



# TRUMP-PROOFING THE PRESIDENCY

A Plan for Executive Branch  
Ethics Reform



**CREW** | citizens for responsibility  
and ethics in washington

October 2, 2018

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# INTRODUCTION

President Trump's election marked the start of an ethics crisis in the United States government. The crisis began before President Trump even took office, when he decided to maintain his financial interests in the hundreds of privately owned businesses that operate under the umbrella of the Trump Organization. This decision represented the exact opposite of the approach of his modern predecessors, Republicans and Democrats, who took steps to eliminate financial holdings that could be vectors for possible corruption once they took office. The decision has resonated through his administration, creating constant risks that the President's own decision-making will be affected by his financial interests; exposing thousands of federal government employees to corruption risks as they must interact with his businesses; and perhaps most importantly, setting a tone from the top that has allowed his unusually wealthy cabinet members and other senior appointees, such as his children, to ignore their own corruption risks.

President Trump's disregard for rules and norms designed to protect against corruption has extended to nearly every part of our ethics system. It began with his inaugural committee raising millions of dollars from influence-seekers without being held accountable for how the money was spent and a dramatically broken transition process. It has extended into the administration, reflecting itself in nepotism in hiring, reversals on important transparency measures like White House visitor logs, and other steps dramatically increasing the risk that government decisions will be compromised by corruption, if they haven't been already.

The weaknesses in these systems predate President Trump, of course, and administrations of both parties have taken advantage of some or all of them in the past. We must acknowledge, however, that no administration of either party has pushed the boundaries of ethics as far as the Trump administration. That said, our long experience as government watchdogs has taught us that once the boundaries of ethical behavior are extended, they do not recede voluntarily, regardless of which party is in power. An open door invites any and all to walk through.

This report identifies several key presidential ethics problems that have arisen thus far in the Trump administration, explains why the system currently fails to prevent these problems, and describes recommended solutions. Some of these are major issues, such as President Trump's failure to sell conflicting assets, and the obvious weaknesses in ethics enforcement within the executive branch. The solutions proposed also represent substantial, perhaps even radical, departures from the current system. Other problems are not as large and the solutions would not take us as far from where we are now. However, we believe even these smaller issues are important to our overall goal: a uniform strengthening of the ethics system.

We focus largely, although not exclusively, on solutions that involve action from Congress. We focus on Congress because one overarching lesson from President Trump's assault on the ethics system is that many parts of that system have worked in the past because presidents *wanted* to avoid corruption risks; the system was designed to *help* them do that. We have now seen that it is risky to design a system that relies too heavily on this impulse from an executive. The checks and balances that are the cornerstone of our constitutional system must play a larger role in protecting Americans from corruption and its corrosive effects on their everyday lives; this is Congress's power and its obligation.

# EXECUTIVE SUMMARY

President Trump's decision to retain his ownership interest in the Trump Organization has set the tone for the present ethics crisis. He has continually used the imprimatur of his office to promote his business interests, and serious questions have been raised about whether his business interests have improperly influenced his decisions in office. Given that executive authority under the U.S. Constitution is both substantial and wide-ranging, it is simply untenable for a president to hold business interests that could raise conflicts of interest or pose other corruption risks. This is why all modern presidents before Trump have generally divested themselves of such interests, leaving remaining assets in widely-held mutual funds, non-commercial real estate, and similar investments. There are two primary possible ways to address this issue: (i) amend the current criminal conflict of interest statute to apply to business interests of the president (and vice president), which would mean that a president who wanted to avoid committing a crime would need to divest assets that could create a conflict of interest, or (ii) impose a separate, stand-alone requirement that a president and vice president divest of business interests that could create conflicts with their government service. We acknowledge that such a requirement could place a burden on a president or vice president; however, we firmly believe that the interests of the American people and our democracy cannot be protected without it.

Enforcement of federal ethics laws and rules also needs to be strengthened substantially. Most ethics decisions are made by individual agencies. The Office of Government Ethics, charged with training and advising ethics officers in those agencies, has very little authority to centralize or standardize enforcement of ethics laws. Again, we identify two paths for addressing this problem: giving authority – and responsibility – for overseeing ethics enforcement to the Office of Government Ethics, or giving such authority to another agency. Regardless of who is involved in enforcing ethics rules, the financial disclosures required of senior government employees are a critical tool for identifying financial conflicts and other possible ethics issues. These disclosures are designed to provide sufficient information to ethics officials without being unnecessarily invasive; but as currently structured, they do not capture enough information, or with enough precision, to play this role. They must be improved.

Other avenues for seeking financial influence over presidents must also be addressed. Inaugural committees, presidential libraries, and legal defense funds are all potential avenues for influence-seekers to funnel money to a president. And not all conflicts are financial – rules against nepotism must be strengthened to ensure the integrity of all government employees, including in the White House.

Finally, some ethics and transparency norms must be given the strength of law. White House visitor logs should be regularly disclosed; the independence of the Justice Department should be protected from White House interference; federal workplaces should be free from improper political activity; presidential advisers should be required to follow ethics rules even if they are not government employees; and presidential transition teams should follow ethics and transparency rules consistent with their important role in creating and shaping a new administration.

The reforms we propose to address the threats to government ethics posed by Trump's ascent to the White House fall into four general categories: 1) prohibiting overt conflicts of interest; 2) improving disclosure of officials' financial affairs; 3) restricting gifts to presidents and public officials; and 4) strengthening ethics and disclosure laws to combat self-dealing and favoritism to family and special interests.

In Section I, **Preventing Conflicts of Interest**, we propose:

1. Requiring the president and vice president to divest assets that pose a risk of conflict-of-interest within 30 days of the president's inauguration; and
2. Strengthening the quality of executive branch ethics enforcement by either: a) creating an overarching inspector general's office to investigate potential ethic violations across the executive branch, including within the White House, or b) by vesting the Office of Government Ethics with enforcement authority.

In Section II, **Improving Financial Disclosure of Candidates and Office Holders**, we propose:

1. Improving the specificity of financial disclosure forms to require candidates and officials to disclose the value of their assets, income, transactions and liabilities within reasonably specific ranges and requiring disclosure of key details relating to public officials' privately-held businesses, including the identities of any major creditors, investors and customers.
2. Requiring presidential and vice-presidential candidates and office holders to disclose their tax returns prior to election and, for office holders, in subsequent years.

In Section III, **Enhancing Rules on Gifts to Candidates and Public Officials**, we propose:

1. Limiting contributions to inaugural committees to match the contributions limits and guidelines on contributions to federal candidates for an election cycle, which would limit contributions to about \$5,000 and require them to come from U.S. natural persons only. At present, there are no limits on amounts and the only source restriction is a prohibition on contributions from foreign sources.
2. Prohibiting sitting presidents from collecting money for their future libraries or other legacy building endeavors or, failing that, subjecting such contributions to the rules that cover contributions to federal candidates. At present, there are no limits on the size or source of these contributions.
3. Enhancing rules and disclosure requirements for legal defense funds established by executive branch officials.

In Section IV, **Strengthening the Integrity of Government**, we propose:

1. Protecting the public from the dangers of nepotism by: a) passing legislation clarifying that the current law banning presidents from hiring immediate family members supersedes other laws on White House employment; b) restricting the size of federal contracts that family members of a president may receive; and c) prohibiting a president's family member from receiving security clearances except in cases in which the person is independently qualified to receive them.

2. Requiring disclosure of White House visitor logs to give the public insight into whom White House officials are meeting with.
3. Creating policy to govern White House contacts with the Department of Justice to create bright lines preventing the White House from unduly interfering in Justice Department affairs.
4. Closing loopholes in the Hatch Act to prevent government employees from improperly engaging in political activities.
5. Updating rules covering special government employees to ensure that people who influence policy are covered by ethics rules.
6. Applying ethics and transparency rules to presidential transition teams, and ending the practice of post-election transition teams relying on private donations to fund their work.

# I. PREVENTING CONFLICTS OF INTEREST

## A. Require the President, Vice President and Senior Officials to Sell Assets that Pose a Risk of Corruption

### THE PROBLEM:

President Trump's business interests make him susceptible to corruption based on real and apparent conflicts of interest and endless opportunities for unjust enrichment.

President Trump's decision to retain his ownership interest in the Trump Organization has led to unprecedented conflicts of interest resulting from various business interests that fall under the umbrella of the Trump Organization. Some of these interests include the Trump Organization's lease with the federal government to operate a hotel in the Old Post Office building in Washington, D.C.,<sup>1</sup> business dealings in Panama and other countries,<sup>2</sup> foreign trademarks,<sup>3</sup> debt obligations,<sup>4</sup> and temporary visas from the U.S. government necessary for foreign persons to work at the Trump-owned club Mar-a-Lago and other Trump properties.<sup>5</sup>

President Trump has continually used the imprimatur of his office to promote his business interests. The profits he derives from his business enterprises raise legitimate concerns about the use of public office for private gain and about the possibility that decisions may be influenced by the President's business interests, rather than made in the interest of the American people.<sup>6</sup> A report revealed that in his first year in office:

- President Trump spent 121 days or a third of his presidency visiting his commercial properties;

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<sup>1</sup> Noah Bookbinder, Norman Eisen, Richard Painter and CREW Staff, *The Most Unethical Presidency: Year One*, ("CREW Year One Report"), *Citizens for Responsibility and Ethics in Washington*, at 13 -16 available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/01/16021013/CREW-trumpONEyearReportFINAL.pdf>.

<sup>2</sup> Ana Cerrud and David A. Fahrenthold, *Warning of 'repercussions,' Trump company lawyers seek Panama president's help*, *Washington Post*, Apr. 9, 2018, available at [https://www.washingtonpost.com/world/warning-of-repercussions-trump-company-lawyers-seek-panama-presidents-help/2018/04/09/9e3fbb8e-3c2f-11e8-8d53-eba0ed2371cc\\_story.html?utm\\_term=.17c7aabdedcb](https://www.washingtonpost.com/world/warning-of-repercussions-trump-company-lawyers-seek-panama-presidents-help/2018/04/09/9e3fbb8e-3c2f-11e8-8d53-eba0ed2371cc_story.html?utm_term=.17c7aabdedcb) ("The request was extraordinary: The U.S. president's company was asking the leader of a U.S. ally to intercede on its behalf, disregarding Panama's separation of powers. It is the first known instance of the Trump Organization asking directly for a foreign leader's help with a business dispute since Trump was elected.")

<sup>3</sup> CREW Year One Report, at 13-14.

<sup>4</sup> Allan Smith, *Trump's long and winding history with Deutsche Bank could now be at the center of Robert Mueller's investigation*, *Business Insider*, Dec. 8, 2017, available at <http://www.businessinsider.com/trump-deutsche-bank-mueller-2017-12>.

<sup>5</sup> Cleve R. Wootson Jr., *Trump, who urged people to 'hire American,' secures 70 foreign workers for Mar-a-Lago*, *Washington Post*, Nov. 5, 2017, available at [https://www.washingtonpost.com/news/powerpost/wp/2017/11/05/trump-who-urged-people-to-hire-american-secures-70-foreign-workers-for-mar-a-lago/?utm\\_term=.951f97b03655](https://www.washingtonpost.com/news/powerpost/wp/2017/11/05/trump-who-urged-people-to-hire-american-secures-70-foreign-workers-for-mar-a-lago/?utm_term=.951f97b03655) ("President Trump recently won permission from the Labor Department to hire 70 cooks, maids and servers to work at his ritzy Mar-a-Lago Club for the tourist season, according to the Palm Beach Post.")

<sup>6</sup> See Walter M. Shaub Jr., Director, U.S. Office of Government Ethics, *Remarks prepared for delivery at the Brookings Institution* ("Shaub Remarks at Brookings"), Jan. 11, 2017, available at [https://www.brookings.edu/wp-content/uploads/2017/01/20170111\\_oge\\_schaub\\_remarks.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_schaub_remarks.pdf).

- President Trump and his White House staff promoted the Trump brand by mentioning or referring to one of his private businesses on at least 54 different occasions;
- Special interest groups held more than 40 events at Trump properties;
- At least eleven foreign governments paid Trump-owned entities during the first year of office and six foreign government officials made appearances at Trump Organization properties; and
- Political groups spent more than \$1.2 million at Trump properties during the president’s first year.<sup>7</sup>

Many of these acts raise more than just conflict of interest concerns; the associated payments to Trump Organization businesses also violate the Constitution. The Foreign Emoluments clause of the Constitution prevents a president from accepting any profit or gain from a foreign state unless Congress consents.<sup>8</sup> The Domestic Emoluments clause of the Constitution prevents a president from accepting an emolument other than his salary “from the United States, or any of them.”<sup>9</sup>

## CURRENT LAW:

The president and vice president are exempt from the main federal conflict-of-interest law, 18 U.S.C. § 208(a),<sup>10</sup> and its implementing regulations.<sup>11</sup> Together, these rules bar federal employees from participating personally and substantially in any particular matter in their government work that would have a direct and predictable effect on their financial interests or financial interests that are imputed to them (for example, financial interests held by their spouses). Typically, federal employees and officers who are subject to these rules have complied with them in one of three ways: (1) recusing themselves from a part of their government work, (2) obtaining special permission to work on the conflicting matter from ethics officials within their agency, known as a waiver, or (3) divesting the financial interest that is causing the conflict. For obvious reasons, options (1) and (2) are not realistically available to presidents or vice-presidents, leaving divestiture as the only reasonable way they can avoid financial conflicts of interest.

