

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



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

# Proposals for Reform

VOLUME II

PRINCIPAL TASK FORCE STAFF:

Rudy Mehrbani, Martha Kinsella,  
and Wendy Weiser

# Table of Contents

---

<b>Executive Summary</b> .....	<b>1</b>
<b>SECTION 1: Integrity and Accessibility of Government</b>	
Research and Data .....	<b>3</b>
Proposal 1 .....	<b>7</b>
Proposal 2 .....	<b>8</b>
Proposal 3 .....	<b>10</b>
Proposal 4 .....	<b>11</b>
Proposal 5 .....	<b>12</b>
Proposal 6 .....	<b>14</b>
<b>SECTION 2: Accountable and Qualified</b>	
Government Officials .....	<b>15</b>
Proposal 7 .....	<b>18</b>
Proposal 8 .....	<b>20</b>
Proposal 9 .....	<b>23</b>
Proposal 10 .....	<b>24</b>
Proposal 11 .....	<b>25</b>
<b>SECTION 3: Checks and Balances to Safeguard</b>	
Democracy and Rule of Law .....	<b>27</b>
APPENDIX OF SCIENTIFIC INTEGRITY ISSUES .....	<b>29</b>
ABOUT THE TASK FORCE MEMBERS .....	<b>38</b>
ENDNOTES .....	<b>40</b>
ACKNOWLEDGMENTS .....	<b>68</b>

## ABOUT THE TASK FORCE

### ► **The National Task Force on Rule of Law & Democracy** is

a nonpartisan group of former government officials and policy experts. We have worked at the highest levels in federal and state government, as prosecutors, members of the military, senior advisers in the White House, members of Congress, heads of federal agencies, and state executives. We come from across the country and reflect varying political views.

We care deeply about our nation and its democratic values. And we are concerned about the erosion in recent years of critical norms and practices, built up over time, that ensure government officials use their power primarily to further the public interest, not partisan or personal interests. We have come together to propose reforms, including legislative changes, to bolster these norms and practices, and to strengthen the future of our democracy.

This is the second report of the Task Force. The first, released in October 2018, focused on the erosion of the norms and practices protecting the rule of law and ethical conduct in government.

## STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at  
**[www.brennancenter.org](http://www.brennancenter.org)**

Sign up for our electronic newsletters at  
**[www.brennancenter.org/signup](http://www.brennancenter.org/signup)**

Visit the Task Force website at  
**[www.democracymission.org](http://www.democracymission.org)**

---

© 2019. This paper is covered by the [Creative Commons Attribution-NonCommercial-NoDerivs license](https://creativecommons.org/licenses/by-nc-nd/4.0/). It may be reproduced in its entirety as long as the Brennan Center for Justice at NYU School of Law is credited, a link to the Center's web pages is provided, and no charge is imposed. The paper may not be reproduced in part or in altered form, or if a fee is charged, without the Center's permission. Please let the Center know if you reprint.

# Executive Summary

---

In recent years, the norms and expectations that once ensured that our government was guided primarily by the public interest rather than by individual or partisan interest have significantly weakened. There are now far fewer constraints to deter abuse by executive branch actors. This report focuses on two distinct areas: the growing politicization of government science and research and the breakdown of processes for filling key government positions.

Objective data and research are essential to effective governance and democratic oversight. But over the last few decades, the safeguards meant to keep government research objective and publicly accessible have been steadily weakening. Recent administrations have manipulated the findings of government scientists and researchers, retaliated against career researchers for political reasons, invited outside special interests to shape research priorities, undermined and sidelined advisory committees staffed by scientists, and suppressed research and analysis from public view — often material that had previously been made available. In many cases, they have appeared to pay little political price for these missteps. This trend has culminated in the efforts of the current administration not only to politicize scientific and technical research on a range of topics, but also, at times, to undermine the value of objective facts themselves.

Now, we are at a crisis point, with almost weekly violations of previously respected safeguards.

- The acting White House chief of staff reportedly instructed the secretary of commerce to have the National Oceanic and Atmospheric Administration (NOAA) — a part of the Department of Commerce — issue a misleading statement in support of the president’s false assertion about the trajectory of a hurricane, contradicting an earlier statement released by the National Weather Service. The secretary of commerce reportedly threatened to fire top NOAA officials in pressuring them to act.
- The Department of Agriculture relocated economists across the country after they published findings showing the financial harms to farmers of the administration’s trade policies.
- The Interior Department reassigned its top climate scientist to an accounting role after he highlighted dangers posed by climate change.
- The Environmental Protection Agency (EPA) adopted rules that prevent leading experts from serving on science advisory boards and encourage participation by industry-affiliated researchers.

- The White House suppressed a report showing a toxic substance that is present in several states’ water supplies endangers human health at levels far lower than previously reported by the EPA.

Political officials have the prerogative to make policy decisions, and even challenge the science and methodology of career experts, but accurate, nonpolitical, government-supported research and analysis should be protected. Indeed, government research has shifted the course of human history through, for example, the space race, cures for disease, food- and water-safety measures, and computer and internet technology innovations.

Effective government also depends on a reliable process for filling senior government positions with qualified professionals who are dedicated to doing the people’s work. Recent presidents have filled critical jobs with unqualified cronies while leaving other posts vacant, and have found ways to sidestep the Senate’s approval role, nullifying a crucial constitutional check. For their part, lawmakers have rubber-stamped some nominees who are unqualified or have conflicts of interest while dragging their feet on considering others, often based on whether or not the Senate majority and the president share a party.

