rarely achieves consensus. The FEC's rulemaking process has also largely ground to a halt,¹⁹⁰ and commissioners increasingly deadlock even on routine

requests for guidance through the commission's advisory opinion process.¹⁹¹

As a result of the FEC's failures to update rules and enforce those already on the books, more than \$1 billion in dark money from undisclosed sources has flooded into U.S. elections since 2010.¹⁹² Additionally, super PACs have been able to spend billions of dollars in close coordination with political campaigns due to a lack of enforcement of rules that limit this type of cooperation.¹⁹³ Similarly, the FEC has failed to respond effectively to the threat of foreign interference in elections.¹⁹⁴ Additionally, commissioners whose terms have expired may remain as hold-overs until their successors are confirmed,¹⁹⁵ which disincentivizes the prompt nomination and confirmation of new members. With the resignation of a commissioner in August 2019, there were only three commissioners until May 2020, below the threshold for a quorum, which prevented the agency from performing most of its core responsibilities.¹⁹⁶ The resignation of another commissioner in June 2020 left the agency again without a quorum.¹⁹⁷

NEEDED ACTION:

The FEC's structure needs a permanent overhaul, but the next president can still improve things by taking steps to make sure that every nominee to the commission — Democrat, Republican, or independent — has the necessary qualifications and is committed to its mission. The president should do so by issuing an executive order establishing an advisory panel to prepare a list of potential candidates for nomination. The panel should be instructed to advance only candidates who are committed to rigorous, even-handed enforcement of campaign finance laws. At a minimum, the advisory panel should include Democrats, Republicans, and independents, and diverse racial, gender, ethnic, and professional backgrounds (including campaign finance and election law experts). The president should commit to making the panel's recommendations public, giving them great weight, and providing a written explanation for any decision to depart from them.

The nomination of highly qualified people who have been selected by a bipartisan panel will help ensure that commissioners are committed to the enforcement of campaign finance law. If confirmed, they could break the gridlock at the FEC and resume administration and enforcement of the nation's campaign finance laws.

By nominating commissioners who would end the partisan logjam at the FEC, the president could make substantial progress toward ensuring the proper functioning of our democratic system, a goal that has bipartisan support.¹⁹⁸ H.R. 1 has several provisions that would improve the FEC, including the use of a bipartisan blue-ribbon advisory commission to identify potential nominees, as well as a structural overhaul to break the agency's gridlock.¹⁹⁹

VII. Voting and Elections

Proposal 21: The president should issue a directive to the National Institute of Standards and Technology to create a cybersecurity framework for elections.

THE PROBLEM:

In 2016 Russia targeted election systems in all 50 states.²⁰⁰ America's intelligence agencies have unanimously concluded that the risk of more cyberattacks on election infrastructure is clear and present — and likely to grow. The highly decentralized nature of our country's elections presents a challenge for protecting them from cyberattacks. And while election officials have long worked to strengthen election security by creating resiliency plans, states have disparate access to cybersecurity resources. Meanwhile, there are no federal standards for election security that election officials can consult to ensure that they are on the right track.

NEEDED ACTION:

The president should issue a directive to the National Institute of Standards and Technology (NIST) to create an Election Profile to guide adoption of the Cybersecurity Framework nationwide for election infrastructure.

NIST is a federal agency within the Department of Commerce. It is responsible for creating and maintaining the Cybersecurity Framework (CSF), which consists of “standards, guidelines, and practices for organizations to better manage and reduce cybersecurity risk.”²⁰¹ The CSF helps industries, governments, and businesses manage cybersecurity risks to protect critical infrastructure. NIST also gives voluntary guidance on how to adapt the CSF to particular critical infrastructure sectors. For instance, the CSF Manufacturing Profile “can be used as a roadmap for reducing cybersecurity risk for manufacturers that is aligned with manufacturing sector goals and industry best practices.”²⁰²

The president should direct NIST to collaborate in creating an Election Profile with other federal partners like the Election Assistance Commission (EAC) and the Department of Homeland Security, state election officials, local election officials, and other entities involved in elections like election technology vendors. Implementing the CSF can be a daunting task. This profile would provide

clear and direct guidance to election officials for how to best secure their systems. State and local election offices could use a CSF Election Profile to identify deficiencies in their systems and guide decisions on how to spend cybersecurity funds. Additional resources would be required for NIST to develop a CSF Election Profile and for the EAC to encourage state and local election officials to use the road map in their cybersecurity planning.