This is why, notwithstanding their exemption from the specific conflict of interest statute, modern presidents of both parties before President Trump addressed potential financial conflicts of interest by adhering to ethical norms and traditions that resulted in the sale of financial interests that could present the risk of corruption. Since the Ethics in Government Act of 1978 was passed, presidents of both parties have established blind trusts or limited their holdings to U.S. Treasuries, diversified mutual funds and other assets that could not create a conflict-of-interest.<sup>12</sup> Doing this not only avoided the risk of corruption, it also acted to insulate these presidents from allegations of unjustly profiting off the presidency.

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<sup>7</sup> *Profiting from the Presidency: A Year’s Worth of President Trump’s Conflicts of Interest*, *Citizens for Responsibility and Ethics in Washington*, Jan. 19, 2017 available at <https://www.citizensforethics.org/profitfromthepresidency/>.

<sup>8</sup> U.S. Const. art. I, § 9, cl. 8.

<sup>9</sup> U.S. Const. art. II, § 1, cl. 7.

<sup>10</sup> 18 U.S.C. § 202(c). The President and Vice President are generally excluded from the definitions of “officer” and “employee” for purposes of section 208 and certain other conflict of interest statutes.

<sup>11</sup> 5 C.F.R. §§ 26350.401-403; 5 C.F.R. §§ 2640.101-103.

<sup>12</sup> Shaub Remarks at Brookings.



## SOLUTIONS:

### **President and Vice President - Amendments to 18 U.S.C. § 208(a) and the Ethics in Government Act of 1978**

#### ***Option 1: Apply Conflict of Interest Laws to the President and Vice President's Business Interests.***

One approach to resolving this issue would be for Congress to remove the statutory language that exempts the president and vice-president from the criminal conflict of interest statute, 18 U.S.C. § 208. Because of the president's and vice-president's wide-ranging authority over matters within the jurisdiction of the executive branch, we believe this would require them to divest of assets that could create conflicts of interest, because neither a waiver nor indefinite recusal from a particular matter is realistic. However, we recommend that if Congress chooses this approach, the statute's applicability be limited to a subset of the president's and vice-president's financial interests that meet a definition of "business interests," as described below. This proposal would codify norms and traditions to minimize possible conflicts of interest and opportunities for unjust enrichment, and allow compliance with both emoluments clauses.

#### ***Option 2: Directly Require the President and Vice-President to Divest Conflicting Assets.***

Another approach would be to create a separate, non-criminal legal requirement that the president and vice-president divest assets that pose a corruption risk (rather than amending the criminal conflict of interest statute). If Congress chooses this approach, we recommend it amend the existing Ethics in Government Act as follows:

- a. The president and vice president shall divest all business interests not later than 30 days after taking office. The Office of Government Ethics ("OGE") may grant reasonable extensions to this deadline, if necessary, but must give written public notice of the extension.
- b. "Business interest" is defined as an investment in any business enterprise, whether publicly held or privately owned, but does not include U.S. Treasuries, diversified mutual funds that qualify for a regulatory exemption, or residential property that is not held for the production of rental or other income.
- c. The requirement to divest business interests shall be satisfied by placing business interests into an OGE qualified blind or diversified trust to be sold; irrevocably transferring the assets to a qualified third party; or selling the assets and rolling over the proceeds from the sale into assets that do not pose a conflict-of-interest risk, such as U.S. Treasury bonds or diversified mutual funds that qualify for the regulatory exemption. We note that the trust established by President Trump before taking office does not meet these statutory requirements for a number of reasons.<sup>13</sup>
- d. The divestiture process shall be conducted under the oversight of OGE and shall be subject to review and certification by the director of OGE as part of the public financial disclosure report (OGE 278) process.
- e. The president and vice president shall be required to file their initial OGE 278 report with OGE not later than May 15 in the year they first take office, and thereafter annually. Each OGE 278

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<sup>13</sup> Shaub Remarks at Brookings, at 1-2.

report filed by the president or vice president shall be reviewed and then certified by the director of OGE based on a determination that the filer has complied with all applicable financial disclosure requirements and resolved all conflicts of interests in compliance with the Constitution and applicable law.

- f. A certified copy of the president and vice president's OGE 278 reports shall be sent to House and Senate leadership within 30 days of receipt by OGE. If the director of OGE is unable to certify the president's or vice president's OGE 278 report within that time period, he/she shall report to Congress on whether the OGE 278 complies with applicable law, and on whether the matter has been referred to the Department of Justice.

The changes to the Ethics in Government Act described in (b) through (f) above would also be appropriate if Congress chooses option 1, applying the current criminal conflict of interest statute to the president and vice-president.

Senior White House Staff and Cabinet Members - Amendments to 18 U.S.C. § 208(a) and the Ethics in Government Act of 1978

18 U.S.C. § 208(a) and the Ethics in Government Act of 1978 should be amended similarly to require that all cabinet members and senior White House staff<sup>14</sup> divest their business interests. Senior White House staff and cabinet members would continue to be subject to existing OGE disclosure, review and certification requirements.

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<sup>14</sup> Senior White House staff would include individuals appointed pursuant to 3 U.S.C. § 105(a)(2)(A) and (B).

## B. Strengthen Federal Government Ethics Enforcement

### THE PROBLEM:

The Office of Government Ethics (“OGE”) is the federal agency charged with ethics oversight for the executive branch. Although the agency is staffed by well-trained professional ethics officers, the agency does not have the impact it otherwise might, due to three basic structural limitations:

OGE acts more as an advisory partner within the executive branch than as a watchdog with enforcement authority.

Responsibility for implementation of the executive branch ethics laws and regulations is decentralized and widely dispersed among some 4,500 officials in the White House and the various executive agencies whose job responsibilities include interpreting and administering ethics laws.<sup>15</sup>

While OGE serves as a central clearinghouse for some ethics records, it does not collect or maintain all agency ethics records that are of public interest.

Currently, ethics laws and regulations that govern the executive branch are implemented and enforced on a decentralized basis through a loose confederation of federal officials with different levels and areas of jurisdiction. In theory, the Office of Government Ethics is responsible for overseeing federal ethics laws and regulations, but it has limited authority to implement ethics regulations or to ensure compliance.

Because of this, ethics regulations and compliance in the executive branch are not always implemented or enforced in a consistent fashion. For example, OGE has little say over agency determinations regarding recusals or divestitures. In addition, while OGE does develop standards of conduct, waivers, authorizations, approvals and gifts are not in practice treated consistently across all agencies.

Just as problematic is OGE’s role in the ethics process in the White House. While OGE and agency ethics officials retain at least the power of persuasion to compel officials in agencies besides the White House to file disclosure reports properly and comply with ethics rules, OGE has almost no practical ability to provide this oversight role for White House employees. This authority is left almost entirely to the White House counsel and, thus, to the president.

When White House officials neglect to file or to accurately and fully complete these public financial disclosures, as at least four senior White House officials failed to do,<sup>16</sup> and the White House counsel declines to compel compliance, OGE’s only recourse is to refer the matter to the Department of Justice to potentially pursue a civil or criminal action.<sup>17</sup> So, for example, when OGE concluded that President Trump failed to include on his financial disclosure a payment that Trump’s lawyer, Michael Cohen, made to actress Stormy Daniels on his behalf, OGE’s only recourse was to send a letter to the Department of Justice.<sup>18</sup>

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<sup>15</sup> Office of Government Ethics, Annual Financial Report for 2016 Fiscal Year, at 1, *available at* [https://www.oge.gov/web/oge.nsf/0/22825141B70675838525806C006FB21A/\\$FILE/2016%20AFR.pdf](https://www.oge.gov/web/oge.nsf/0/22825141B70675838525806C006FB21A/$FILE/2016%20AFR.pdf).

<sup>16</sup> Anita Kumar and Ben Wieder, *Top Trump Staffers Failed to File Financial Reports on Their Way Out The Door*, *McClatchy*, Nov. 26, 2017, *available at* <https://www.mcclatchydc.com/news/politics-government/white-house/article186003568.html>.

<sup>17</sup> 5 U.S.C. app. § 104.

<sup>18</sup> Letter from David J. Apol to Rod J. Rosenstein, May 16, 2018, *available at* [https://www.oge.gov/web/OGEnsf/0/D323FD5ABB1FD2358525828F005F4888/\\$FILE/OGEnsf%20Letter%20to%20DOJ%20\(posting\).pdf](https://www.oge.gov/web/OGEnsf/0/D323FD5ABB1FD2358525828F005F4888/$FILE/OGEnsf%20Letter%20to%20DOJ%20(posting).pdf).

## CURRENT LAW:

The Office of Government Ethics was established by the Ethics in Government Act of 1978. It was created to administer government ethics laws and regulations for the executive branch and to promulgate implementing regulations. Even though OGE has stewardship over the overall executive branch ethics program, agencies retain day-to-day responsibility for ethics decisions, only consult OGE voluntarily, and do not routinely provide OGE with copies of key ethics records.

The Ethics in Government Act directed OGE to review financial disclosure forms of presidential appointees, provide ethics training to executive branch officials and oversee the implementation of ethics rules by each agency. The Ethics Act also required OGE to provide an advisory service and to publish its opinions. OGE's director is appointed by the president for a five-year term and may be removed by the president for any reason. OGE currently has a staff of about 80 employees.

OGE is dependent on agencies and/or inspector general offices to investigate allegations of misconduct, and it depends on agency heads to take disciplinary action or otherwise enforce ethics laws. It also relies on the president to take disciplinary actions for standards of conduct violations by White House staff and any violations by agency heads themselves, who are of course appointed by the president. OGE is not vested with subpoena authority to acquire records needed to determine whether ethics laws or rules are being violated, or even to require that all waivers granting special permission to participate in a particular matter be sent to the OGE for scrutiny and public disclosure. While OGE offers training, the Ethics in Government Act does not compel ethics officers to participate in any particular training; indeed, some ethics officers for the various executive branch agencies lack adequate ethics training, according to a study by the Department of Interior Inspector General.<sup>19</sup> And while OGE provides advice and promulgates regulations in consultation with the attorney general and the Office of Personnel Management, OGE lacks the enforcement mechanisms to compel compliance.

OGE also lacks the authority to initiate conversations with Congress. The agency cannot request oversight hearings or specific legislative actions, without first being asked for such input by Congress.

While OGE compiles some ethics records, several of which are made available to the public, most ethics records are dispersed among the various agencies and not made readily available. Ethics agreements for agency officials not subject to Senate confirmation are maintained only by the agencies. Recusals by any official – presidential appointee or not – are not compiled and are not automatically available for public release. OGE has had to prod agencies in some cases to release their waivers.

## SOLUTIONS:

In order to create greater uniformity in the interpretation and implementation of ethics laws and rules in the executive branch, Congress needs to substantially strengthen enforcement. The steps needed include:

- 1. Protect the independence of the agency.** The director of the Office of Government Ethics (or any ethics enforcement agency) should continue to be appointed for 5-year terms, but should only be

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<sup>19</sup> U.S. Department of Interior, Office of Inspector General, Report of Investigations, PI-SI-02-0053-1, 2004, available at <https://www.doi.gov/sites/doi.gov/files/GrilesFinal3-27-04REDACTED.pdf>

able to be removed from office during a 5-year term for cause with 30 days advance written notice to Congress and the Office of Government Ethics.

2. **Enhance ethics enforcement processes.** There are at least two distinct ways in which ethics enforcement processes could be substantially improved. One is to create a separate agency with investigative and/or enforcement authority, allowing OGE to continue to play a primarily advisory role in ethics enforcement. One suggestion along these lines has been to create a new branch-wide inspector general's office that could (1) undertake investigations of any matter ordinarily within the jurisdiction of an Inspector General in agencies that currently do not have an Inspector General (including, significantly, the White House), and (2) undertake ethics investigations in *any* agency upon request by OGE.<sup>20</sup> The other is to vest OGE itself with investigative and enforcement powers it does not currently have.

**Option 1: Create an Executive Branch Inspector General.** Under this plan,<sup>21</sup> OGE would be preserved as an advisory agency, but a special Executive Branch Inspector General's office would be created for OGE to make public referrals to for investigations of potential violations of ethics laws and rules. The inspector general's office, which has the authority to conduct investigations but like OGE also lacks enforcement authority, would (i) either publicly accept or decline the referral from OGE in writing, and (ii) if the referral is accepted, complete a full investigation and issue a public report of its findings to the relevant parties. The transparency would help compel compliance with the ethics laws and rules, all the while preserving OGE as an advisory agency from which executive branch employees may seek confidential advice.

**Option 2: Vest OGE itself with enforcement authority.** The second model would grant OGE investigative and enforcement authority.<sup>22</sup> It seeks to follow the Canadian model of ethics enforcement in which one division of an ethics agency (here, OGE) would issue ethics advice and guidelines, and a separate division would wield investigative and enforcement authority to compel compliance. This plan would entail:

- Granting the director of OGE the authority to use subpoenas to gather necessary information and conduct formal investigations.
- Granting OGE authority to review and, if necessary, overrule the decisions of agency ethics officers, who would still function as the first-line authority to interpret and enforce the ethics laws.
- Clarifying that the scope of OGE rules and regulations extend to White House personnel.
- Authorizing OGE to order corrective actions (such as divestiture, blind trusts and recusal), and impose appropriate administrative remedies (such as reprimand, suspension or dismissal).
- Protecting the rights of executive branch personnel by allowing any individual subject to an investigation or corrective action to demand a formal hearing.
- Enabling the Director to refer egregious violations for civil or criminal prosecution to the U.S. Attorney's Office for the District of Columbia.