The consequences are readily apparent: less than half the senior roles at the Departments of Justice and Homeland Security are filled; at least a dozen agencies — including two cabinet departments — are run by non-Senate-confirmed acting officials two years into this administration; and the Senate confirmation process takes five times longer than it did 40 years ago.

If left unchecked, both of these trends are likely to do damage. Government research that is guided by politics, not the facts, can lead to ineffective and costly policy, among other harms, and a dysfunctional appointments process risks stymieing vital government functions. Both developments also threaten to exact a long-term price, if allowed to stand. They risk creating a vicious cycle, opening the door to abuse by future administrations, which may push the envelope ever further.

We are committed to teaching future administrations the opposite lesson — that these abuses of power violate broadly recognized standards of honest and effective

tive government, long accepted by both political parties. Abuse once again can beget reform. And the task of advancing this reform could not be more urgent, and cannot be for one or another party alone.

We have big problems to solve in this nation. If we cannot agree on the facts underlying potential solutions to those problems, and we do not have qualified and dedicated people in place to develop and execute on them, we will imperil the future of our democracy.

To protect government research from politicization and keep it accessible, we offer proposals that would

- create scientific integrity standards and require agencies to establish protocols for adhering to them,
- prohibit politically motivated manipulation or suppression of research,
- ensure the proper functioning of scientific advisory committees, and
- increase public access to government research and data.

To fix the process for filling senior government positions, we offer proposals that would

- encourage the appointment of qualified and ethical people to key government posts,
- make it harder for presidents to sideline the Senate during the process,
- streamline the confirmation process for executive branch nominees, and
- protect national security by fixing the vulnerable White House security clearance process.

Our proposals narrowly target areas that are ripe for executive abuse. But as former federal government officials, we have seen up close how other factors contribute to government dysfunction and undermine democratic values. We conclude this report by highlighting these factors — in particular, our broken campaign finance system, the president’s expansive emergency powers, the weakening of Congress as a check on the executive, and the politicization of the judiciary — and we reaffirm the essential role that a functioning system of checks and balances plays in protecting our democracy.

# Integrity and Accessibility of Government Research and Data

**The process of governing, while inherently political,** must still be grounded in an accurate assessment of reality. For this reason, the United States has long invested significant government resources in research and the production of objective data on virtually every issue that impacts society and public policy, mostly through a range of executive branch agencies and departments. As executive leaders, presidents and their political appointees at government agencies can and should set their agencies' research and policy priorities and weigh scientific research against economic and other factors when making policy decisions, but it is inappropriate for them to manipulate or suppress research in order to justify policy objectives or for personal, financial, or partisan political gain. Recognizing this, American leaders have long respected the principles that government research should be both insulated from undue political influence and shared with the scientific community and the general public. For the most part, this ensured that U.S. policy, no matter its ideological orientation, was informed by sound empirical data.

The benefits of this approach are clear: important, unbiased research has undergirded policies that have improved the lives of Americans, making our air and water cleaner, saving lives on the roads and in the sky, and leading to the development of life-saving drugs. The use and public availability of unbiased research also bolstered public trust in the legitimacy of the policy-making process.

Under recent administrations, this principle has been breaking down. A few examples are representative:

- George W. Bush administration officials suppressed and undercut the findings of a leading climate change expert.<sup>1</sup>
- Obama administration officials inserted a misleading phrase into a public draft report on fracking that downplayed the impact on drinking water, a move that was protested by members of the EPA's Science Advisory Board, a panel of independent scientists.<sup>2</sup>
- Trump administration officials at the Department of the Interior (DOI) removed from a government doc-

ument warnings about the environmental impact of a proposed wall on the southern border.<sup>3</sup>

The Appendix includes a more extensive list of such violations.

Perhaps even more troubling, the value of scientific and technical research, and of objective data itself, is now contested. While politicians have long tried to spin the results of government research to their advantage, in the past a broad consensus held that this kind of manipulation was clearly improper. And government officials at least paid lip service to the idea that policy should be guided by unbiased information, analyzed without political pressure. When examples of manipulation did come to light, those responsible generally paid a price.<sup>4</sup>

In recent years, adherence to this ideal has weakened. We have seen efforts to recast the scientific and research communities as little more than special interest groups whose conclusions carry no more weight than those of other such groups.<sup>5</sup> We have also seen attempts to dismiss inconvenient facts — especially on hot-button political issues like climate change and immigration — by labeling them biased or partisan.<sup>6</sup> And even more alarming, we have seen outright efforts to manipulate data for personal or political gain.

These developments pose several dangers. Politicized research can lead to flawed government policy, undertaken to achieve a political goal rather than to advance the public interest. When government officials undermine objective scientific analysis for political ends, scientists may leave government service or self-censor their work.<sup>7</sup> Bad or undisclosed science also undermines judicial review established to ensure agencies are following the law. Flawed government science or research — about, for instance, the health effects of alcohol consumption<sup>8</sup> or the environmental impact of various pollutants<sup>9</sup> — nonetheless can carry an imprimatur of authority, allowing it to gain traction with the media and public and causing a range of long-term harms. Without access to the underlying research, Americans cannot properly evaluate their government's decisions or have confidence that those decisions are being guided by the facts. And the broader efforts to undermine the value assigned to scientific and technical research threaten to weaken the expectation

that our government should even attempt to base policy on an accurate understanding of objective reality.