Proposal 22: The president should direct federal agencies to accept designation as National Voter Registration Act agencies.

THE PROBLEM:

The United States is far behind peer nations in voting rates, due in part to low rates of registration.²⁰³ One in four eligible Americans — or approximately 51 million — are not registered to vote.²⁰⁴ Part of the problem is lack of access to voter registration services. America is the only major democracy in which the onus of registration falls on the individual. In a 2017 Pew Charitable Trusts survey, more than 60 percent of respondents said that they had never been asked to register to vote. Less than 20 percent of respondents said that they had been offered the chance to register to vote at a government agency.²⁰⁵ In addition to problems with access, staying registered is a challenge. Millions of Americans go to the polls only to have trouble voting because of registration flaws.²⁰⁶ Some find their names wrongly deleted from the rolls. Others fall out of the system when they move.

The National Voter Registration Act (NVRA), also known as the Motor Voter Act, was designed to simplify the voter registration process by requiring certain state government agencies to provide voter registration services. The most well-known is the Department of Motor Vehicles, from which the law gets its nickname, but agencies providing public assistance or state-funded programs that primarily serve people with disabilities must also do so under the act.²⁰⁷ In the first two decades after the law took effect in 1995, hundreds of millions of Americans registered through government agencies.²⁰⁸

But while state agencies are required under the NVRA to provide registration services, federal agencies are not; they can agree to do so at a state's request but are under no obligation. Federal agencies have refused several

states' requests that they be designated as NVRA agencies. For example, the Department of Veterans Affairs (VA) has repeatedly refused to allow voter registration services at its offices in California, Kansas, North Carolina, Ohio, and Vermont, citing in 2008 a lack of adequate personnel and a concern that using VA resources for this purpose would diminish the agency's ability to otherwise fulfill its mission.²⁰⁹

The result is that many of the millions of Americans who interact with federal agencies, including many whose information may not be captured elsewhere, are missing out on the chance to get on the voter rolls. For example, only 60 percent of American Indians and Alaska Natives are registered; this is well below the national registration rate.²¹⁰ Designating the Indian Health Service (IHS) could reach more than 1.9 million members of these populations. Nearly 20 million veterans could benefit from registration opportunities to the extent they interact with the VA.²¹¹ Designation of the U.S. Citizenship and Immigration Services (USCIS) could expand registration opportunities to the approximately 760,000 new Americans who are naturalized each year.²¹² While USCIS has taken some initial steps to enable voter registration at administrative naturalization ceremonies, a more comprehensive approach is needed for its voter registration services to be fully compliant with the NVRA.

The clear intent of the NVRA is to reduce barriers to voter registration by providing registration services to people wherever they interact with government entities. To that end, millions of individuals would benefit from the provision of voter registration services not only by

federal agencies but by the federal health exchange,²¹³ Government-subsidized health insurance under the Affordable Care Act (ACA) counts as public assistance, bringing ACA Health Benefit Exchanges into the purview of Section 7 of the NVRA. Before the implementation of the ACA, all states administered their own Medicaid applications and therefore offered voter registration services in compliance with Section 7. The 12 states and the District of Columbia that operate their own ACA health exchanges already provide these services upon enrollment. However, in the 38 states that have federally facilitated health exchanges, millions of Americans are now not receiving the comprehensive voter registration assistance upon enrolling that they would have received before the implementation of the ACA.²¹⁴ Despite years of advocacy from voting rights groups, including the League of Women Voters, Project Vote, Demos, and others, federal health exchanges still do not provide NVRA-compliant voter registration services.²¹⁵

NEEDED ACTION:

The president should issue a memorandum directing federal agencies to accept designation as voter registration agencies under the NVRA. This would include agencies such as the VA, IHS, Social Security Administration, and USCIS. Additionally, the president should direct the secretary of health and human services to modify the federal exchange application process to offer voter registration services that are in compliance with NVRA standards.