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<sup>20</sup> Letter from Walter M. Shaub, Jr. to Hon. Trey Gowdy and Hon. Elijah E. Cummings, Nov. 9, 2017, *available at* [https://campaignlegal.org/sites/default/files/W%20Shaub%20Legislative%20Proposal%20-%209%20November%202017\\_0.pdf](https://campaignlegal.org/sites/default/files/W%20Shaub%20Legislative%20Proposal%20-%209%20November%202017_0.pdf).

<sup>21</sup> Proposed by former OGE Director Walter Shaub.

<sup>22</sup> This has been proposed by Rep. Jamie Raskin (D-Md.) and Sen. Richard Blumenthal (D-Conn.). Executive Branch Comprehensive Ethics Enforcement Act, S.2919, *available at* <https://www.congress.gov/bill/115th-congress/senate-bill/2919/text>; Executive Branch Comprehensive Ethics Enforcement Act of 2018, H.R. 5902, *available at* <https://www.congress.gov/bill/115th-congress/house-bill/5902/text>.

3. **Allow OGE to communicate directly with Congress.** OGE does not currently have the authority to reach out to Congress on policy or enforcement matters unless Congress solicits OGE's input. OGE could address problems in executive branch agencies, especially the White House, without exercising direct enforcement authority by requesting congressional oversight. Contact with Congress would also allow the agency to propose legislative remedies to recurring problems.
4. **Establish OGE as the central repository for ethics records and training. These steps would include:**

Mandating ethics training and education programs for all agency ethics officials and the president's designee.

Requiring agencies to send to OGE, and OGE to maintain and, as appropriate, make available to the public agency records related to ethics rules and enforcement. Require OGE to promulgate regulations for determining whether a given record must be centrally maintained at OGE; generally, these should include laws, rules and regulations, recusals, waivers and exemptions, ethics advisory opinions, financial disclosure reports, compliance reviews, major documents related to enforcement actions, and any other conflicts of interest and ethics records required by law for the executive branch. All waivers and recusal agreements shall be available to the public.

Requiring all ethics records that are deemed public information by law or by the OGE director to be made available online in a searchable, sortable, and downloadable format.

# II. IMPROVING FINANCIAL DISCLOSURES OF CANDIDATES AND OFFICE HOLDERS

## A. Eliminate Loopholes in Current Financial Disclosure Requirements

### THE PROBLEM:

The Ethics in Government Act of 1978, as amended, requires high-level federal officials to publicly disclose personal financial interests in order to identify and prevent conflicts of interest, so as to instill “confidence in the integrity of the Federal Government” and to demonstrate “that they are able to carry out their duties without compromising the public trust.”<sup>23</sup> Yet the current disclosure requirements are not adequate to identify with confidence all potential conflicts of interest that may arise from President Trump’s retained ownership interest in the Trump Organization. Conflicts of interest may arise from a multitude of major creditors, investors and customers whose identities are unknown to the public.

- The Trump Organization is comprised of approximately 500 separate entities, many of which are limited liability corporations (LLCs).<sup>24</sup> Due to legal protections afforded by state laws, LLCs are shielded from making information publicly available about their investors, creditors and customers; this means that when these LLCs appear on Trump’s financial disclosure form, ethics officials cannot tell who is behind it, and therefore cannot know if it raises conflict-of-interest concerns.
- A substantial source of financing for President Trump’s business appears to have been Deutsche Bank’s private wealth management unit.<sup>25</sup> Because of the way loans from this unit are structured, without further information about these loans, there is a possibility that President Trump may be significantly indebted to foreign governments or other problematic actors.

### CURRENT LAW:

The Ethics in Government Act of 1978, as amended, contains significant shortcomings that can prevent conflicts of interest from being revealed under reporting requirements. For instance:

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<sup>23</sup> 5 C.F.R. § 2634.104(a) and (b).

<sup>24</sup> Letter from Sheri A. Dillon and William F. Nelson to Donald J. Trump, Mar. 7, 2016, *available at* [https://assets.donaldjtrump.com/Tax\\_Doc.pdf](https://assets.donaldjtrump.com/Tax_Doc.pdf); Jean Eaglesham, Mark Maremont and Lisa Schwartz, *How Donald Trump’s Web of LLCs Obscures His Business Interests*, *Wall Street Journal*, Dec. 8, 2016, *available at* <https://www.wsj.com/articles/how-donald-trumps-web-of-llcs-obscures-his-business-interests-1481193002>.

<sup>25</sup> Ben Protess, Jessica Silver-Greenberg and Jess Drucker, *Big German Bank, Key to Trump’s Finances, Faces New Scrutiny*, *New York Times*, July 19, 2017, *available at* <https://www.nytimes.com/2017/07/19/business/big-german-bank-key-to-trumps-finances-faces-new-scrutiny.html>.

- The Act does not require the president (or vice president) to file a public financial disclosure report until May 15 in the year following the president’s first year in office,<sup>26</sup> although President Trump, like President Obama and most other modern presidents, elected to file his first public financial disclosure report in his first year of office.
- The Act contains numerical caps for reporting the value of assets, transactions and liabilities by numerical category of income making it difficult to get a full understanding of the filer’s wealth and debt obligations.<sup>27</sup> Assets, transactions and liabilities that exceed the \$50 million threshold are reported simply as “greater than \$50,000,000.”
- The Act also contains numerical caps for reporting income.<sup>28</sup> Income that exceeds the \$5 million threshold is reported simply as “greater than \$5,000,000.”
- Except for pooled investment funds, the Act only requires minimal reporting information for LLCs and other privately held businesses, including those engaged in real estate or other activities susceptible to money laundering.<sup>29</sup> For privately held businesses, filers must provide the “name of the business;” “the line of business” and “describe the type of asset, including the city and state (or county and state) for real estate.”<sup>30</sup> Generally, the filer “need not itemize the assets and liabilities of the business” or provide other information about the business’s sources of income or investment.<sup>31</sup>

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<sup>26</sup> See 5 U.S.C. app. § 101(a)(d) and (f).

<sup>27</sup> 5 U.S.C. app. § 102(d)(1) The categories for reporting the amount or value of the items are as follows:

- (A) not more than \$15,000;
- (B) greater than \$15,000 but not more than \$50,000;
- (C) greater than \$50,000 but not more than \$100,000;
- (D) greater than \$100,000 but not more than \$250,000;
- (E) greater than \$250,000 but not more than \$500,000;
- (F) greater than \$500,000 but not more than \$1,000,000;
- (G) greater than \$1,000,000 but not more than \$5,000,000;
- (H) greater than \$5,000,000 but not more than \$25,000,000;
- (I) greater than \$25,000,000 but not more than \$50,000,000; and
- (J) greater than \$50,000,000.

<sup>28</sup> 5 U.S.C. app. § 102(a)(1) (A). The categories for reporting the amount or value of income are as follows:

- (A) not more than \$1,000;
- (B) greater than \$1,000 but not more than \$2,500;
- (C) greater than \$2,500 but not more than \$5,000;
- (D) greater than \$5,000 but not more than \$15,000;
- (E) greater than \$15,000 but not more than \$50,000;
- (F) greater than \$50,000 but not more than \$100,000;
- (G) greater than \$100,000 but not more than \$1,000,000;
- (H) greater than \$1,000,000 but not more than \$5,000,000; or
- (J) greater than \$5,000,000.

<sup>29</sup> See Emily Badger, *Anonymous Owner, L.L.C.: Why It Has Become So Easy to Hide in the Housing Market*, *New York Times*, Apr. 30, 2018, available at <https://www.nytimes.com/2018/04/30/upshot/anonymous-owner-llc-why-it-has-become-so-easy-to-hide-in-the-housing-market.html>.

<sup>30</sup> OGE Public Financial Disclosure Guide, *General guidance*, available at <https://www.oge.gov/Web/278cGuide.nsf/Resources/Part+6:+General+guidance>.

<sup>31</sup> OGE Public Financial Disclosure Guide, *Small Business*, available at <https://www.oge.gov/Web/278cGuide.nsf/fedb37db1c7052cd85257ea100446f55/08ff9449852503a85257f3f0058e54c?OpenDocument>.



- Current law does not require filers to report assets divested by the filer through a gift transfer to a family member, trust or third party, making it difficult to track a filer's compliance with divestiture commitments made to agency ethics officials.<sup>32</sup>

## SOLUTIONS:

1. **New Entrant Report for the President and Vice President** - Amend the Ethics in Government Act, 5 U.S.C. app. § 101(a), to require that the president and vice president file a public financial disclosure report by May 15 of the first year in which he takes office by deleting “or as a candidate for the position” from 5 U.S.C. app. § 101(a).
2. **Enhance Public Financial Disclosure Requirements for the President, Vice President and other Senior Officials** - Amend the Ethics in Government Act, 5 U.S.C. app. §§ 101- 111, to enhance financial disclosure requirements applicable to the president, vice president, cabinet members and senior White House staff as follows:

**Assets, transactions and liabilities that exceed \$50 million** - Require these filers to report the value of all assets, transactions and liabilities that exceed \$50 million to the nearest \$100 million. For example, for an asset with a value of \$80 million, the president would be required to report the asset as having a value of between \$50 million and \$100 million; and for a liability with a value of \$150 million, the president would be required to report the liability as having a value of between \$100 million and \$200 million;

**Income that exceeds \$5 million** - Require these filers to report the value of income that exceeds \$5 million to the nearest \$10 million. For example, for an asset with income of \$7.5 million, the president would be required to report the income as having a value of between \$5 million and \$10 million; Note: This amendment would not affect the reporting requirement for specific types of income that must be reported exactly (e.g., salary income).

3. **LLCs and other privately held businesses** - For any LLC or other privately held business<sup>33</sup> that is not divested prior to taking office, require these filers to report the identity and amounts received by the LLC or other privately held business from its major creditors, investors and customers, as follows:

**Identity of any major creditor and category of value of the total liabilities owed** by the LLC or other privately held business to that creditor, which exceeds \$10,000, by numerical categories;

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<sup>32</sup> See 5 U.S.C. app. §§ 102(a)(5)(A), 103(l).

<sup>33</sup> While we recommend elsewhere in this report that the law require the president and vice-president to divest all business interests that could pose risks of conflicts, if that recommendation is not adopted, an enhanced reporting requirement for LLCs and other privately held businesses would provide an alternative, if less effective, means for accountability.

**Identity of any major investor and category of value of its investment** in the LLC or other privately held business, which exceeds \$50,000, by numerical categories;

**Identity of any major customer and category of value of any sales transaction** made by the LLC or other privately held business to that customer, which exceeds \$50,000, by numerical categories.

- 4. Gift transfers** – Amend the Ethics in Government Act<sup>34</sup> to require public disclosure within 30 days after any gift transfer by the filer of assets that exceed \$1,000 in value when the gift is undertaken by the filer to comply with divestiture commitments made to agency ethics officials.

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<sup>34</sup> 5 U.S.C. app. § 102(a)(5), § 103(l).

## B. Require Candidates and Office Holders to Disclose Their Tax Returns

### THE PROBLEM:

President Trump's continuing refusal to release his tax returns runs contrary to common practice of leading presidential and vice presidential candidates over the last 40 years. All U.S. presidents and vice presidents, and most serious candidates for the White House, have routinely released their tax returns for public inspection at least since President Carter in 1976.<sup>35</sup> Some presidents did so even before it was common practice. President Nixon disclosed his returns for the years 1969 through 1972, even when under an IRS audit.<sup>36</sup>

Presidential tax transparency serves two critical functions. The first is to establish public confidence that our nation's top leaders are also paying their fair share of taxes. A second function is to highlight any potential financial conflicts of interest and help assure voters and Congress that any conflicts would be addressed. It is important that the public believe actions taken by the White House are not intended to enrich the president or vice president.

These concerns have occupied center stage with President Trump. Trump's vast business interests span the globe, and the specifics of these interests are largely unknown, in significant part because he has refused to release his returns. While the president is required to file a public financial disclosure form (Form 278e), these disclosures tend to be general in nature and not very informative (see the previous discussion of the problems with the public financial disclosure forms).

Tax returns provide different information than public financial disclosures. Tax returns tell the public: the annual income of the candidate; how much the candidate paid in taxes; what deductions and credits were claimed; how much the candidate gave to charity; the candidate's domestic and international investments; to whom the candidate owes money; and the identity of the candidate's related business interests. In the case of Trump, the tax returns would help spell out his domestic and international conflicts of interest, illuminate how much Trump has given to charity and the sources of these gifts, and may even help reveal whether there are financial ties between Trump and Russian business interests, potentially clarifying questions of collusion.

### CURRENT LAW:

There is no legal requirement that the president and vice president, or any candidate for federal office, disclose their tax returns to the public. In fact, the tax code provides specific privacy rights to all taxpayers preventing the public release of tax returns by anyone other than the individual taxpayer.

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<sup>35</sup> Tax History Project, *Presidential Tax Returns*, available at <http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns>.

<sup>36</sup> Daniel Hemel, "Can New York Publish President Trump's State Tax Returns?" *The Yale Law Journal Forum*, May 22, 2017, available at: <http://docplayer.net/49581859-Can-new-york-publish-president-trump-s-state-tax-returns.html>.

This right to taxpayer privacy is relatively new in American history. The concept of tax privacy was a contested issue throughout much of the 19th and 20th centuries, and was finally codified in the Tax Reform Act of 1976.<sup>37</sup> Several other nations, especially in Scandinavia, simply do not adhere to this principle and publicly post everyone's tax returns, public officials as well as ordinary citizens.