These dangers are too great for us to merely hope that the norms that are now breaking down will repair themselves. In today's hyperpartisan climate, we need additional guardrails to cultivate an environment of free scientific inquiry, monitor political officials' influence on experts' work, ensure public access to government research and data, and deter and punish political interference. To protect the integrity of government science and research, we need Congress to act.

## The Ideal of Unbiased and Accessible Government Research

The federal government has sponsored scientific research since at least the mid-19th century, when Congress created the National Academy of Sciences “to guide public action in reference to science matters.”<sup>10</sup> With the emergence of a powerful central government and complex administrative state in the 20th century, the quest for accurate information to undergird policy led the federal government, in the years following World War II, to become a major funder of scientific research and data.<sup>11</sup>

Over the course of the country's history, Congress has created a slew of agencies, subagencies, and offices, the sole or primary purpose of which is to produce scientific research and data. Prominent examples include the National Aeronautics and Space Administration (NASA), the National Institutes of Health (NIH), the Centers for Disease Control and Prevention (CDC), the Census Bureau, and the Defense Advanced Research Projects Agency (DARPA). There are also more than 200 scientific and technical advisory committees — some created by Congress, others by the agencies themselves — made up of experts from academia, industry, state and local governments, and the nonprofit sector who generally serve without pay or for a modest stipend.<sup>12</sup> Moreover, Congress has relied upon expert, nonpartisan offices within the legislative branch to provide guidance on complex subjects, such as the Congressional Research Service (CRS),<sup>13</sup> the Joint Committee on Taxation (JCT),<sup>14</sup> the Office of Technology Assessment (now defunct),<sup>15</sup> and the Congressional Budget Office (CBO).<sup>16</sup> These agencies, offices, and committees were established to produce unbiased research and data by qualified experts following accepted professional standards of objectivity and empiricism.

The principle that government research and data should be unbiased and apolitical is longstanding. In a 1935 report, President Franklin Roosevelt's Science Advisory Board wrote that science must be “free to report

and interpret the facts . . . as [it finds] them, and not as the government of the day may wish to have them reported or interpreted.”<sup>17</sup> Vannevar Bush, who as director of the Office of Scientific Research and Development in the 1940s was the architect of modern federal government research programs, promoted a vision of government research being performed in an environment of free scientific inquiry<sup>18</sup> — a vision that has enjoyed wide support. Half a century later, President George H. W. Bush explained, “Science, like any field of endeavor, relies on freedom of inquiry; and one of the hallmarks of that freedom is objectivity. . . . [G]overnment relies on the impartial perspective of science for guidance.”<sup>19</sup>

It has also long been understood that, as a governing principle, research and data should be accessible to the public. This fosters accountability in two ways. First, it provides the transparency that deters — and allows us to recognize and root out — manipulation of scientific information. Second, it gives the public a chance to test and assess the data on which policy decisions are based, and to improve the quality of that information. “A democracy works best when the people have all the information that the security of the Nation permits,” President Lyndon Johnson said when he signed the Freedom of Information Act (FOIA) in 1966. “No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”<sup>20</sup>

For the second half of the 20th century, administrations more or less adhered to these twin ideals of unbiased research and public access to information.<sup>21</sup> A few relevant laws — such as the Administrative Procedure Act (APA)<sup>22</sup> and FOIA<sup>23</sup> — provided broad, indirect checks to ensure research quality. More important, a strong set of informal norms and practices emerged to uphold these ideals. They included proactive disclosure of completed, peer-reviewed scientific reports; respect for government science as separate from political decision-making; and a tradition of selecting highly regarded scientists with relevant subject-matter expertise to give scientific advice to government policymakers.

This system never worked perfectly. On a number of occasions, for example, presidents tried to suppress or alter expert reports that exposed deficiencies in their policy initiatives. The Johnson White House imposed an explicit political test in the selection of members of the President's Science Advisory Committee (PSAC), based on their attitudes toward the Vietnam War.<sup>24</sup> The Nixon administration suppressed a government report that criticized the cost of a project to develop a high-speed passenger jet, as well as the performance of the aircraft.<sup>25</sup> After a physicist on the PSAC testified to his technical reservations about the project before Congress, President Richard Nixon dissolved PSAC and abolished the office of the presidential science adviser.<sup>26</sup> President Ronald Reagan's Defense Department delayed the release of an expert

congressional report that exposed the technical infeasibility of the administration’s “Star Wars” defense program; the administration also suppressed three chapters of the report.<sup>27</sup> Under President George H. W. Bush, the White House altered the proposed congressional testimony of James Hansen, a renowned NASA climate expert, to emphasize scientific uncertainties about climate change.<sup>28</sup> Still, throughout this period there was a clear working consensus, honored for the most part, that government science and research should be unbiased and accessible.