Endnotes

- 1** Instead, the Trump administration initially downplayed the crisis, then aimed to address it by sidelining scientific experts, favoring political allies, and placing politics ahead of Americans' health. This deeply flawed response is one reason why the U.S. currently has more Covid-19 cases than any other country on earth. See "44 Times Trump Downplayed the Coronavirus," *Washington Post*, May 6, 2020, https://www.washingtonpost.com/video/politics/34-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c_video.html; James Hohmann, "The Daily 202: Ousted Vaccine Expert, Alleging Retaliation, Is Not the First Scientist Sidelined in Trump Era," *Washington Post*, Apr. 23, 2020, <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/04/23/daily-202-ousted-vaccine-expert-alleging-retaliation-is-not-the-first-scientist-sidelined-in-trump-era/5ea11bf588e0fa34528d7574>; Jonathan Allen, Phil McCausland, and Cyrus Farivar, "Behind Closed Doors, Trump's Coronavirus Task Force Boosts Industry and Sows Confusion," NBC News, Apr. 11, 2020, <https://www.nbcnews.com/politics/white-house/trump-s-coronavirus-task-force-amassed-power-it-boosted-industry-n1180786>; and Isaac Stanley-Becker, Toluse Olorunnipa, and Seung Min Kim, "Trump Foments Resistance to Democratic-Imposed Shutdowns, but Some Republican Governors Are Also Wary of Moving Too Fast," *Washington Post*, Apr. 17, 2020, https://www.washingtonpost.com/politics/trump-foments-resistance-to-democratic-imposed-shutdowns-but-some-republican-governors-are-also-wary-of-moving-too-fast/2020/04/17/5595e5fa-80c2-11ea-9040-68981f488eed_story.html?itid=ap_toluseolorunnipa.
- 2** According to a 2019 poll, less than 30 percent of Americans today said they could trust government in Washington to do what is right "just about always or most of the time." "Public Trust in Government: 1958–2019," Pew Research Center, Apr. 11, 2019, <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019>.
- 3** Unlike memoranda and directives, executive orders are required to be published in the Code of Federal Regulations. For a discussion of different types of executive actions, see Vivian S. Chu and Todd Garvey, "Executive Orders: Issuance, Modification, and Revocation," CRS Report No. RS20846 (Washington, DC: Congressional Research Service, 2014), <https://fas.org/sgp/crs/misc/RS20846.pdf>; Randolph D. Moss, Acting Assistant Attorney General, "Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order" (official memorandum, Washington, DC: Department of Justice, Jan. 29, 2000), <https://fas.org/irp/offdocs/predirective.html>; and "Executive Order, Proclamation, or Executive Memorandum?" Library of Congress, accessed May 14, 2020, <https://guides.loc.gov/executive-orders/order-proclamation-memorandum>.
- 4** Michael Waldman and Inimai Chettiar, eds., *15 Executive Actions*, Brennan Center for Justice, 2014, 12, https://www.brennancenter.org/sites/default/files/2019-08/Report_15_Executive_Actions.pdf.
- 5** 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>. Regarding White House–DOJ communications policies, see, e.g., Donald Rumsfeld, White House Chief of Staff, "Standards of Conduct: Contacts with Regulatory Agencies and Procurement Officers" (official memorandum, Washington, DC: The White House, Oct. 10, 1975), <https://www.fordlibrarymuseum.gov/library/document/0204/1511945.pdf>; Fred F. Fielding, Counsel to the President, "Communications with the Department of Justice" (official memorandum, Washington, DC: The White House, Feb. 10, 1981), <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/smf/cos/cicconi/box-11/40-94-6914308-011-006-2016.pdf>; C. Boyden Gray, Counsel to the President, "Prohibited Contacts with Agencies" (official memorandum, Washington, DC: The White House, Feb. 1989); Jack Quinn, Counsel to the President, "Contacts with Agencies" (official memorandum, Washington, DC: The White House, Jan. 16, 1996), <https://clinton.presidentiallibraries.us/items/show/27001>; Michael Mukasey, Attorney General, "Communications with the White House" (official memorandum, Washington, DC: Department of Justice, Dec. 19, 2007), <https://www.justsecurity.org/wp-content/uploads/2017/06/AG-2007-Memo-Communications-with-White-House.pdf>; Eric Holder, Attorney General, "Communications with the White House and Congress" (official memorandum, Washington, DC: Department of Justice, May 11, 2009), https://www.justice.gov/oip/foia-library/communications-with-the-white-house-and-congress_2009.pdf/download; and Donald F. McGahn II, White House Counsel, "Communications Restrictions with Personnel at the Department of Justice" (official memorandum, Washington, DC: The White House, Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>.
- 6** McGahn, "Communications Restrictions."
- 7** Adam Serwer, "When Does Contact between the FBI and the White House Cross the Line?" *Atlantic*, Feb. 24, 2017, <https://www.theatlantic.com/politics/archive/2017/02/when-does-contact-between-the-fbi-and-the-white-house-cross-the-line/517845>.
- 8** Committee on the Judiciary, *Report: The Security from Political Interference in Justice Act of 2007*, S. Rep. No. 110-203, at 3 (2007), <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 for Gonzales's 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>.
- 9** 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, DC: 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").
- 10** 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. Kathryn Ruemmler, Counsel to the President, "Prohibited Contacts with Agencies and Departments" (official memorandum, Washington, DC: The White House, Mar. 23, 2012).
- 11** The story of the changes to the limited contact policy during George W. Bush's administration illustrates how congressional scrutiny of contact policies can make a difference. See Mukasey, "Communications with the White House"; Committee on the Judiciary, *Security from Political Interference in Justice Act*, 3; Eggen, "Mukasey Limits Agency's Contacts"; and 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>.
- 12** This proposal builds on existing DOJ guidance for particular contacts with outside parties. The *Justice 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, *Justice Manual* (Washington, DC: U.S. Department of Justice, 2018),