The American public has expressed strong support for tax transparency, particularly for presidential candidates. The Pew Research Center found that 60 percent of Americans polled believe that Trump has a responsibility to release his taxes.<sup>38</sup> Despite bipartisan support for presidential tax transparency, efforts to pass such a law have stalled so far in the 115th Congress.

## SOLUTIONS:

1. Congress should amend the tax code so that all candidates for the office of president or vice president are required to release their most recent tax returns to the public. Improved personal financial disclosure Form 278e, as discussed above, would probably provide sufficient disclosure of potential conflicts of interest for congressional candidates and other administration officeholders.

These tax returns should be filed with the Office of Government Ethics (OGE) within 30 days of the person's becoming a candidate for nomination or election to the office of president or vice president, or by May 15 of that calendar year, whichever is later but at least 30 days before the election, and on or before May 15 of each succeeding year of being a candidate for president or vice president or holding such office.

2. The tax code should specify a limited set of information that a candidate is permitted to redact before submitting tax returns to OGE for publication. Permitted redactions should include contact information such as street addresses, email addresses and phone numbers; dates of birth; names of immediate family members; social security numbers; and account numbers. OGE should have specific authority to require a filer to unredact information that does not fall into a specified category.
3. OGE should be established as the central repository for the tax filings, and tax filings should be made available to the public online in a searchable, sortable, and downloadable format.

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<sup>37</sup> Paul Schwartz, *The Future of Tax Privacy*, *National Tax Journal*, Dec. 2008, available at: [http://www.jstor.org/stable/41790485?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/41790485?seq=1#page_scan_tab_contents)

<sup>38</sup> *Negative Views of Trump's Transition, Amid Concerns about Conflicts, Tax Returns*, *Pew Research Center*, Jan. 10, 2017, available at: <http://www.people-press.org/2017/01/10/negative-views-of-trumps-transition-amid-concerns-about-conflicts-tax-returns/>

# III. ENHANCING RULES ON GIFTS TO CANDIDATES AND PUBLIC OFFICIALS

## A. Restrict Contributions to Inaugural Committees

### THE PROBLEM:

Fundraising for presidential inaugural committees has long been at odds with the spirit of our campaign finance system. Unlike restrictions on federal candidates, incoming presidents are permitted to raise unlimited amounts of money for their inaugural committees, which pay for any expenses surrounding inaugurations besides the ceremony itself.

Corporations and others with business before the federal government have often contributed checks of six or seven figures to inaugural committees in thinly veiled attempts to ingratiate themselves to the incoming administration. These gifts sometimes come with specific benefits. In 2017, for instance, million dollar-plus donors were rewarded with tickets to dinners and events featuring cabinet officials, members of the congressional leadership, Vice President Mike Pence, and President Trump.<sup>39</sup> Additionally, inaugural committees can be a vector for illegal foreign money; lobbyist Samuel Patten recently admitted in court to arranging for a prominent Ukrainian to purchase \$50,000 in tickets to inaugural events through his company and a straw purchaser in the United States.<sup>40</sup>

Aside from selling access to public officials, Trump's inaugural committee might have suffered from self-dealing. The Trump inaugural committee raised \$106.8 million.<sup>41</sup> That was about twice as much as raised by either of President Obama's inaugural committees.<sup>42</sup> Meanwhile, the Trump inauguration celebrations included less entertainment and fewer balls than other recent ones.<sup>43</sup> These facts left experts puzzled about what the Trump inaugural committee did with all that money.<sup>44</sup>

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<sup>39</sup> Carrie Levine, *Donald Trump offering huge perks for inauguration donors*, *The Center for Public Integrity*, Nov. 29, 2016, available at <https://www.publicintegrity.org/2016/11/29/20486/donald-trump-offering-huge-perks-inauguration-donors>

<sup>40</sup> Rosalind S. Helderan and Spencer S. Hsu, *American political consultant admits foreign money was funneled to Trump inaugural*, *Washington Post*, Sep. 1, 2018, available at [https://www.washingtonpost.com/local/public-safety/washington-consultant-for-ukraine-party-set-to-plead-guilty-to-violating-lobbyist-disclosure-law/2018/08/31/172cf2c8-ad23-11e8-a8d7-0f63ab8b1370\\_story.html](https://www.washingtonpost.com/local/public-safety/washington-consultant-for-ukraine-party-set-to-plead-guilty-to-violating-lobbyist-disclosure-law/2018/08/31/172cf2c8-ad23-11e8-a8d7-0f63ab8b1370_story.html).

<sup>41</sup> Press release, 58th Presidential Inaugural Committee, *58th Presidential Inaugural Committee Announces Final Update and Charitable Giving*, Feb. 15, 2018, available at <http://abcnews.go.com/images/Politics/presidential-inaugural-committee-announcement-2-15-18-FINAL.pdf>

<sup>42</sup> Danielle Kurtzleben, *We Now Know Trump's Inauguration Donors. Where the Money Went Is Another Story*, *National Public Radio*, Apr. 19, 2017, available at <https://www.npr.org/2017/04/19/524727575/we-now-know-trumps-inauguration-donors-where-the-money-went-is-another-story>.

<sup>43</sup> Brad Tuttle, *Trump's Low-Key Inauguration Will Be the Most Expensive in History*, *Time*, Jan. 18, 2017, available at <http://time.com/money/4637694/trump-inauguration-costs-obama-bush-performers/>.

<sup>44</sup> Ilya Marritz, *Where'd Trump's Record Inauguration Spending Go? "It's Inexplicable"*, *ProPublica*, Mar. 14, 2018, available at <https://www.propublica.org/article/trump-inc-podcast-trump-record-inauguration-spending>.

In February 2018, the Trump inaugural committee released cursory details of its spending.<sup>45</sup> But this disclosure only raised more questions. More than half of its money went to event planning firms. Of that, nearly \$26 million went to a firm that was created by a friend of incoming first lady Melania Trump just a couple months before the inauguration.<sup>46</sup> The details of how this vendor spent that money remain a mystery.

## CURRENT LAW:

Expenses related to the inauguration ceremony itself are paid by the federal government. By far, the biggest cost is for security to manage the massive crowds that typically attend inaugural ceremonies. Costs for ancillary functions, such as for concerts and balls, are financed with private money.<sup>47</sup>

About the only rules restricting contributions to inaugural committees are a prohibition on contributions from foreigners and a requirement that contributions of \$200 or more be disclosed to the Federal Election Commission within 90 days of the inauguration.<sup>48</sup>

Inaugural committees operate as nonprofits under section 501(c) of the tax code. Such entities are required to file tax returns and to make them available to the public. The tax returns of 501(c) groups include some details about their spending, such as the compensation provided to their highest-paid employees and highest-paid vendors.

Inaugural committees typically impose rules on themselves. For instance, the committee of President-elect Obama in 2009 limited contributions to \$50,000 and prohibited contributions from corporations and lobbyists.<sup>49</sup> Obama lifted most of those restrictions for his 2013 inauguration.<sup>50</sup> Trump said that he would not solicit contributions from corporations of more than \$1 million, but he did accept more than that from at least one person. Billionaire casino owner Sheldon Adelson contributed \$5 million to Trump's committee.<sup>51</sup>

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<sup>45</sup> Form 990, 58th Presidential Inaugural Committee, Feb. 6, 2018, *available at* <https://www.scribd.com/document/373660505/Trump-Inaugural-Committee-form-990>

<sup>46</sup> Maggie Haberman and Kenneth P. Vogel, *Trump's Inaugural Committee Paid \$26 Million to Firm of First Lady's Adviser*, *New York Times*, Feb. 15, 2018, *available at* <https://www.nytimes.com/2018/02/15/us/politics/trumps-inaugural-committee-paid-26-million-to-first-ladys-friend.html>.

<sup>47</sup> Roxanne Roberts, *How much does an inauguration cost? And who pays for what?*, *Washington Post*, Dec. 13, 2016, *available at* [https://www.washingtonpost.com/lifestyle/style/how-much-does-an-inauguration-cost-and-who-pays-for-what/2016/12/13/d7c1fe96-be48-11e6-91ee-1adddfe36cbe\\_story.html](https://www.washingtonpost.com/lifestyle/style/how-much-does-an-inauguration-cost-and-who-pays-for-what/2016/12/13/d7c1fe96-be48-11e6-91ee-1adddfe36cbe_story.html).

<sup>48</sup> 36 U.S.C. § 510(b)(1)

<sup>49</sup> Katharine Q. Seelye, *Obama Places Stringent Limits on Inaugural Contributions*, *New York Times*, Nov. 25, 2008, *available at* <https://www.nytimes.com/2008/11/26/us/politics/26inaug.html>.

<sup>50</sup> David Levinthal, *Obama inauguration sponsors spent millions influencing government*, *The Center for Public Integrity*, Jan. 18, 2013, *available at* <https://www.publicintegrity.org/2013/01/18/12050/obama-inauguration-sponsors-spent-millions-influencing-government>.

<sup>51</sup> Nicholas Fandos, *Trump to Accept Inauguration Funds From Corporations and Big Donors*, *New York Times*, Nov. 23, 2016, *available at* <https://www.nytimes.com/2016/11/23/us/politics/trump-inaugural-donors.html>) and Nicholas Confessore, Nicholas Fandos and Rachel Shorey, *Trump Inaugural Drew Big Dollars From Donors With Vested Interests*, *New York Times*, Apr. 19, 2017, *available at* <https://www.nytimes.com/2017/04/19/us/politics/trump-inauguration-sheldon-adelson-fundraising.html>.

There are no laws or regulations that limit how an inaugural committee may spend its money nor how an inaugural committee may disburse leftover funds.<sup>52</sup> There is also little mandatory disclosure of how the money was spent, other than what is required on the inaugural committee's tax filings.

## SOLUTIONS:

1. Rules for contributions to inaugural committees should be in line with those covering contributions to federal candidates. This would limit contributions to about \$5,000 per election cycle and mandate that any contribution come from a U.S. citizen, not a corporation or foreign national. Entertainers should be permitted to make in-kind contributions in excess of the limit, such as by performing for free or for a below market rate. But exceptions should not be made for other in-kind contributions, such as the free use of automobiles, that might resemble corporate sponsorships.
2. All expenditures shall be made for the purpose of paying for the presidential inaugural ceremony and functions and activities connected with the ceremony, including reasonable operating expenses of the committee, or disbursed as surplus funds according to procedures outlined below.
3. Disclosure rules should be amended to require prompt disclosure to the FEC of the expenditures by inaugural committees in a fashion similar to the requirements upon political committees.
4. Inaugural committees should be required either to return unspent money on a pro-rata basis to contributors, donate leftover money to charities that have no connection to the president, president-elect or individuals affiliated with the inaugural committee, or to turn over unspent money to the federal treasury.

Presidential inaugurations embody our government by the people, for the people. There is no reason to tarnish this event with commercialism or, worse, contributions that present the appearance or reality of buying favor. Large contributions from special interests cannot help but evoke cynicism over an event that should be an occasion for national pride.

The worst consequence of restricting contributions would be taking a little glitter off the ancillary festivities surrounding inaugurations. Most of the voters who actually elect our incoming presidents would probably be just fine with that.

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<sup>52</sup> Keenan Steiner, *After the inaugural balls, where does the extra money go?*, *Sunlight Foundation*, Jan. 9, 2013, available at <https://sunlightfoundation.com/2013/01/09/after-the-inaugural-balls-where-does-extra-money-go/>.

## B. Limit Contributions to the Library Funds of Sitting Presidents

### THE PROBLEM:

The tradition of sitting presidents raising money for their libraries presents a blatant risk of conflicts of interest that has manifested itself in practice.

During the last three years of his presidency, President Clinton received \$450,000 from the former wife of fugitive Marc Rich for his library fund. Clinton pardoned Rich in the final moments of his presidency.<sup>53</sup> In the final year of George W. Bush's presidency, *The Times* of London recorded a U.S. lobbyist and major Republican fundraiser offering to set up meetings for a Kazakh politician with Vice President Dick Cheney, Secretary of State Condoleezza Rice and, possibly, President Bush himself, in exchange for contributions that would include \$250,000 toward the Bush library.<sup>54</sup>

We have no idea how many similar episodes have escaped public attention.

The tradition of presidential libraries was initiated when President Franklin Roosevelt gave documents from his administration, along with a building to house them, to the federal government. Since then, Congress has determined that presidential documents belong to the public while it has granted authority for outgoing presidents to construct private buildings to hold the documents.<sup>55</sup>

But the buildings that former presidents have built to store their documents have come to resemble museums more than research facilities. President Barack Obama formalized this trend by declaring that his library will not even house the official documents from his administration. The documents, instead, will be stored and managed elsewhere by National Archives and Records Administration (NARA) at public expense, although digital versions may be available to Obama library visitors.<sup>56</sup>

Absent changes to the law, President Trump will be free to circle the globe in search of unlimited contributions to build his future library. Given Trump's expansive interpretation of a president's immunity from conflict-of-interest rules and his prior history of misusing his office to promote himself and his businesses, that is alarming.

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<sup>53</sup> James V. Grimaldi, [Denise Rich Gave Clinton Library \\$450,000](https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30/?utm_term=.3ccae03db1bd), *Washington Post*, Feb. 10, 2001, available at [https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30/?utm\\_term=.3ccae03db1bd](https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30/?utm_term=.3ccae03db1bd) and Milt Freudenheim, [The Fugitive Commodities Trader Who Can Go Home Again](https://www.nytimes.com/2001/01/22/business/the-fugitive-commodities-trader-who-can-go-home-again.html), *New York Times*, Jan 22, 2001, available at <https://www.nytimes.com/2001/01/22/business/the-fugitive-commodities-trader-who-can-go-home-again.html>.