Today, the norms that supported this practice are breaking down, with the result that political actors enjoy a much freer hand than in the past to undermine the integrity of government research or to keep it secret. As detailed more fully in the Appendix, political officials have increasingly manipulated research and data about topics such as ecology, economics, and pharmaceuticals,<sup>29</sup> retaliated against career researchers for political reasons or threatened to do so,<sup>30</sup> and suppressed politically inconvenient research and analysis from public view — often material that had previously been made available.<sup>31</sup> Many of these episodes of tampering involve environmental issues, with government officials who have close financial, political, or personal ties to the oil, chemical, and manufacturing industries interfering with research, to the benefit of those industries, but there have been abuses in other fields — including public health, worker and food safety, and fiscal policy — as well. That is why we need additional safeguards to protect the scientific legitimacy of the government’s research enterprise and restore the longstanding role of objective data and research as a foundation for policymaking.

## Past Responses to Abuse and Their Shortcomings

**After past assaults on the integrity of government research and data, both the executive branch and Congress spearheaded reforms. These responses have been worthwhile first steps, and they underscore the value placed on objective science-based policymaking. However, they have generally been too narrowly focused or have lacked sharp-enough teeth to have a lasting impact.**

When one administration has crossed the line, subsequent administrations have responded with efforts to rebuild scientific integrity. For instance, in the 1940s and 1950s, government officials and members of the public grew concerned about the power of advisory committees, created by private-sector industries, that attempted to influence federal government operations.<sup>32</sup> In response, the Truman and Kennedy administrations created standards for the composition and functioning of these advisory committees. (Congress subsequently strengthened

these directives by establishing statutory standards.)<sup>33</sup> In the years after President Nixon’s controversial move to dissolve PSAC, several presidents took steps to restore the role of science advice in the White House. First, President Reagan’s science adviser created a White House Science Council that reported to him,<sup>34</sup> and then President George H. W. Bush created the President’s Council of Advisers on Science and Technology (PCAST), an advisory body administered by the White House Office of Science and Technology Policy (OSTP) that reports directly to the president.<sup>35</sup> Presidents Bill Clinton, George W. Bush, Barack Obama, and Donald Trump have maintained the PCAST, but President Trump has not yet appointed any members to it.<sup>36</sup> After a spate of episodes of political interference in government research and data under President George W. Bush, during which political officials in the White House and federal agencies censored scientists’ work and ordered experts to change their analyses in order to justify the administration’s policy objectives,<sup>37</sup> President Obama in 2009 issued a memorandum on the need to maintain “the highest level of integrity in all aspects of the executive branch’s involvement with scientific and technological processes.” The memo also required federal agencies to create and implement scientific integrity policies.<sup>38</sup>

As with other executive branch efforts, the Obama administration initiative was a good first step, but it was not enough. In practice, the scientific integrity policies produced by the agencies vary significantly in their scope and specificity, as well as in the degree to which they have been implemented.<sup>39</sup>

Turning to the public availability of government research, there have been similar limitations to addressing science-related transparency concerns through executive action. In response to criticisms during the Reagan administration that the White House’s Office of Information and Regulatory Affairs (OIRA), which oversees the implementation of government-wide policies and reviews draft regulations, allegedly succumbed to pressure from business groups,<sup>40</sup> President Clinton issued an executive order mandating that agencies make publicly available their underlying analyses of the costs and benefits of regulatory actions.<sup>41</sup> The order also required agencies to publicly identify the substantive changes between draft rules submitted to OIRA for review and the actions subsequently announced, and to identify those changes in the regulatory actions that were made at the suggestion or recommendation of OIRA.<sup>42</sup> Another executive order, issued in 2011 by President Obama, required that agencies ensure the objectivity of any scientific or technological information, or processes used to support regulatory actions.<sup>43</sup> The Clinton and Obama executive orders — still in effect — express the principle that rulemaking should be transparent and based on high-quality research. But even when followed, they have shortcomings. The Clinton order requires disclosure only of changes made by

OIRA, not those made by political officials *within* agencies. Though the Obama order establishes a standard of objectivity for the rulemaking process, it contains no mechanism for accountability. And executive orders, of course, can be changed from one administration to the next.

Congress has also taken steps to prevent abuse, but its efforts have been either vetoed or too limited. In the midst of the Nixon administration's effort to undermine science advice in the White House, Congress established OSTP in the Executive Office of the President to advise on science and technology issues.<sup>44</sup> Congress also created the Office of Technology Assessment (OTA), which gave lawmakers their own source of "competent, unbiased information" about technology and its impact on the world. Unfortunately, Congress withdrew the latter agency's funding in 1995.<sup>45</sup>

Building on the Truman and Kennedy administrations' efforts to limit corporate influence over government science advice, Congress passed in 1972 the Federal Advisory Committee Act (FACA),<sup>46</sup> which requires that advisory committees be balanced in the points of view represented, insulated from inappropriate outside influence, and transparent with lawmakers and the public about their activities and makeup.<sup>47</sup> A decade later, during the Reagan administration, the principles of FACA were thwarted when political officials at the EPA created a "hit list" of scientists serving on EPA science advisory committees. The list included disparaging comments about the scientists' purported views, such as "reported to be liberal and environmentalist" and "get him out fast, extreme anti-nuclear type."<sup>48</sup> In response, Congress passed legislation to reduce the EPA administrator's discretion in choosing advisory board members, with stronger conflict-of-interest screenings and greater protections against committee members' removal.<sup>49</sup> The legislation was vetoed by President Reagan.<sup>50</sup>

Some reform efforts that have been signed into law have not gone far enough. In the 1970s, when an epidemiologist conducting a government-funded study concluded that low-level radiation exposure caused cancer in nuclear workers, government officials pressured him to suppress his findings and publicly refute those of a similar study. When he refused, they terminated his contract.<sup>51</sup> In response, Congress conducted hearings<sup>52</sup> and passed the Radiation-Exposed Veterans Compensation Act of 1988<sup>53</sup> and the Radiation Exposure Compensation Act in 1990.<sup>54</sup> Though these laws attempted to right the wrongs of this specific episode, they did not do much to stop similar abuses in other areas. Congress lacked, and still lacks, the capacity and expertise to legislate substantive, science-based solutions every time political officials in the executive branch interfere with government science. Broader safeguards to protect against politically motivated interference are necessary.