§§ 1-7.000, 1-8.000, <https://www.justice.gov/usam/united-states-at-torneys-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.

13 To reduce duplication (or any perceived burden), the executive order 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.

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15 28 C.F.R. § 600.7(d).

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17 Alan Feuer et al., "Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle," *New York Times*, June 20, 2020, <https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html>. Senior political officials also pressured DOJ attorneys to conduct an antitrust investigation of automakers that attempted to lower their emissions and to cut Trump ally Roger Stone "a break" in sentencing. Kyle Cheney and Leah Nylen, "Prosecutor Says He Was Pressured to Cut Roger Stone 'a Break' Because of His Ties to Trump," *Politico*, June 23, 2020, <https://www.politico.com/news/2020/06/23/prosecutor-says-he-was-pressured-to-cut-roger-stone-a-break-because-of-his-ties-to-trump-336075>.

18 For-cause removal protection is a standard means to preserve the independence of personnel throughout the executive branch. See, e.g., 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); 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); 39 U.S.C. § 502(a) (Postal Regulatory Commission); and 49 U.S.C. § 1301(b)(3) (Surface Transportation Board).

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25 Jen Kirby, "Inspectors General, Explained by a Former Inspector General," *Vox*, May 20, 2020, <https://www.vox.com/2020/5/20/21262678/steve-linick-inspector-general-fired-state-department-explainer>.

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"Clinton Pardons a Billionaire Fugitive, and Questions Abound," *Los Angeles Times*, Jan. 24, 2001, <http://articles.latimes.com/2001/jan/24/news/mn-16268>; and 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. 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/>.

32 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.