<sup>54</sup> Daniel Foggo, [President George W Bush lobbyist in 'cash for access' row](https://www.thetimes.co.uk/article/president-george-w-bush-lobbyist-in-cash-for-access-row-76b0f6q5mtf), *The Times*, Jul. 13, 2008, available at <https://www.thetimes.co.uk/article/president-george-w-bush-lobbyist-in-cash-for-access-row-76b0f6q5mtf>; Paul Kiel, [In Wake of Lobbyist Story, Bush Library Fundraising Policies Remain Unclear](https://www.propublica.org/article/in-wake-of-lobbyist-story-bush-library-fundraising-policies-remain-715), *ProPublica*, Jul. 15, 2008, available at <https://www.propublica.org/article/in-wake-of-lobbyist-story-bush-library-fundraising-policies-remain-715>.

<sup>55</sup> National Archives and Records Administration, [Presidential Library History](https://www.archives.gov/presidential-libraries/about/history.html), available at <https://www.archives.gov/presidential-libraries/about/history.html>.

<sup>56</sup> Anthony Clark, [Presidential Libraries Are a Scam. Could Obama Change That?](https://www.politico.com/magazine/story/2017/05/07/presidential-libraries-are-a-scam-could-obama-change-that-215109), *Politico Magazine*, May 7, 2017, available at <https://www.politico.com/magazine/story/2017/05/07/presidential-libraries-are-a-scam-could-obama-change-that-215109>.



## CURRENT LAW:

Federal law permits NARA to accept the gift of facilities to be used as presidential libraries.<sup>57</sup> Over time, Congress has imposed increasing requirements that a gift to the government of a building for a library must be accompanied by an endowment to pay for the future management of the facility.<sup>58</sup>

Federal law imposes no restrictions on sitting presidents' permissions to raise money for their libraries, nor any requirements that the details of contributions be revealed.<sup>59</sup> While federal candidates for office are restricted on an anti-corruption rationale from accepting contributions that are particularly large or come from corporations or foreign countries, there are no restrictions on sitting presidents raising money for libraries. Presidents Clinton and George H.W. Bush, for instance, received about \$10 million each for their library funds from the royal family of the Kingdom of Saudi Arabia.<sup>60</sup>

A change to the law last decade did require federal lobbyists to disclose contributions they make to presidential library funds.<sup>61</sup>

Because documents created by a presidential administration belong to the public, NARA is obliged to store these documents and make them available to researchers if they are not classified or subject to other exemptions. This requirement applies whether the documents are stored in a privately funded library or a government-owned facility.

## SOLUTIONS:

Sitting presidents should not be permitted to raise money for the construction of private buildings or other legacy-building endeavors while they are still in office.

At a minimum, contributions to a sitting president's library fund should be subject to the same limits and disclosure requirements as campaign contributions to federal candidates. That would restrict contributions to about \$5,000 per election cycle, and require them to come from U.S. citizens – not corporations, foreign nationals or foreign governments. Once presidents have left office, they would be free to raise money as they wish to construct buildings in their names.

Obama's decision to forego the ostensible main purpose of a presidential library – stewardship of public documents – revealed how far these projects have strayed from their original purpose. If restricting incumbent presidents' freedom to raise money stunts the development of future presidential libraries, that's a price the public could easily live with.

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<sup>57</sup> 44 U.S.C § 2112

<sup>58</sup> National Archives and Records Administration, Report on Alternative Models for Presidential Libraries Issued In Response to The Requirements of PL110-404, Sept. 25, 2009, available at <https://www.archives.gov/files/presidential-libraries/reports/report-for-congress.pdf>.

<sup>59</sup> Center for Responsive Politics, Disclose Donors to Presidential Libraries, available at <https://www.opensecrets.org/action/issues/donors-to-presidential-libraries/>.

<sup>60</sup> John Solomon and Jeffrey H. Birnbaum, Clinton Library Got Funds From Abroad, *Washington Post*, Dec. 15, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/14/AR2007121402124.html>.

<sup>61</sup> Jacob R. Straus, Lobbying Registration and Disclosure: Before and After the Enactment of the Honest Leadership and Open Government Act of 2007, *Congressional Research Service*, Apr. 22, 2011, available at <https://fas.org/sgp/crs/misc/R40245.pdf>.

The fundamental value of a presidential library is its role as an archive of historical documents. Those documents are just as useful if read in a government building as a private one.

## C. Enhance Disclosure and Rules Covering Legal Defense Funds

### THE PROBLEM:

While the House and Senate have established specific procedures for legal defense funds for members of Congress, no such concrete guidelines and procedures exist for the executive branch. This has not been much of a problem in the past, given the previous infrequent use of legal defense funds by executive branch personnel. However, more executive branch personnel today are facing legal challenges and may need to make use of legal defense funds and other avenues to pay for those expenses. Yet, the Office of Government Ethics (OGE) has very few guidelines as how to establish and finance such funds and no specific rules ensuring the avoidance of conflicts of interest.

Lacking such guidelines and standards for executive branch legal defense funds, several new legal defense funds have been established for and/or by current and former executive branch personnel in an ad hoc fashion and without much guidance from OGE. Individual legal defense funds have been established for former Trump National Security Adviser Michael Flynn and former EPA Director Scott Pruitt; neither has disclosed how much money has been raised or who donated.<sup>62</sup> Of course, any rules promulgated by OGE governing legal defense funds would likely only apply to an official while in public office but conceivably could set a standard for voluntary compliance by those who have left the executive branch.

Just as problematic, allies of President Trump and his legal team established an unprecedented legal defense fund, called the Patriot Legal Expense Fund Trust, LLC (“Patriot Fund”), designed to pay the legal bills of a large class of campaign aides and executive branch personnel related to the investigation of Russian interference in the 2016 elections.<sup>63</sup> As a radical departure from past practice in the executive branch, the Patriot Fund was established not as a trust for one individual but as a limited liability company that is structured to qualify for tax treatment as a political organization, with a virtually unlimited number of potential recipients. Recipients of the funds may include employees, consultants and volunteers of the Trump campaign and transition team as well as the Trump administration.<sup>64</sup> The Patriot Fund’s manager selects recipients without coordinating with them or their agency’s ethics officials and without disclosing the criteria used for selection.<sup>65</sup> The Patriot Fund’s charter permits the manager to taint the pool of money received from donors by accepting donations from “prohibited sources” – including those with business pending before White House and agency personnel – subject only to a requirement that the manager steer funds from these prohibited sources to recipients outside the government.<sup>66</sup> Among other problems, the fund’s charter document incorrectly defines the term “prohibited source,” prohibits the fund manager from coordinating with recipients in order to identify

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<sup>62</sup> Peter Overby, [Legal Defense Funds For Trump Allies Multiply](https://www.npr.org/2018/06/15/620230403/legal-defense-funds-for-trump-allies-multiply), *National Public Radio*, Jun. 15, 2018, available at <https://www.npr.org/2018/06/15/620230403/legal-defense-funds-for-trump-allies-multiply>.

<sup>63</sup> Michelle Ye Hee Lee, [Legal defense fund for Trump aides launches amid questions about donor transparency](https://www.washingtonpost.com/politics/legal-defense-fund-for-trump-aides-launches-amid-questions-about-donor-transparency/2018/02/28/ea7a8c92-1a6d-11e8-9de1-147dd2df3829_story.html), *Washington Post*, Feb. 28, 2018, available at [https://www.washingtonpost.com/politics/legal-defense-fund-for-trump-aides-launches-amid-questions-about-donor-transparency/2018/02/28/ea7a8c92-1a6d-11e8-9de1-147dd2df3829\\_story.html](https://www.washingtonpost.com/politics/legal-defense-fund-for-trump-aides-launches-amid-questions-about-donor-transparency/2018/02/28/ea7a8c92-1a6d-11e8-9de1-147dd2df3829_story.html); Walter Shaub, [Trump’s Ethics Office has blessed an unethical legal defense fund for the president’s associates](http://www.latimes.com/opinion/op-ed/la-oe-shaub-patriot-fund-20180209-story.html), *Los Angeles Times*, Feb. 9, 2018, available at <http://www.latimes.com/opinion/op-ed/la-oe-shaub-patriot-fund-20180209-story.html>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

prohibited sources, makes the process for selecting recipients secret, creates the potential for influencing testimony by withholding funds from eligible recipients whose testimony is adverse to the president, and politicizes the process by allowing the fund’s manager to communicate with the president’s campaign.

Several Democratic members of Congress sent a letter to OGE Acting Director David Apol raising a slew of concerns about the management, operations and transparency of the Patriot Fund.<sup>67</sup> “The structure of the Fund appears to allow secret donations to these individuals, and it raises serious concerns about whether it complies with ethics, tax, and election laws, as well as OGE guidance,” lawmakers wrote.<sup>68</sup> Following the confirmation of Emory Rounds as OGE’s new director, several Democratic members of Congress raised these same concerns with the new director.<sup>69</sup>

These are the types of problems and concerns that arise concerning legal defense funds as a result of OGE’s failure to develop clear and written guidelines and standards for such funds. It is time that such guidelines and standards be set in place for executive branch legal defense funds, either through legislation or rulemaking by OGE.

## CURRENT LAWS AND RULES

When members of Congress and officials of the Executive Branch face legal investigations related to their campaigns or official duties or face alleged ethical violations, they may establish a fund – commonly referred to as a legal defense fund or legal expense trust – to pay for their legal defense. These funds are governed by detailed House and Senate ethics rules for members of Congress and congressional staff. For the executive branch, the Office of Governmental Ethics has merely offered non-binding advice on how legal defense funds should be established and operate. The rules governing congressional legal defense funds are more restrictive and much more specific than the informal guidelines that govern funds for executive branch officials.

Legal defense funds have only rarely been employed by executive branch personnel in recent history, making the lack of clear rules governing executive branch legal defense funds less problematic – until now. Executive branch personnel today are facing increasing legal challenges and are in greater need of clear rules and guidelines as how to properly establish and finance legal defense funds.

In 1993, OGE provided some guidance on how legal defense funds should operate.<sup>70</sup> More recently, OGE provided new advice on the disclosure of donations to legal defense funds on its website. The section entitled “FAQs: Gifts and Travel Reimbursements,” advises that public officials should at least

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<sup>67</sup> Letter from Democratic Members of the House of Representatives to David Apol, Acting Director of the Office of Government Ethics, Apr. 2, 2018, available at: <https://assets.documentcloud.org/documents/4428488/House-Democrats-call-on-Office-of-Government.pdf>.

<sup>68</sup> *Id.* at 1.

<sup>69</sup> Letter from Democratic Members of the Senate to Emory Rounds, Director of the Office of Government Ethics, Aug. 2, 2018, available at <https://www.hassan.senate.gov/imo/media/doc/RoundsPatriotFundLetterSIGNED.180802.pdf>.

<sup>70</sup> Office of Government Ethics, 23 x 21: Letter to an Alternate Designated Agency Ethics Official, Aug. 30, 1993, available at [https://oge.gov/web/OGE.nsf/Legal%20Advisories/0C4D87012885C50385257E96005FBC7B/\\$FILE/93x21.pdf?open](https://oge.gov/web/OGE.nsf/Legal%20Advisories/0C4D87012885C50385257E96005FBC7B/$FILE/93x21.pdf?open)

disclose donors of more than \$390 to legal defense funds on the official's annual personal financial disclosure reports.<sup>71</sup> Once again, however, this is informal advice.

## SOLUTIONS:

It is in the interest of all parties concerned that clear and precise rules be formulated governing the establishment, financing and operations of legal defense funds for the executive branch. Executive branch personnel need to understand proper procedures for such funds; OGE needs to know when and how the operation of legal defense funds may run afoul of conflict of interest rules; and the public needs reassurance that executive branch personnel under legal challenge are not being placed in a position of undue influence by large donors.

To address these concerns, OGE should determine whether it has adequate authority to issue regulations governing the establishment of legal defense funds; if not, legislation should give OGE such authority.

Executive branch rules on legal defense funds should borrow from congressional rules. Such rules should include: (i) the legal defense fund must be established as a trust for a single individual; (ii) contribution limits, so that no donor may attempt to buy undue influence with the official; (iii) source prohibitions to avoid serious conflicts of interest; and (iv) full transparency of the sources and expenditures of legal defense funds to assure the public that the funds are not being abused as a means of currying political favor.

Specifically, Congress and OGE should:

- impose a contribution limit of \$5,000 per donor per year, excluding immediate family members;
- require that donations only come from individuals, not corporations, unions or other organizational entities;
- prohibit donations from lobbyists, foreign agents, and persons who have business pending before the official or the official's agency;
- mandate full disclosure to OGE of the sources and expenditures of funds on a quarterly basis, to be filed electronically and posted on the Internet in a searchable, sortable and downloadable database.
- establish a recusal requirement for recipient officers from participating in particular matters involving specific parties in which a donor to the legal defense fund is a party or represents a party for a period of four years.
- require that legal defense funds be established as a trust and that they benefit only a single executive branch employee so that conflicts of interest can be screened on an individual basis, and

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<sup>71</sup> Office of Government Ethics, [FAQs: Gift and Travel Reimbursements](https://www.oge.gov/Web/278cGuide.nsf/Content/FAQs~FAQs:+Gifts+and+Travel+Reimbursements), available at <https://www.oge.gov/Web/278cGuide.nsf/Content/FAQs~FAQs:+Gifts+and+Travel+Reimbursements>.

mandate close coordination between the trustee, the employee, and agency ethics officials in order to ensure that prohibited sources are properly identified; and

- require that any employee who files a public financial disclosure must disclose the true source of any donation. This means identifying in the financial disclosure report each and every individual and organization directly or indirectly responsible for the donation, even if that individual or organization is not the immediate source of the donation.