The mechanisms Congress has created for fighting

improper politicization are not sufficient. Inspectors general can play an important role in uncovering misconduct,<sup>55</sup> but their investigations often wrap up long after scientific analysis has been altered and policy decisions based on it have been made. Regulatory analysis and government research products may be obtained through FOIA requests, but it often takes months, if not years, for those requests to be fulfilled,<sup>56</sup> and there are reports from the DOI and the EPA that information that should have been released pursuant to FOIA has been withheld for political reasons.<sup>57</sup> Similarly, political manipulation can sometimes be challenged in court under the APA,<sup>58</sup> which requires that the agency policymaking process be transparent and allow for public participation.<sup>59</sup> But litigation is time-consuming and expensive for everyone involved, courts often lack the technical expertise needed to evaluate the quality of scientific research, and without a record of revisions and contacts, it is difficult to prove political interference. And plenty of egregious cases of politicization are not illegal under current law.

Congress has also taken steps to ensure government research is made public. During the Obama administration, it directed OSTP to prioritize and coordinate the development of agency policies to promote public access to unclassified federally funded research.<sup>60</sup> In turn, OSTP issued a directive requiring federal agencies to create public-access plans to proactively make available government-generated scientific data and peer-reviewed, published research.<sup>61</sup> By 2017, 22 federal agencies and departments had issued public-access plans pursuant to OSTP's directive.<sup>62</sup> Although the policy is still in effect, there have been episodes in which completed research — often about politically controversial topics, such as climate change — was withheld from public view.<sup>63</sup> Moreover, this executive branch directive lacks an enforcement mechanism.

Ultimately, the long list of recent efforts to politicize research or keep it hidden from the public — documented more fully in the Appendix — makes clear that we need to do much more. In practice, only rules that have the force of law behind them and that apply across the government can provide the enforcement mechanisms needed to ensure the integrity and transparency of government research and data.



# Proposal 1

---

## Congress should pass legislation that establishes scientific integrity standards for the executive branch and requires agencies to create policies that guarantee those standards.

Here, it is instructive to look at a success story. During the George W. Bush administration, NASA's public affairs office censored government research for political reasons, adding uncertainty to scientific findings, changing report titles to obscure findings, eliminating politically controversial terms such as "global warming," and altering scientists' quotations.<sup>64</sup> But NASA had laws and agency mechanisms in place to respond to this attack on scientific integrity. The agency's inspector general found that the episode violated the National Aeronautics and Space Act's requirement that NASA offer "the widest practicable and appropriate dissemination"<sup>65</sup> of information about its work.<sup>66</sup> In response, the NASA administrator renewed the agency's commitment to scientific openness<sup>67</sup> and reformed its public relations policy.<sup>68</sup>

Other agencies, however, lack such safeguards, underscoring the need for government-wide rules. Notwithstanding the existence of Obama-era scientific integrity policies, there have been continued reports of political interference in the scientific process at federal agencies.<sup>69</sup> For instance, EPA officials recently blocked agency scientists and contractors from presenting research about climate change and related ecological issues at a professional conference.<sup>70</sup> Agency officials at the Departments of Agriculture, Energy, and the Interior have similarly prevented staff from attending scientific conferences.<sup>71</sup> At the Department of Health and Human Services (HHS), the CDC, and the United States Geological Survey (USGS), agency officials have increased scrutiny of scientists' communications with congressional representatives and the media about their research.<sup>72</sup> An employee at the National Parks Service reports being instructed to avoid using terms such as "climate change" in internal project proposals.<sup>73</sup> And the EPA has introduced a proposed "transparent science"

rule that, despite its name, would limit EPA scientists' access to high-quality research<sup>74</sup> because it would prohibit the agency from using research whose underlying data is not made publicly available.<sup>75</sup> (It would, in effect, bar a substantial number of environmental and public health research studies involving privacy-protected personally identifiable health information from agency consideration.<sup>76</sup>)

Congress should respond to these and other potential threats to the integrity of government research and data by passing legislation that promotes a culture of openness and scientific inquiry, free from politically motivated suppression and manipulation. Specifically, Congress should pass legislation to require agencies to implement and publish scientific integrity policies that apply to both employees and contractors who perform government and government-funded research at federal agencies, as well as federally funded research and development centers.<sup>77</sup> The policies should contain the following principles and elements:

**>> Science and the scientific process** at federal agencies shall be free from politics, ideology, and financial conflicts of interest.<sup>78</sup>