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37 *Presidential or Legislative Pardon of the President*, 1 Op. O.L.C. Supp. 370.

38 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): 31–37, <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1007&context=nljforum> (noting that 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) (stating that 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, <https://www.acslaw.org/wp-content/uploads/2018/04/Love - Reinvigorating the Federal Pardon Process Q.pdf> (recommending that the president publicly announce a pardoning policy and publish an

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40 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; and Wyo. Const. art. 4, § 5. See generally Love, "Reinvigorating the Federal Pardon Process," 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.

41 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 be published in the Federal Register); and 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).

42 Walter M. Shaub Jr., Director, U.S. Office of Government Ethics, remarks at Brookings Institution, Washington, DC, Jan. 11, 2017), https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_schaub_remarks.pdf ("Every 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.").

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44 Letter from Walter M. Shaub Jr., Director, U.S. Office of Government Ethics, to Stefan C. Passantino, Deputy Counsel to the President (Mar. 9, 2017), [https://www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/6838A4064B210D-94852580DE006BBCF0/\\$FILE/Letter%20to%20HQR%20Chairman%20and%20Ranking%20Member%209%20Mar%202017.pdf?open](https://www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/6838A4064B210D-94852580DE006BBCF0/$FILE/Letter%20to%20HQR%20Chairman%20and%20Ranking%20Member%209%20Mar%202017.pdf?open).

45 Shaub, remarks at Brookings Institution.

46 Ron Dicker, "Donald Trump Has Stake in Hydroxychloroquine Drugmaker: Report," *Huffington Post*, updated Apr. 7, 2020, https://www.huffpost.com/entry/donald-trump-stake-company-hydroxy-chloroquine_n_5e8c41d7c5b6e1d10a696280?ncid=APPLE-NEWS00001.

47 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," in *Guide to Judiciary*

Policy, Administrative Office of the United States Courts, 2013, 6–9, <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees> (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 XXVII: 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).

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49 Eric Lipton, “White House Moves to Block Ethics Inquiry into Ex-Lobbyists on Payroll,” *New York Times*, May 22, 2017, <https://www.nytimes.com/2017/05/22/us/politics/trump-white-house-government-ethics-lobbyists.html>.

50 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 Commission v. NRA Political Victory Fund*, 6 F.3d 821, 826 (DC 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[.]”). A recent Supreme Court decision struck down the single-director model for the Consumer Financial Protection Bureau, while recognizing the constitutionality of other for-cause removal protections. *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19–7 (2020).

51 For the People Act of 2019, H.R. 1, 116th Cong. (2019).

52 President Ford only released 10 years’ worth of summary tax data in 1976. Jill Disis, “Presidential Tax Returns: It Started with Nixon. Will It End with Trump?” CNN, Jan. 26, 2017, <https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html>; and 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>.

53 Eric Bradner, “Conway: Trump Will Not Release Tax Returns,” CNN, updated Jan. 22, 2017, <https://www.cnn.com/2017/01/22/politics/kellyanne-conway-trump-tax-returns/index.html>; and David Jackson, “Donald Trump Says He Won’t Give His Tax Returns to Congress,” *USA Today*, updated Apr. 10, 2019, <https://www.usatoday.com/story/news/politics/2019/04/10/donald-trump-says-he-wont-give-his-tax-returns-congress/342119002>.

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58 Straus, *Ethics Pledges*.

59 Derek Kravitz, “The Trump Administration Says It Has Violated Its Own Ethics Pledge,” *ProPublica*, Oct. 23, 2019, <https://www.propublica.org/article/the-trump-administration-says-it-has-violated-its-own-ethics-pledge>. The agency inspector general found that the appointee’s participation in the case was a “serious and flagrant problem and/or deficiency.” David P. Berry, “Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of Its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter” (official memorandum, Washington, DC: National Labor Relations Board, Feb. 9, 2018), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy-Brand%20Deliberations.pdf>. The Labor Board vacated the controversial decision. Noam Scheiber, “Labor Board’s Do-Over Leaves an Obama-Era Rules Intact,” *New York Times*, Feb. 26, 2018, <https://www.nytimes.com/2018/02/26/business/economy/labor-board.html>.