# IV. STRENGTHENING THE INTEGRITY OF GOVERNMENT

## A. Protect the Public From the Dangers of Nepotism

### THE PROBLEM:

In a functioning democracy, those who make decisions should not be loyal to any particular leader, but instead to the Constitution and the rule of law. When those in power choose relatives who may ostensibly be more loyal to them than to the institution of government and the citizens it functions for, the checks and balances against an abuse of power cannot function.

In addition, relatives are likely not to have the expertise most relevant to the positions they are taking, but instead gain their post due to their close connection and perceived allegiance to the person in charge. In this situation, we may see sloppy policy-making, and in the event that laws are broken, undermined, or subverted by their boss, we would be more likely to see denials or normalization of the corruption, and to see its persistence.

There is also the threat that family members positioned closely to the leader may seek special favors, contracts, or security access.

Nepotism is the hallmark of authoritarian regimes, but has never been the norm in a well-functioning democracy. In the late 1960's, Congress passed the Federal Anti-Nepotism Statute, sometimes referred to as the “Bobby Kennedy law” because it came not long after President John F. Kennedy appointed his brother as attorney general.<sup>72</sup> The law made it illegal to appoint close relatives to official positions. By choosing his son-in-law Jared Kushner<sup>73</sup> and his daughter Ivanka Trump<sup>74</sup> to be senior advisors, President Trump has tested the boundaries of this law.

### CURRENT LAW:

The anti-nepotism law, 5 U.S.C. § 3110, states that a public official “may not appoint, employ, promote, advance, or advocate for appointment” a relative to an agency or office that is run by the official.

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<sup>72</sup> 5 U.S.C. § 3110. Note that one of the bill's sponsors denied that Kennedy was the prime driver, expressing the view that post offices and Congress were the real problem areas. Olivia B. Waxman, Behind the Law That May Keep Donald Trump's Children From White House Jobs, *Time*, Nov. 18, 2016, available at <http://time.com/4574971/donald-trump-transition-jared-kushner-legal-anti-nepotism-law/>.

<sup>73</sup> Alan Yuhas, Trump names son-in-law Jared Kushner as senior adviser, testing anti-nepotism law, *The Guardian*, Jan. 10, 2017, available at <https://www.theguardian.com/us-news/2017/jan/09/jared-kushner-senior-adviser-donald-trump>.

<sup>74</sup> Maggie Haberman and Rachel Abrams, Ivanka Trump, Shifting Plans, Will Become a Federal Employee, *New York Times*, Mar. 29, 2017, available at <https://www.nytimes.com/2017/03/29/us/politics/ivanka-trump-federal-employee-white-house.html>.

When Trump sought to hire Kushner, he sought an opinion from the Office of Legal Counsel (OLC) of the Department of Justice. The OLC said that a president seeking a relative's advice could either "seek that advice on an unofficial, ad hoc basis" without the status and responsibilities of a White House job, or appoint the relative to a post "and subject him to substantial restrictions against conflicts of interest."<sup>75</sup>

In the opinion, the OLC noted that its current opinion contradicts earlier OLC opinions, which barred the president from appointing a family member "to permanent or temporary employment as a member of the White House staff."<sup>76</sup>

Today's OLC concludes that the president's son-in-law and daughter are cleared to work in the administration on an official basis as advisors in part because the president has authority to hire White House positions without oversight.<sup>77</sup> That argument hinges on a different statute that gives the president special hiring authority to appoint employees "without regard to any other provision of law regulating the employment."<sup>78</sup>

The anti-nepotism law has a clear intention, and Ivanka Trump's and Jared Kushner's White House posts fly in its face. The ambiguity in the anti-nepotism law proves the need to update it. In addition, since the DOJ allowed Kushner to serve, as stated in the OLC opinion, the need for him to disclose his financial and ethical conflicts is clear. When he later proved unable to do so easily, he lost his interim high-level security clearance<sup>79</sup>, but not his job.

## SOLUTIONS:

We recommend three changes to improve the current anti-nepotism law. 1) Amend the rule to prohibit appointments of immediate family to the White House staff, 2) create a new rule limiting government contracts held by immediate family, and 3) clarify interim security clearance rules to ensure no preferential treatment.

- 1. Clarify the anti-nepotism law.** The anti-nepotism law, 5 U.S.C. § 3110, needs to be clarified to confirm that it supersedes 3 U.S.C. § 105(a) and 106(a) as to presidential and vice presidential appointments generally. The anti-nepotism law must clearly state that, notwithstanding these applicable appointment authorities, the president is prohibited from appointing a relative to any position in the executive branch, including a position in the White House Office or the Office of the Vice President.

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<sup>75</sup> Office of Legal Counsel, U.S. Department of Justice, "[Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office](https://www.justice.gov/opinion/file/930116/download)", Jan. 20, 2017, at 14, available at <https://www.justice.gov/opinion/file/930116/download>.

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 14.

<sup>78</sup> 3 U.S.C. § 105(a)(1)

<sup>79</sup> Ashley Parker, Josh Dawsey, Philip Rucker, [Security clearances downgraded for Kushner and other White House officials](https://www.washingtonpost.com/politics/security-clearances-downgraded-for-kushner-and-other-white-house-officials/2018/02/27/106d763c-1c01-11e8-9de1-147dd2df3829_story.html?utm_term=.542e159f59e3), *Washington Post*, Feb. 27, 2018, available at [https://www.washingtonpost.com/politics/security-clearances-downgraded-for-kushner-and-other-white-house-officials/2018/02/27/106d763c-1c01-11e8-9de1-147dd2df3829\\_story.html?utm\\_term=.542e159f59e3](https://www.washingtonpost.com/politics/security-clearances-downgraded-for-kushner-and-other-white-house-officials/2018/02/27/106d763c-1c01-11e8-9de1-147dd2df3829_story.html?utm_term=.542e159f59e3).



- 2. Limit government contracts held by immediate family members.** To ward against preferential treatment as well as potential conflicts of interest in the contracting process, 42 U.S.C. § 6962, the federal procurement law, should be amended and the Office of Procurement designated to create a rule to ensure that immediate family members of the president cannot hold or benefit from any government contract over the amount of \$500,000.
- The [prohibition/rule] should prohibit a family member from (a) being a party to such a contract, (b) holding a vested or unvested beneficial interest in a trust that is a party to such contract, (c) holding an ownership interest a business entity that is a party to such contract, and (d) benefiting from any other financial arrangement involving a party to the contract. (It would not apply to employment with, or ownership of interests in, a publicly traded company that does business with the government.)
  - The term “immediate family member” should be defined to include a spouse, parent, spouse’s parent, minor or adult child, son-in-law, daughter-in-law, or sibling of either the president or the vice president.
  - An exception may be made for a parent, spouse’s parent, adult child, son-in-law, daughter-in-law, or sibling of either the president or the vice president only if all of the following conditions are met: (a) the individual held an interest in the contract prior to the election, (b) the president (or vice president) has never held any interest in the contract, and (c) all noncareer employees are recused from matters related to the contract and supervision of career employees involved in the contract.
- 3. Ensure that security clearance determinations are not affected by nepotism.** The law defining security clearances, 50 U.S.C. § 3341, should clarify that immediate family members of the President should not gain interim or full security clearance if not otherwise qualified.

## B. Require Disclosure of White House Visitor Logs

### THE PROBLEM:

Visitor logs provide meaningful insight into who the president and staff are consulting with on policy matters. Furthermore, these records have proven to be of tremendous value to the public in revealing key information about the potential influences that may shape a president's decisions and legislative proposals on critical issues. The Trump administration, like some others before it, have refused to release this information to the public. At the same time, White House officials have continued to meet with and seek advice from former corporate executives and outside business leaders to help shape, and in some cases reverse, a variety of policies, including those regarding the Export-Import Bank and the NAFTA trade pact with Canada and Mexico.<sup>80</sup> Many of these meetings have occurred at President Trump's various privately-owned properties, including his Florida resort at Mar-a-Lago and his golf courses in Virginia and New Jersey.

### CURRENT LAW:

The issue of the legal status of White House visitor logs dates back to the George W. Bush administration, which took the position that such records are not available to the public under the Freedom of Information Act.<sup>81</sup> CREW sued, but the administration ended before it could be finally resolved. The Obama administration initially adopted the view of its predecessor, so again CREW sued.<sup>82</sup> As part of a settlement of the lawsuit, the administration pledged to actively post visitor logs on an ongoing basis with some exceptions.<sup>83</sup>

The records voluntarily disclosed were themselves not perfect, as watchdog Center for Public Integrity noted in its comprehensive analysis of the records.<sup>84</sup> However, after seven years of proactive disclosure of visitor logs under Obama, the Trump administration broke from this policy completely, restricting White House visitor logs from public scrutiny due to "grave national security risks and privacy concerns."<sup>85</sup> CREW, along with the National Security Archive and the Knight First Amendment Institute at Columbia University, renewed its legal challenge on this issue.

Separately, Public Citizen also challenged the Trump administration's decision in a slightly different context. On February 13, 2018, the administration agreed to release visitor logs for certain offices within the White House dating back to the beginning of Trump's time in office as part of a settlement of this

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<sup>80</sup> Eli Stokols, Michael C. Bender, *Donald Trump's Recent Policy Reversals Reflect Business Influence*, *Wall Street Journal*, Apr. 13, 2017, available at <https://www.wsj.com/articles/donald-trumps-recent-policy-reversals-reflect-business-influence-1492129555>

<sup>81</sup> David Morgan, *White House Blocks Access To Visitor Logs*, *CBS News*, Jan. 5, 2007, available at <https://www.cbsnews.com/news/white-house-blocks-access-to-visitor-logs/>.

<sup>82</sup> Fred Schulte, Viveca Novak, *White House visitor logs riddled with holes*, *Center for Public Integrity*, May 19, 2014, available at <https://www.publicintegrity.org/2011/04/13/4115/white-house-visitor-logs-riddled-holes>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Merrit Kennedy, *White House Says It Will No Longer Release Visitor Logs To The Public*, *National Public Radio*, Apr. 14, 2017, available at <https://www.npr.org/sections/thetwo-way/2017/04/14/523968950/white-house-says-it-will-no-longer-release-visitor-logs-to-the-public>

suit.<sup>86</sup> However, the many redactions within the records raise substantial questions.<sup>87</sup> CREW's lawsuit is pending.

## SOLUTIONS:

Congress should require disclosure of visitor logs to normalize transparency and openness in government.

1. Congress should impose a separate requirement, outside of the Freedom of Information Act, to disclose White House visitor log records. As CREW and Public Citizen have, and continue to argue, the Freedom of Information Act does indeed require the disclosure of these records when held by agencies outside the White House. However, the experience with the Obama administration's White House visitor logs demonstrates that these logs are of substantial public interest and importance, and so we believe they should be proactively disclosed.

Congress should use the exceptions outlined by Obama administration in its visitor log disclosure policy, but should clarify the exception relating to "particularly sensitive" records that may be withheld until they are no longer sensitive. The phrase "particularly sensitive" is broad in nature, and may lead to the withholding of records the public should be entitled to. Clarifying what types of meetings would qualify for this exception and what should trigger their release would allow sensitive information to be protected without compromising the American public's right to transparency.

2. Visitor log records, when kept, should be clear and accurate such that the public can understand them. These records should contain the names of all visitors, the date and time of their visit, a brief and accurate description of the nature of the visit, as well as confirmation that the guests were actually present. They should be available via searchable database. Genuine transparency requires not just the keeping of records, but the maintenance of records that are accurate, complete, and unambiguous.
3. Visitor log records should not be solely restricted to meetings that occur at the White House. President Trump has utilized various locations to conduct official business outside of the White House, including his Mar-a-Lago estate and other Trump Organization-owned properties. Visitor log records should be kept and available for public inspection from any location the president is meeting with individuals or groups that can potentially influence policy matters.

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<sup>86</sup> Josh Gerstein, Trump administration agrees to post visitor logs for some White House offices, *Politico*, Feb. 15, 2018, available at <https://www.politico.com/story/2018/02/15/trump-visitor-logs-white-house-413016>

<sup>87</sup> Megan R. Wilson, White House releases limited visitor logs after settlement, *The Hill*, Apr. 11, 2018, available at <http://thehill.com/homenews/administration/382720-white-house-releases-limited-visitor-logs-after-settlement>

## C. Ensure Effective Policies Govern White House Contacts With the Department of Justice

### THE PROBLEM:

Politicization – or, in extreme cases, personal control – of law enforcement is a hallmark of authoritarian regimes. Preventing this in the United States constitutional system can be particularly challenging because, in general, law enforcement is constitutionally committed to the executive branch, meaning that checks and balances from the other branches are necessarily limited. However, presidents of both parties have historically recognized that protecting evenhanded enforcement is critical to the rule of law, and therefore to the functioning of democracy. As a result, presidents of both parties have taken steps to exercise self-restraint, and most importantly have put in place procedural guard rails to reinforce that self-restraint.