**>> Scientists at federal agencies shall be able to review content released** publicly in their names or that significantly relies on their work as government scientists, so that they can respond to changes to, or inaccurate representations of, their work.<sup>79</sup>

**>> Agencies shall have a clear, consistent, transparent, and predictable procedure for agency approval** of government scientists' publications, presentations, and participation in scientific conferences.<sup>80</sup>

**>> Agencies shall have a procedure for handling disagreements** about scientific method and conclusions.<sup>81</sup>

**>> Agencies shall designate a nonpolitical agency official or officials**, with relevant scientific expertise, to be charged with monitoring and supporting scientific integrity,<sup>82</sup> with appropriate insulation from political officials.<sup>83</sup>

**>> Agencies shall conduct routine scientific integrity training** for all agency personnel who use science to any significant degree in their jobs.<sup>84</sup>

Other countries have similar policies. For instance, last year, Canada's chief science adviser published a government-wide policy on scientific integrity, with directives against falsifying data, destroying records, and ignoring conflicts of interest, and a process to deal with infractions.<sup>85</sup>



## WAGES

### Agency

Department of Labor

### Research and Analysis

The Department of Labor's mission includes assuring work-related benefits and rights, improving working conditions, and advancing opportunities for employment. When regulations are under development, department economists assess their projected economic impact.

### Who Uses It

The Labor Department's economic analyses help workers and business owners predict the effects of regulations on wages and profits.

### Political Interference

In 2018, senior Labor Department officials [ordered](#) career researchers to revise a study showing the negative financial effects on restaurant workers of a proposed rule that would permit restaurant managers to take tips from tip pools over workers' objections. Dissatisfied with the results of the revised study because it still did not support their objective, department officials excluded the analysis from the public rulemaking record.

### Consequences

The manipulation and suppression of the economic analysis of the "tip pooling" rule misled tipped workers about their future earnings, damaging their ability to plan for living expenses. Such unanticipated changes to wages have a ripple effect throughout the economy, impacting business owners and investors.

In the United States, an executive branch requirement that agencies create scientific integrity policies already exists, although it has not been fully implemented. Legislation that would turn this requirement into law — the Scientific Integrity Act — was introduced this year.<sup>86</sup> Making the existing executive branch requirement law is an efficient solution, because it builds on efforts already underway at agencies. It would establish clear standards, and a mechanism to enforce them, while giving agencies flexibility to craft policies that fit their unique needs. And it would improve upon protections in existing law<sup>87</sup> without impeding or suppressing government research.

## Proposal 2

### Congress should pass legislation requiring agencies that perform scientific research to articulate clear standards for, and report on, how political officials interact with career researchers.

When a political official with no background in biology forced DOI scientists to reverse their findings on an issue of endangered species protection, she was criticized in the press and scrutinized by the department's inspector general, prompting her to resign (see Appendix).<sup>88</sup> But the embarrassment this episode from the George W. Bush administration caused has not deterred other political officials from tampering with government scientists' work; on the contrary, many officials have continued to do so with relative impunity.<sup>89</sup> For instance, during the Obama administration, the Fish and Wildlife Service (FWS) decided against protecting the sagebrush lizard under the Endangered Species Act because, as a senior regional official put it, the service did not want to "list a lizard [with a habitat] in the middle of oil country during an election year." The biologist reviewing the process was instructed to report directly to a senior official, instead of her immediate supervisor, about the matter. That supervisor subsequently raised concerns about FWS's decision and later alleged that he was transferred in retaliation for doing so.<sup>90</sup>

During the current administration, when U.S. Customs and Border Protection asked FWS for its input on how animals would be affected by the construction of the president's proposed border wall,<sup>91</sup> FWS officials removed from the agency's response letter several warnings by career biologists and wildlife managers about the wall's potential impacts on the area's rare cats and other animals.<sup>92</sup> Before the letter was drafted, aides to then Interior Secretary Ryan Zinke communicated to FWS officials that "we are to support the border security mission,"<sup>93</sup> regardless of scientific assessments about the impact of that mission on animals the agency is charged with protecting.<sup>94</sup>

These examples — each of which led to the provision of incomplete or inaccurate information to decisionmakers — demonstrate the need for stronger protections from political staff using their oversight of agencies to interfere in the substance of scientific work. While the scientific

integrity policies called for above are a powerful tool for cultivating openness and unbiased research, they are not enough on their own.

Congress should require agencies to adopt protocols that ensure appropriate insulation of experts' work, particularly during the technical stages of regulatory development and the preparation of scientific reports to Congress and the public. It should also increase transparency and bolster accountability in political officials' interactions with scientific staff. Specifically, Congress should pass legislation to:

**>> Require the White House and agencies to publish a policy detailing measures taken to ensure that senior political officials with supervisory authority do not exert improper political influence on the research and analysis of career scientists and other subject-matter experts at agencies.**<sup>95</sup> The legislation should require each administration to identify specific officials, in both the White House and the relevant agencies, who are authorized to communicate with career experts during the technical stages of regulatory development, as well as during the preparation of scientific reports to Congress and the public. The public disclosure requirement can assist Congress and inspectors general in investigating political interference in government research.

**>> Require agencies to maintain a log of contacts between senior political officials with supervisory authority (both at the agency and in the White House) and agency experts.** The log would cover any communications about the substance of scientific research, data, and expert analysis related to proposed regulations and scientific reports prepared for Congress and the public. It would include contacts by subordinates who are directed by covered senior officials to engage in such contacts.

