STRENGTHENING PRESIDENTIAL ETHICS LAW

Daniel I. Weiner
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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

**UNDERSTANDING THE STAKES**

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

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

President Trump’s Potential Conflicts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Broader Implications**

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

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

The irony, of course, is that both the Putin and Chavez governments turned out to be at least as corrupt as their predecessors. This is perhaps the biggest risk of having no clear safeguards at the highest levels — not that official self–dealing will spark opposition, but that it will become normalized.
As the theorists Gerald and Naomi Caiden wrote almost forty years ago in the wake of Watergate: “Corruption does not disappear when it becomes entrenched and accepted: rather, it assumes a different form, that of systemic as opposed to individual corruption.”

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

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

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

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

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

**SOLUTIONS**

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

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

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

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

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

Silberman’s approach became the official legal position of the Department of Justice (DOJ) — although a subsequent opinion by future Supreme Court Justice Antonin Scalia noted that “it would obviously be undesirable as a matter of policy for the president or vice president to engage in conduct proscribed” by conflict of interest rules, “whether or not they technically apply.” OGE adopted DOJ’s view in 1983, and Congress codified it in 1989.

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

Without question, “[t]he President occupies a unique position in the constitutional scheme” of the United States. As the Supreme Court has observed, the American presidency “concentrates executive authority in a single head in whose choice the whole Nation has a part.... In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear.”
The uniqueness of the presidency in our system and the breadth of the president’s responsibilities have led the Court to find that the occupant of the office must have immunity from certain kinds of legal actions. For example, absent an express congressional authorization, the president is immune from many civil damages suits arising from official acts (though not from suits arising from his or her private conduct).  

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

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

As a general matter, conflict of interest rules plainly further Congress’s legitimate objectives. They serve a vital function in preventing officials from “advancing their own interests at the expense of the public welfare.” Self-dealing of this sort is, according to the Supreme Court, “an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials ⋅⋅ engage in activities which arouse suspicions of malfeasance and corruption.”

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

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

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

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

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

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

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

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

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

**Fix Federal Ethics Disclosure Rules**

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

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

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

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

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

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

To help balance out these new regulatory provisions, Congress should significantly raise and index to inflation EIGA’s monetary disclosure thresholds for assets and income (which have not been updated since the 1970s), and consider exempting certain classes of income unlikely to pose any conflict risk.113
Strengthen Administration and Enforcement of Ethics Rules in the Executive Branch

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

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

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

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

The following changes are essential:

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

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

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

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

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

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

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

**CONCLUSION**

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

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


U.S. Const. art. I, § 9, cl. 8; U.S. Const. art. II, § 1, cl. 7.


For example, revelations that President Richard Nixon had sought to evade his federal income tax obligations in the early 1970s using dubious charitable deductions seriously damaged his credibility with the public and arguably set the stage for his downfall in Watergate. Stephen Mihm, “Nixon’s Failed Effort to Withhold His Tax Returns,” Bloomberg, August 2, 2016, https://www.bloomberg.com/view/articles/2016-08-02/nixon-s-failed-effort-to-withhold-his-tax-returns.


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

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


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


U.S. CONST. art. II, § 1, cl. 7.

See Federalist, no. 73 (Alexander Hamilton).


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


Berzon and Grant, “One of Government’s Largest Landlords, Vornado, Pays Millions Each Year to Trump Company.”


57 Legal scholars Aziz Huq and Tom Ginsburg have argued that constitutional democracy has “three institutional predicates”: 1) free and fair elections; 2) robust protections for speech and association; 3) stable and predictable rule of law and legal institutions. Huq and Ginsburg, “How to Lose a Constitutional Democracy,” at 9. Under this framework, a system in which the
rule of law and protections for speech and association eroded would have suffered significant democratic deterioration even if it still conducted regular free elections. Id.


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


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

65 See note 6.


70 Id. at 4.


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

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


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


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

83 *Id.* at 563.


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

86 *See 5 C.F.R. § 2635.402(a)(3).*


88 5 C.F.R. § 2635.402(a)(4).

89 5 C.F.R. § 2635.402(c), Example 1.


91 *See, e.g.*, McCarthy, “Your Sentencing Advice is Not Helpful, Mr. President.”

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

93 *Id.* at 12.

94 *Id.* at 14-15.


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

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


99 U.S. Const. art. I, § 7

100 5 C.F.R. § 2640.103(a)(1).

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

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


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

105 Id. at 2.

106 Id. at 1 & n.7, 5.

107 Id. at 1, 5.

108 Id.

109 Id. at 6.

110 Id. at 3-5.

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

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

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


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

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


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

123 Shaub, Policy Proposals on Ethics, at 7.


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


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

128 18 U.S.C. § 208(b)(1)

129 See Shaub, Policy Proposals on Ethics, at 18.

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

Id. at 16 n.33.


Id.

Id.

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