In general, these guard rails have taken the form of what are called “contacts policies” – that is, policies that (1) limit communications between the White House and law enforcement officials to certain approved topics and (2) route those communications generally through senior lawyers on both sides, to avoid improper influence or the appearance of a thumb on the scale. The potential weakness in these policies is obvious: they rely largely on self-enforcement.

President Trump’s conduct while in office has raised serious doubt about whether he and his administration are committed to this self-restraint. For example, less than a month after taking office, reports emerged that U.S. intelligence agencies had intercepted communications between multiple Trump campaign officials and senior Russian intelligence officials before the election.<sup>88</sup> Thereafter, then-White House Chief of Staff Reince Priebus directly approached then-FBI Deputy Director Andrew McCabe and then-FBI Director James Comey, asking the FBI to publicly disavow the story.<sup>89</sup> When the FBI refused, the Trump administration then reportedly persuaded officials from the intelligence community to speak to reporters off the record, where they argued that the contacts previously reported were not “frequent” but were instead “sporadic.”<sup>90</sup> The effort then extended even so far as to involve members of Congress, as White House staffers reportedly asked Sen. Richard Burr, chair of the Senate Select Committee on Intelligence, and Rep. Devin Nunes, chair of the House Permanent Select Committee on Intelligence, to knock down the story.<sup>91</sup> These unprecedented efforts from the early days of the Trump administration – three months before Special Counsel Robert Mueller was appointed to investigate Russian interference in the 2016 election and possible involvement of Trump campaign

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<sup>88</sup> Michael S. Schmidt, Mark Mazzetti and Matt Apuzzo, Trump Campaign Aides Had Repeated Contacts With Russian Intelligence, *New York Times*, Feb. 14, 2017, available at <https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html>.

<sup>89</sup> Jim Sciutto, Evan Perez, Shimon Prokupez, Manu Raju and Pamela Brown, FBI refused White House request to knock down recent Trump-Russia stories, *CNN*, Feb. 24, 2017, available at <https://www.cnn.com/2017/02/23/politics/fbi-refused-white-house-request-to-knock-down-recent-trump-russia-stories/>.

<sup>90</sup> Greg Miller and Adam Entous, Trump administration sought to enlist intelligence officials, key lawmakers to counter Russia stories, *Washington Post*, Feb. 24, 2017, available at [https://www.washingtonpost.com/world/national-security/trump-administration-sought-to-enlist-intelligence-officials-key-lawmakers-to-counter-russia-stories/2017/02/24/c8487552-fa99-11e6-be05-1a3817ac21a5\\_story.html](https://www.washingtonpost.com/world/national-security/trump-administration-sought-to-enlist-intelligence-officials-key-lawmakers-to-counter-russia-stories/2017/02/24/c8487552-fa99-11e6-be05-1a3817ac21a5_story.html).

<sup>91</sup> *Id.*

officials in those efforts – demonstrate how quickly these efforts by political officials can spiral out of control in the absence of procedural guardrails.

While criminal investigations involving the president and those close to him paint a dramatic picture of the critical role of a contacts policy, it is important to note that the principle of evenhanded enforcement logically applies to *all* enforcement matters involving particular parties – including those with no connection to the White House, and even those enforcement matters that are not criminal, such as enforcement actions by agencies like the Environmental Protection Agency, the Securities and Exchange Commission, and others. President Trump’s record of telegraphing on Twitter his views on such matters as merger approvals<sup>92</sup> and tax enforcement<sup>93</sup> against his perceived political allies or enemies raises substantial questions as to whether he or members of his White House exercise appropriate restraint in direct, non-public contact with relevant agencies. Given that even the Trump White House contacts policy, unlike the Obama policy, apparently does not explicitly apply to contacts with agencies other than the Justice Department,<sup>94</sup> the risk seems high.

## CURRENT LAW:

Currently, there is no legal requirement that the White House, or any other part of the executive branch, have a contacts policy at all. As discussed above, the Trump White House does have such a policy, although it is narrower than the previous administration’s policy because it apparently applies only to contacts with the Department of Justice, not other executive agencies with enforcement authority.

On the other side of the coin, *following* contact policies can help *prevent* violations of law. For example, a federal obstruction of justice statute, 18 U.S.C. § 1505, criminalizes “communication[s]” that “influence[], obstruct[], or impede[] ... the due and proper administration of the law.”<sup>95</sup> Obstruction of justice also formed the basis for an article of impeachment against Presidents Nixon and Clinton.<sup>96</sup>

Finally, the principles underlying contact policies are consonant with several important constitutional principles, including the Due Process clause, the Equal Protection clause, and Article II’s Take Care clause.<sup>97</sup>

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<sup>92</sup> Margaret Harding McGill and John Hendel, [Trump tweet seen as boost for Sinclair deal](https://www.politico.com/story/2018/04/02/trump-sinclair-merger-tweet-453014), *Politico*, Apr. 2, 2018, available at <https://www.politico.com/story/2018/04/02/trump-sinclair-merger-tweet-453014>; Emily Goldberg, [Trump derides CNN days after administration moves to block media merger](https://www.politico.com/story/2017/11/25/trump-cnn-time-warner-justice-department-259707), *Politico*, Nov. 25, 2017, available at <https://www.politico.com/story/2017/11/25/trump-cnn-time-warner-justice-department-259707>.

<sup>93</sup> Michael D. Shear, Nick Wingfield and Cecilia Kang, [Trump Attacks Amazon, Saying It Does Not Pay Enough Taxes](https://www.nytimes.com/2018/03/29/us/politics/trump-amazon-taxes.html), *New York Times*, Mar. 29, 2018, available at <https://www.nytimes.com/2018/03/29/us/politics/trump-amazon-taxes.html>.

<sup>94</sup> In the course of reporting on the Reince Priebus matter, *Politico* obtained a copy of the policy. Isaac Arnsdorf, [Priebus talk with FBI appears to break White House rules](https://www.politico.com/story/2017/03/reince-priebus-fbi-discussion-white-house-rules-236192), *Politico*, Mar. 17, 2017, available at <https://www.politico.com/story/2017/03/reince-priebus-fbi-discussion-white-house-rules-236192>. A copy of the policy is linked in the story.

<sup>95</sup> For further discussion of how this could apply to some of President Trump’s communications with law enforcement, see Barry H. Berke, Noah Bookbinder and Norman L. Eisen, [Presidential Obstruction of Justice: The Case of Donald J. Trump](https://www.brookings.edu/wp-content/uploads/2017/10/presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf), *Brookings Institution*, at 34-80, available at <https://www.brookings.edu/wp-content/uploads/2017/10/presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf>.

<sup>96</sup> *Id.* at 105-107.

<sup>97</sup> For further discussion of these and other related issues, see Justin Florence, [On the Importance of Limiting White House-DOJ Contacts: It’s Not Just About Obstruction](https://www.lawfareblog.com/importance-limiting-white-house-doj-contacts-its-not-just-about-obstruction), *Lawfare*, May 22, 2017, available at <https://www.lawfareblog.com/importance-limiting-white-house-doj-contacts-its-not-just-about-obstruction>.

## SOLUTIONS:

Congress should revive and pass the bipartisan, bicameral proposed legislation, last considered in 2007, that requires that it receive reports of any communication on enforcement matters between the White House and the Department of Justice *except* communications involving the senior officials on each side.<sup>98</sup> A critical feature of that bill is that statute itself specifies exactly which senior officials' communications are exempt. As the Senate Report on that body's version of the bill notes, the legislation "applies a fundamental tool of Congressional oversight – the reporting requirement – to the issue of communications between the [Justice] Department and the White House regarding pending investigations and cases ... [thereby] provid[ing] the Congress, and the public, with a clear sense of the degree to which the White House is involved in the administration of justice."<sup>99</sup>

In reviving this proposed legislation, however, Congress should expand its reach beyond the Department of Justice to ensure that other agencies that exercise enforcement authority, such as the Department of Homeland Security, are included as appropriate.

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<sup>98</sup> Security from Political Interference in Justice Act of 2007, S. 1845/H.R. 3848 (110th Cong.).

<sup>99</sup> S. Rept. 110-203, at 9-10 (Oct. 23, 2007).

## D. Close Loopholes in the Hatch Act

### THE PROBLEM:

The Hatch Act<sup>100</sup> is a federal law that prohibits federal employees from engaging in certain political activities while they are on duty or in the workplace. For a particular activity to be prohibited, it must be “directed at the success or failure of a political party, partisan political group, or candidate for partisan political office.”<sup>101</sup> White House aides, including Kellyanne Conway, Dan Scavino, and Jared Kushner,<sup>102</sup> and senior officials including Ambassador Nikki Haley and Interior Secretary Ryan Zinke,<sup>103</sup> have all engaged in conduct that at least appears to violate the Hatch Act.

Although the U.S. Office of Special Counsel (OSC) is generally empowered to enforce the Hatch Act’s restrictions on partisan political activity by government employees, it must rely on the President to take action against senior White House aides and most political appointees.<sup>104</sup> For example, when OSC found that Conway twice violated the Hatch Act in television interviews in November and December of 2017, it referred the violations to the President<sup>105</sup>; the White House took no action in response.<sup>106</sup> For senior officials such as these, it comes as no surprise that a president would be less inclined to take disciplinary action.

In addition to questions of enforcement, one part of the law itself that is not clear is *when* a person becomes a candidate for partisan political office. In the case of President Trump, this meant that although he filed his paperwork with the Federal Election Commission for re-election *on the day* he was inaugurated (January 20, 2017)<sup>107</sup>, and his campaign was continually actively raising and spending money,<sup>108</sup> it was not until he announced a campaign manager on February 27, 2018,<sup>109</sup> over a year later, that he was considered a candidate for the 2020 election for Hatch Act purposes.<sup>110</sup>

This mismatch creates a situation ripe for abuse. Without a clear statement of when a person is a candidate for partisan political office, federal employees are left uncertain about the propriety of their own conduct. Even more importantly, if fundraisers and other campaign activity are happening, federal

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<sup>100</sup> 5 U.S.C. § 7321 et seq.

<sup>101</sup> U.S. Office of Special Counsel, Guidance on President Trump’s Status as a Candidate and Its Effect on Activity in the Federal Workplace, Feb. 7, 2017, available at <https://osc.gov/Resources/2017-President-Candidate-Guidance.pdf>.

<sup>102</sup> Julie Hirschfeld Davis, White House Aides Blur the Lines Between Partisans and Public Servants, *New York Times*, Mar. 12, 2018, available at <https://www.nytimes.com/2018/03/12/us/politics/trump-white-house-hatch-act.html>.

<sup>103</sup> CREW Year One Report, 26-27.

<sup>104</sup> 5 U.S.C. § 1215(a) and (b).

<sup>105</sup> Letter from Henry J. Kerner, Special Counsel, to President Donald J. Trump, Mar. 6, 2018, available at <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf>.

<sup>106</sup> MJ Lee, Office of Special Counsel: Conway violated Hatch Act, CNN, Mar. 6, 2018, available at <https://www.cnn.com/2018/03/06/politics/kellyanne-conway-hatch-act/index.html>.

<sup>107</sup> FEC Form 99, Donald J. Trump for President, Inc., filed Jan. 20, 2017, available at <http://docquery.fec.gov/pdf/569/201701209041436569/201701209041436569.pdf>.

<sup>108</sup> Federal Election Commission, Donald J. Trump, Inc. Financial Summary, available at <https://www.fec.gov/data/candidate/P80001571/>.

<sup>109</sup> Press Release, President Trump Announces 2020 Campaign Manager, Feb. 27, 2018, available at <https://www.donaldjtrump.com/media/president-trump-announces-2020-campaign-manager/>.

<sup>110</sup> U.S. Office of Special Counsel, Updated Guidance Regarding the Hatch Act and President Donald Trump Now That He Is Officially a Candidate for Reelection, Mar. 5, 2018, available at <https://osc.gov/Resources/Candidate%20Trump%20Hatch%20Act%20Guidance%203-5-2018.pdf>.

employees will be put in positions to engage in exactly the behaviors the Hatch Act is meant to prevent – improperly using federal resources and the influence that comes with holding a federal office to influence the result of partisan elections. This untenable situation will inevitably undermine public trust in government.

## CURRENT LAW:

The Hatch Act provides that, among other limitations, a federal employee “may not use his official authority or influence for the purpose of interfering with or affecting the result of an election.”<sup>111</sup> While the statute explicitly defines who is an employee and which elections are covered, it does not explicitly address when a candidacy begins.<sup>112</sup> The Office of Special Counsel (OSC), the federal agency with responsibility for interpreting and enforcing the Hatch Act, has interpreted the law to mean that an incumbent is not a candidate for partisan political office until he or she “officially announces” the candidacy.<sup>113</sup>

If OSC finds that a federal employee has violated the Hatch Act, it can initiate a disciplinary action via the Merit Systems Protection Board, a separate body designed to enforce civil service protections while protecting employees’ due process rights.<sup>114</sup> However, if the employee is “in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate,” OSC’s finding that the employee broke the law “shall be presented to the President for appropriate action in lieu of” proceeding to the Merit Systems Protection Board.<sup>115</sup>

## SOLUTION:

The Hatch Act should be amended to clarify that a person becomes a candidate for partisan political office when he or she files paperwork with the relevant election regulator; for federal candidates, this would be the Federal Election Commission.