**>> Require agencies to publish reports based on the above logs.** This would allow Congress, inspectors general, and scientific integrity officers to review and inquire about particular contacts, and would allow outside scientists to take those contacts into consideration when relying on agency research and analysis. It would also let courts assess the impact of those contacts when evaluating agency decision-making under the APA.

As in Proposal 1, this legislation would codify a policy that the executive branch has already imposed itself numerous times. For instance, several administrations have adopted policies that limit White House contacts with agencies pertaining to pending regulatory matters.<sup>96</sup> And some agencies have rules requiring that communications by the White House be disclosed in the rulemaking record if they are of substantial significance and clearly intended to affect the ultimate decision.<sup>97</sup>

In addition, scholars have called for similar reforms,<sup>98</sup> and members of Congress looking to hold the executive branch accountable have at times sought contact logs in response to allegations of politically motivated manipulation of scientific research.<sup>99</sup>

## Proposal 3

---

**Congress should pass legislation to define and prohibit politically motivated manipulation and suppression of government research and data in the executive branch. It should also prohibit discrimination and retaliation against government researchers on the basis of their scientific conclusions.**

**Promoting a culture of scientific integrity and shining a light on senior political officials' contacts with agency scientists are important steps to protect government science and data. But they must be supported by mechanisms to deter and punish inappropriate politicization.**<sup>100</sup>

To be sure, political officials have the authority and prerogative to set research and regulatory priorities and direct career experts accordingly. But it undermines the important and longstanding role of unbiased science in policymaking when political officials interfere with completed scientific research in order to make it appear to support their policy objectives.

To date, there have been some executive branch efforts to prohibit scientific misconduct. The Federal Policy on Research Misconduct addresses fabrication, falsification, and plagiarism in proposing, performing, and reviewing research, and in reporting research results.<sup>101</sup> However, this policy does not focus on the specific problem of political interference in government research.

Additionally, federal employees who blow the whistle on science-related improprieties have some legal protections.<sup>102</sup> But the process for pursuing such whistle-blower claims is time-consuming, and claimants' prospects for

relief are low.<sup>103</sup> There should be consequences for wrongdoers — not merely for retaliating against whistle-blowers, but for the underlying misconduct — in order to hold them accountable and deter malfeasance.

At times, inspectors general police political interference in government research and data.<sup>104</sup> But their authority to investigate wrongdoing often turns on agency-specific legislation and regulations<sup>105</sup> rather than a government-wide standard that prevents improper political interference. Inspectors general also have limited power to impose penalties. Instead, that is left in the hands of agency heads, who may themselves be implicated in wrongdoing or susceptible to political pressure.<sup>106</sup>

Congress should enact legislation that makes it unlawful for government officials<sup>107</sup> to

**>> tamper with the conduct of federally funded scientific research or data** for personal, financial, or partisan political gain,<sup>108</sup>

**>> censor findings of such research or analysis for the same reasons,**<sup>109</sup>

**>> direct the dissemination of scientific information** that the directing official knows is false or misleading,<sup>110</sup> and

**>> retaliate or discriminate against government researchers** for the development or dissemination of scientific research or analysis that the researchers reasonably believe to be accurate and valid.<sup>111</sup>

To ensure that this legislation does not penalize legitimate supervisory interventions in scientific research, differences of opinion, and merely negligent errors in scientific judgment, there should be a clear standard for intent. Thus, a finding of prohibited political interference should require that there be a significant departure from accepted practices of the relevant research community,<sup>112</sup> the misconduct be committed intentionally, knowingly, or recklessly,<sup>113</sup> and the allegation be proven by a preponderance of evidence.<sup>114</sup>

This legislation would strengthen the longstanding aims of several existing executive branch protocols,<sup>115</sup> as well as statutes that prohibit public employers from retaliating against employees who assist in their administration or enforcement.<sup>116</sup> It would create a clearly defined, government-wide prohibition against improper influence over government research and data that has until now existed only in specific statutes or as a matter of executive branch policy. Similar legislation has been introduced: the Scientific Integrity Act, introduced this year, would prohibit the alteration and suppression of scientific and technical findings, as well as intimidation of and retaliation against research staff.<sup>117</sup> And the Restore Scientific



## LABOR MARKET

### Agency

Bureau of Labor Statistics

### Research and Analysis

The BLS measures labor market activity, working conditions, and price changes in the economy. Its mission is to collect, analyze, and disseminate essential economic information to support public and private decision-making.

### Who Uses It

BLS data inform workers' decisions about when to look for jobs, and careers and industries to pursue. Over 80 million people are affected by cost-of-living adjustments to wages, benefits, and financial obligations, which are determined by the agency's Consumer Price Index. Businesses change wages and benefits and make hiring and production decisions based on BLS cost-of-living statistics and other data. Additionally, BLS data track consumer buying habits, helping companies market products and set prices.

### Political Interference

President Trump has [called](#) into question the veracity of BLS data, although there is no evidence to support his claims.

### Consequences

Unfounded criticisms of BLS data can undermine their integrity. If BLS data were manipulated or suppressed, workers' wages, consumers' buying power, and companies' continued economic viability and business strategy would all be at risk. Additionally, due to the significance of wage and employment statistics as metrics for the success of elected officials' political agendas, manipulated statistics could undermine voters' ability to make informed decisions at the ballot box.