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Lobbying Restrictions on Appointees.” *Government Executive*, Jan. 2, 2001, <https://www.govexec.com/federal-news/2001/01/clin-lifts-lobbying-restrictions-on-appointees/8217>.

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67 Exec. Order No. 13,490, § 4.

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- 90** Evich, "Agriculture Department Buries Studies."
- 91** Snider, "White House, EPA Headed Off Chemical Pollution Study."
- 92** If the OSTP determines that a shorter gap between completion of the research and public availability is feasible, agencies should comply with that shorter time frame.
- 93** Congress directed the head of OSTP to coordinate agency policies "related to the dissemination and long-term stewardship of the results of unclassified research, including digital data and peer-reviewed scholarly publications, supported wholly, or in part, by funding from the Federal science agencies." America Competes Reauthorization Act of 2010, Pub. L. 111-358, § 103(a). A memorandum issued by OSTP in 2013 mandates the creation of public access plans and clarifies that the push for disclosure does not extend to laboratory notebooks, preliminary analyses, drafts of scientific papers, plans for future research, peer review reports, or communications with colleagues. John Holdren, director of the Office of Science and Technology Policy, "Increasing Access to the Results of Federally Funded Scientific Research" (official memorandum, Washington, DC: Executive Office of the President, Feb. 22, 2013).
- 94** U.S. Government Accountability Office, *Federal Research: Additional Actions Needed to Improve Public Access to Research Results*, GAO-20-81 (Washington, DC: Government Accountability Office, 2019), <https://www.gao.gov/assets/710/702847.pdf>.
- 95** Foundations for Evidence-Based Policymaking Act of 2018, Pub.L. No. 115-435 (2019).
- 96** H.R. 3427, 115th Cong. (2017); S. 1701, 115th Cong. (2017). See also H.R. 370, 113th Cong. (2013); S. 350, 113th Cong. (2013); H.R. 1477, 114th Cong. (2015); and S. 779, 114th Cong. (2015).
- 97** Lydia Wheeler, "Report: Labor Department Hiding Unfavorable Report on Impacts of Tip-Pooling Rule," *The Hill*, Feb. 1, 2018, <http://thehill.com/regulation/labor/371798-report-labor-department-hiding-unfavorable-report-on-impacts-of-tip-pooling>; and Eric Levitz, "Trump DOL Hid Report Showing Its Tips Rule Would Likely Cost Workers Billions," *New York Magazine*, Feb. 1, 2018, <http://nymag.com/daily/intelligencer/2018/02/dol-hid-study-showing-tips-rule-could-cost-workers-billions.html>.
- 98** Ben Penn, "Mulvaney, Acosta Override Regulatory Office to Hide Tips Rule Data," *Bloomberg Law*, Mar. 1, 2018, <https://news.bloomberglaw.com/daily-labor-report/mulvaney-acosta-override-regulatory-office-to-hide-tips-rule-data-1>. There are many other examples detailed in the appendix of the Brennan Center task force's report. See Bharara, Whitman, et al., *Proposals for Reform, Volume II, Appendix*, 36–37.
- 99** Exec. Order No. 12,866, 3 C.F.R. 638, § 6(a)(3)(E)(ii)–(iii) (1993). President Obama issued Executive Order 13,563, which supplemented and reaffirmed the principles of regulatory review established in Executive Order 12,866. 3 C.F.R. 215 (2011).
- 100** "No covered individual shall suppress, alter, interfere, or otherwise impede the timely release and communication of scientific or technical findings." Scientific Integrity Act, H.R. 1709; and S. 775.