Additionally, the procedure for reporting violations committed by senior aides and political appointees should be amended. Although ultimate responsibility for determining the appropriate response should still rest with the president in these cases, it is appropriate for OSC to recommend appropriate disciplinary action to enhance the fair and uniform application of the law to all federal employees. Similarly, the president should be required to send OSC a written explanation of the decision to accept or decline OSC’s recommendation, and OSC should be required to make that explanation available to the public along with OSC’s initial report presenting its finding of a violation.

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<sup>111</sup> 5 U.S.C. § 7323(a)(1).

<sup>112</sup> 5 U.S.C. § 7322(1), (2).

<sup>113</sup> U.S. Office of Special Counsel, Guidance on President Trump’s Status as a Candidate and Its Effect on Activity in the Federal Workplace available at <https://osc.gov/Resources/2017-President-Candidate-Guidance.pdf>; *see also* U.S. Office of Special Counsel, Updated Guidance Regarding the Hatch Act and President Donald Trump Now That He Is Officially a Candidate for Reelection, available at <https://osc.gov/resources/candidate%20trump%20hatch%20act%20guidance%203-5-2018.pdf>.

<sup>114</sup> 5 U.S.C. § 1215(a).

<sup>115</sup> 5 U.S.C. § 1215(b).



## E. Update Rules Covering Special Government Employees

### THE PROBLEM:

From time to time, it is helpful to the federal government to seek the expertise of those outside the government without hiring them as permanent employees or contractors (which would generally require them to leave their other jobs). For example, in 2017 a group of five doctors, public health officials and policy experts served<sup>116</sup> on an Interagency Committee on Smoking and Health to advise the Department of Health and Human Services and the Centers for Disease Control and Prevention on particular issues within their area of expertise – the effect of smoking on human health.<sup>117</sup> Federal law allows agencies across the government to hire experts like these on a part-time basis as “special Government employees.”<sup>118</sup> A study by the Government Accountability Office identified some 40,000 such persons employed by the government as of December 2014.<sup>119</sup> These employees are subject to some, but not all, of the same ethics rules as other government employees, including the criminal conflict of interest statute that prevents them from participating in matters in which they have a personal financial stake.<sup>120</sup>

President Trump, however, attempted to have it both ways when he named billionaire investor Carl Icahn “special advisor to the president on overhauling federal regulations” in December 2016.<sup>121</sup> The administration claimed that Icahn “would be an adviser with a formal title” but would “be advising the President in his individual capacity,” meaning Icahn would not be an SGE subject to ethics requirements.<sup>122</sup> Icahn’s conduct in this role vividly demonstrated the reason such arrangements are improper and unwise. In his role as advisor to President Trump, Icahn reportedly advocated for rollback of a particular environmental regulation that he felt put an unfair burden on an oil refining company in which he held a major investment,<sup>123</sup> drawing a subpoena from federal prosecutors in New York.<sup>124</sup> Icahn stepped down from his role as Trump’s adviser in August of 2017.<sup>125</sup> As this example indicates, problems may arise when people act like SGEs, but are not classified as such and therefore are not subject to the governing ethics rules.

Similar concerns have arisen about three members of President Trump’s Mar-a-Lago Club who have reportedly formed “an informal council that is exerting sweeping influence on” the Department of

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<sup>116</sup> U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Roster, Interagency Committee on Smoking and Health, 2017, available at [https://www.cdc.gov/maso/facm/pdfs/ICSH/ICSH\\_2017\\_Roster.pdf](https://www.cdc.gov/maso/facm/pdfs/ICSH/ICSH_2017_Roster.pdf).

<sup>117</sup> U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Charter, Interagency Committee on Smoking and Health, Mar. 15, 2017, available at <https://www.cdc.gov/maso/facm/pdfs/ICSH/ICSH-Charter-2017-2019.pdf>.

<sup>118</sup> 18 U.S.C. § 202(a).

<sup>119</sup> Government Accountability Office, Opportunities Exist to Improve Data on Selected Groups of Special Government Employees, GAO-16-548, July 2016, available at <https://www.gao.gov/assets/680/678470.pdf>.

<sup>120</sup> *Id.* at 4-5.

<sup>121</sup> David Benoit, Trump Names Carl Icahn as Adviser on Regulatory Overhaul, *Wall Street Journal*, Dec. 21, 2016, available at <https://www.wsj.com/articles/trump-to-name-icahn-as-adviser-on-regulatory-overhaul-1482354552>.

<sup>122</sup> Patrick Radden Keefe, Carl Icahn’s Failed Raid on Washington, *The New Yorker*, Aug. 18, 2017, available at <https://www.newyorker.com/magazine/2017/08/28/carl-icahns-failed-raid-on-washington>.

<sup>123</sup> Eric Lipton, Icahn Raises Ethics Flags With Dual Roles as Investor and Trump Adviser, *New York Times*, Mar. 26, 2017, available at <https://www.nytimes.com/2017/03/26/us/politics/carl-icahn-trump-adviser-red-flags-ethics.html>.

<sup>124</sup> Matthew Goldstein, Prosecutors Are Examining Carl Icahn’s Role as Trump Adviser, *New York Times*, Nov. 8, 2017, available at <https://www.nytimes.com/2017/11/08/business/carl-icahn-trump-ethanol-subpoena.html>.

<sup>125</sup> *Id.*

Veterans Affairs.<sup>126</sup> Ike Perlmutter, chairman of Marvel Entertainment, Bruce Moskowitz, a Florida doctor, and attorney Marc Sherman “have leaned on VA officials and steered policies affecting millions of Americans,” and “spoke with VA officials daily ... reviewing all manner of policy and personnel decisions.”<sup>127</sup> Some staff at the VA reportedly refer to the three as “the Mar-a-Lago Crowd.”<sup>128</sup> In addition to questions about the general propriety of their influence over agency officials and policies, questions of self-dealing arose with respect to initiatives reportedly pushed by Perlmutter and Moskowitz, resulting in Marvel characters joining the VA secretary in ringing the closing bell on the New York Stock Exchange, Moskowitz’s son being suggested to advise an effort to develop an app for veterans to find care nearby, and others.<sup>129</sup>

## CURRENT LAW:

The law defines a “special Government employee” (SGE) as someone who is hired “to perform, with or without compensation ... temporary duties either on a full-time or intermittent basis.”<sup>130</sup> As the Government Accountability Office explains, “SGEs are covered by most ethics rules, but the application of some of those rules to SGEs is less restrictive than for other employees and permits them to engage in more outside activities.”<sup>131</sup>

## SOLUTIONS:

We believe the current rules applied to SGEs strike the appropriate balance between ensuring honest service to the federal government while not unduly hindering SGEs in their outside work. However, as the Icahn and Mar-a-Lago Crowd examples make clear, it is important that all those who actually advise the government be subject to these reasonable ethics precautions. As a result, we recommend that the current definition of who is an SGE be amended to ensure that it includes any person who has received a formal title in recognition of their advisory services or designation of responsibility over a subject area; is provided with official resources to conduct such activities, including a phone, email account or office space; or has apparent authority to direct action by government employees.<sup>132</sup>

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<sup>126</sup> Isaac Arnsdorf, The Shadow Rulers of the VA, *ProPublica*, Aug. 7, 2018, available at <https://www.propublica.org/article/ike-perlmutter-bruce-moskowitz-marc-sherman-shadow-rulers-of-the-va>. See also Arthur Allen, “Who the hell is this person?” Trump’s Mar-a-Lago pal stymies VA project, *Politico*, Apr. 30, 2018, available at <https://www.politico.com/story/2018/04/30/trump-doctor-health-technology-508297>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 18 U.S.C. § 202(a).

<sup>131</sup> Government Accountability Office, Opportunities Exist to Improve Data on Selected Groups of Special Government Employees, GAO-16-548, July 2016, at 4, available at <https://www.gao.gov/assets/680/678470.pdf>.

<sup>132</sup> An appropriate exception to this would be if the person has such access as a non-governmental employee because they serve on an officially-recognized federal advisory committee pursuant to 5 U.S.C. App. or as part of registered lobbying activities pursuant to 2 U.S.C. § 1601 et al.

## F. Apply Ethics and Transparency Rules to Presidential Transition Teams

### THE PROBLEM:

The work of presidential transition teams is extremely influential, even if it officially precedes a presidential administration. Despite the significance of their work in shaping the government, the teams are funded in part by private contributions and are exempted from most of the ethics and transparency laws that apply to normal government functions. This leaves the transition process vulnerable to exploitation by lobbyists and other special interests.

Transition teams typically adopt ethics rules, but these are of their own design and lack enforcement mechanisms. For example, after suffering bad publicity for inviting numerous lobbyists aboard, the transition team of President-elect Trump in 2016 hastily issued a pair of ethics pledges that created the appearance of purging lobbyists.<sup>133</sup> But the rules proved largely meaningless, as lobbyists either took advantage of loopholes or ignored the rules altogether. For instance, at least five team members deregistered as lobbyists to remain on the team only to reregister for the same clients shortly after Trump was inaugurated.<sup>134</sup>

### CURRENT LAW:

Starting with the Presidential Transition Act of 1963, the federal government has provided some money to fund transition work once a president-elect is chosen. Congress has amended the law several times to provide more money, and in 2010 expanded the law to provide for funding of pre-election transition work undertaken by party nominees.<sup>135</sup>

While these laws embed an understanding that presidential transitions are important and official functions, this funding has not fully replaced contributions from private sources. Meanwhile, laws covering transitions have not been expanded to include ethics and transparency standards.

### SOLUTION:

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<sup>133</sup> Taylor Lincoln, *The Unruly Transition*, *Public Citizen*, Apr. 25, 2017, at 5-7, available at <https://www.citizen.org/sites/default/files/trump-transition-retrospective.pdf>

<sup>134</sup> Taylor Lincoln and Alan Zibel, *Feeding Frenzy in Trump's Swamp: Lobbyists with Close Ties to Trump or Pence Bill Nearly \$42 Million To Curry Favor In Nation's Capital*, *Public Citizen*, Oct. 5, 2017, at 20-21, available at [https://www.citizen.org/system/files/case\\_documents/trump-lobbyists-report.pdf](https://www.citizen.org/system/files/case_documents/trump-lobbyists-report.pdf)

<sup>135</sup> Henry B. Hogue, *Presidential Transition Act: Provisions and Funding*, *Congressional Research Service*, Oct. 5, 2016, available at <https://fas.org/sgp/crs/misc/RS22979.pdf>.

Especially after an incoming president has been elected, transition teams should operate under the same rules as government offices to the extent possible. This should apply to the teams' funding, the facilities they use, the ethics rules they must adhere to, and their recordkeeping requirements.

Funding for transition teams once major party nominees are selected should be provided entirely by the federal government. The current practice of presidential nominees and presidents-elect soliciting contributions to fund transition teams is an invitation for special interests to position themselves for special treatment. The transition team of candidate Donald Trump explicitly traded access for contributions.<sup>136</sup>

At least as soon as the president-elect is chosen, the work of transition teams should be conducted in office space provided by the federal government. Doing so would be more efficient, more secure and more conducive to the preservation of records than operating out of privately leased space.

Transition teams should also be subject to statutorily prescribed ethics rules. Federal ethics laws that prohibit departing members of the executive branch from lobbying their former agencies should be modified to apply to those who work on the post-election phase of transition teams. At present, senior government officials are prohibited from lobbying their former agencies for one year after departing; very senior officials face a two-year ban as well as additional restrictions.<sup>137</sup> Members of transition teams for presidents-elect should be subject to at least a one-year ban on lobbying the White House and the agencies that their transition work concerned. Transition team members whose work involves more than two agencies, such as those who serve on executive committees, should be prohibited from lobbying the entire executive branch for the administration's first year.

With limited exceptions, federal laws and regulations place limitations on employees of the executive branch accepting gifts (broadly described as things of value) from anyone with business before the government.<sup>138</sup> The same prohibition should apply to members of transition teams.

Any records generated by transition teams that are sent to or received from a government agency should be transmitted to the General Services Administration (GSA) and preserved and released by GSA in accordance with requirements of the Presidential Records Act and Freedom of Information Act.

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<sup>136</sup> Anna Palmer, Jake Sherman, and Daniel Lippman, SCOOP: Team Trump gives Republicans a 'look inside' transition for 5K donation -- Hackers targeted Arizona election system -- Huma calls it QUITTS -- B'DAY: Warren Buffett, *Politico*, Aug. 30, 2016, available at <https://www.politico.com/tipsheets/playbook/2016/08/scoop-team-trump-gives-republicans-a-look-inside-transition-for-5k-donation-hackers-targeted-arizona-election-system-huma-calls-it-quits-bday-warren-buffett-216115>

<sup>137</sup> Jack Maskell, Post-Employment, "Revolving Door," Laws for Federal Personnel, *Congressional Research Service*, Jan. 7, 2014, available at <https://fas.org/sgp/crs/misc/R42728.pdf>.

<sup>138</sup> 5 U.S.C. § 7353.

## V. CONCLUSION

The election of Donald Trump as president exposed numerous shortcomings and outright chasms in the ethics laws that govern the executive branch of the U.S. government. Trump differs starkly from all of his modern day predecessors – and likely all presidents in U.S. history – due to the breadth of his assets, his refusal to divest himself of those assets and his disregard for the norms of avoiding conflicts of interest as a check on government corruption.

Trump's unique circumstances combined with his merging his office and business interests should serve as a call to action for a deep scrub of executive branch ethics rules. This update should aspire to fix both longstanding, nettlesome problems – such as the lack of adequate regulation of inaugural funds and presidential transitions – as well as flaws that Trump has revealed, the most glaring of which is the president's exemption from financial conflict of interest laws.

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