- 101** For nearly six months in 2018, then secretary of labor Alexander Acosta failed to fill vacancies on the Advisory Board on Toxic Substances and Worker Health, created to address the needs of workers at the nation's nuclear facilities who developed work-related diseases induced by radiation or chemicals. Rebecca Moss, "Injured Nuclear Workers Finally Had Support. The Trump Administration Has Mothballed It." *ProPublica*, Mar. 9, 2018, <https://www.propublica.org/article/injured-nuclear-workers-finally-had-support-the-trump-administration-has-mothballed-it>. See also Genna Reed et al., "Abandoning Science Advice," Union of Concerned Scientists, 2018, 6, 8, <https://www.ucsusa.org/sites/default/files/attach/2018/01/abandoning-science-advice-full-report.pdf> (reporting that, as of 2018, total membership of science advisory committees at the Department of Commerce was down 13 percent from 2016); and Bharara, Whitman, et al., *Proposals for Reform, Volume II*, 32–34.
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- 103** Coral Davenport, "E.P.A. Dismisses Members of Major Scientific Review Board," *New York Times*, May 7, 2017, <https://www.nytimes.com/2017/05/07/us/politics/epa-dismisses-members-of-major-scientific-review-board.html> (reporting on dismissals of several advisory committee members from academia); Lisa Friedman, "E.P.A. to Disband a Key Scientific Review Panel on Air Pollution," *New York Times*, Oct. 11, 2018, <https://www.nytimes.com/2018/10/11/climate/epa-disbands-pollution-science-panel.html>; and Bharara, Whitman, et al., *Proposals for Reform, Volume II*, 32–34.
- 104** The EPA instituted a rule to bar agency grant recipients from serving on advisory committees, which has had the effect of limiting the participation of academic researchers. Warren Cornwall, "Trump's EPA Has Blocked Agency Grantees from Serving on Science Advisory Panels. Here Is What It Means," *Science*, Oct. 31, 2017, <https://www.sciencemag.org/news/2017/10/trump-s-epa-has-blocked-agency-grantees-serving-science-advisory-panels-here-what-it>. A federal appeals court struck down this rule. Ellen M. Gilmer, "Trump EPA's Constraints on Science Advisers Unlawful: Court (1)," *Bloomberg Law*, Apr. 21, 2020, <https://news.bloomberglaw.com/environment-and-energy/trump-epas-constraints-on-science-advisers-unlawful-court-says>. The number of industry representatives and consultants quadrupled on the EPA's Science Advisory Board, while representation of academics decreased from 79 to 50 percent. Reed et al., "Abandoning Science Advice," 6.
- 105** Exec. Order No. 13, 875, 84 Fed. Reg. 28,711 (June 14, 2019). In 1993 the Clinton administration issued an executive order that slashed the number of advisory committees by one-third. A subsequent GAO analysis found that this failed to reduce costs — instead, total costs increased by 3 percent. U.S. Government Accountability Office, "Federal Advisory Committee Act: Overview of Advisory Committees Since 1993," GAO/T-GGD-98-24 (Washington, DC: Government Accountability Office, 1997), <https://www.gao.gov/assets/110/107157.pdf>.
- 106** For instance, the EPA's Science Advisory Board publishes the criteria for selection of committee members. See U.S. Environmental Protection Agency, "Reorganization of the EPA Science Advisory Board: A Report of the EPA Science Advisory Board Staff Office," EPA-SAB-04-001 (Washington, DC: Environmental Protection Agency, 2003), 7, 9, [https://yosemite.epa.gov/sab/sabproduct.nsf/Web/ReorgOfSAB/\\$File/sab04001.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/Web/ReorgOfSAB/$File/sab04001.pdf).
- 107** Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116 Cong. (2019).
- 108** Senator Maggie Hassan, "Portman, Hassan Introduce Bipartisan Legislation to Improve Transparency of Federal Advisory Committees," news release, Apr. 11, 2019, <https://www.hassan.senate.gov/news/press-releases/portman-hassan-introduce-bipartisan-legislation-to-improve-transparency-of-federal-advisory-committees>.

- 109** Edmond v. United States, 520 U.S. 651, 659 (1997).
- 110** See *Federalist*, no. 76 (Alexander Hamilton).
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