Integrity to Federal Research and Policymaking Act, introduced in 2005 in response to threats to scientific integrity during the George W. Bush administration, would have made political interference a prohibited personnel practice.<sup>118</sup>

## Proposal 4

---

### Congress should pass legislation to ensure the proper functioning of science advisory committees.

Federal policy benefits from the knowledge of subject-matter experts across the country. But we cannot expect every expert in life-saving technologies or medicines to be a federal employee. Science advisory committees help policymakers tap into outside expertise. To give a few examples, the Federal Reserve and the Consumer Financial Protection Bureau rely on expert advice about financial stability from academics, consumer advocates, and industry leaders who serve as members of advisory committees,<sup>119</sup> and HHS convenes advisory committees composed of health-care professionals and researchers from across the country when responding to new health risks, such as antibiotic-resistant bacteria.<sup>120</sup> The work of these advisory committees, too, is at risk of political interference. Indeed, notwithstanding the guardrails meant to ensure balance in the points of view represented on science advisory committees,<sup>121</sup> these committees have been undermined and politicized in a variety of ways under recent administrations, often affecting the quality and independence of the advice they provide.<sup>122</sup>

Both Presidents Clinton and Trump issued executive orders requiring executive departments and agencies to reduce the number of advisory committees by one-third, and President Trump has placed a cap on the total number of advisory committees across the government.<sup>123</sup> The George W. Bush administration disbanded advisory committees when they attracted opposition from religious and industry groups for their scientific conclusions<sup>124</sup> and removed experts on pediatric lead exposure from an advisory committee that issues recommendations to prevent childhood lead poisoning, replacing them with members who had direct ties to the lead industry.<sup>125</sup> The revamped panel issued recommendations at odds with research showing serious cognitive damage resulting from lead exposure.<sup>126</sup> The Obama administration was criticized for naming a proponent of a debunked theory about links between vaccines and autism to the President's Committee for People with Intellectual Disabilities<sup>127</sup> and appointing a major donor to Democratic candidates and the Clinton Foundation to the State Department's International Security Advisory Board, despite his lack of background in nuclear security.<sup>128</sup>

During the present administration, several committees

have not met, in violation of their charters;<sup>129</sup> administration officials have failed to fill vacancies on science advisory committees;<sup>130</sup> agency officials have dismissed science advisory committee members who come from academia and other subject-matter experts and replaced them with officials from only Republican state governments, and with representatives from regulated industries who hold views that are outside the scientific mainstream on topics such as climate change and the health effects of exposure to toxic chemicals.<sup>131</sup> At the EPA, political officials have abandoned the practice of deferring to career staff's recommendations for appointment of advisory committee members, further increasing the membership of political actors and industry representatives.<sup>132</sup>

As a result of these abuses, many agencies either do not receive independent science advice in policymaking or receive advice that is skewed in favor of the regulatory agendas of political leaders or the interests of regulated industries. To ensure that policymaking is informed by high-quality, objective science, Congress must address the shortcomings of the current federal science advisory committee system. Specifically, Congress should pass legislation to:

**>> Create more accountability in the science advisory committee membership selection process** by publishing the criteria for evaluation of nominees,<sup>133</sup> allowing the public to comment on candidates, and releasing the names and roles of the key officials involved in the selection process.<sup>134</sup> As one means to ensure that highly qualified scientists are among those under consideration for appointment to science advisory committees, Congress could require that the National Academies of Sciences, Engineering, and Medicine (NASEM) provide lists of nominees for the agencies to consider (to be made available to the public simultaneously).<sup>135</sup> Finally, Congress could articulate educational and professional requirements for at least some of the members of specific advisory committees.<sup>136</sup>

**>> Increase protections against vacancies on science advisory committees and the politically motivated removal of advisory committee members**, such as by creating staggered terms for members of standing committees, for-cause removal protection for members,<sup>137</sup> and a default selection process in the event that vacancies are not filled promptly.<sup>138</sup>

**>> Increase transparency surrounding science advisory committee members' financial and professional ties.** This should be done by extending disclosure requirements that apply to participants designated as "special government employees" to those designated as "representatives,"<sup>139</sup> and potentially by expanding the scope of information required to be disclosed — such as the

historical professional affiliations of nominees and the sources of funding for their research<sup>140</sup> — in order to better capture potential sources of influence. Congress should also require contemporaneous disclosure of recusals and conflict-of-interest waivers.<sup>141</sup> Finally, Congress should specify that receiving grants from the agency that hosts the advisory committee is not a conflict of interest.

**>> Establish safeguards to better ensure that science advisory committees meet as required by their charters**, such as by requiring that information about meeting schedules, notes from meetings, and the reasons for canceling or not scheduling meetings be published on advisory committees' websites.<sup>142</sup> This would be in addition to the existing requirement that such information is published in the Federal Register.<sup>143</sup>

**>> Create a mechanism for peer review of science advisory committees' work in the event that there are credible claims from members of the public that a committee's work deviates significantly from the scientific consensus of the relevant research community.** This would build on ad hoc measures agencies have used when the validity of advisory committees' scientific conclusions is called into question.<sup>144</sup> NASEM has at times performed such independent peer review of scientific conclusions.<sup>145</sup> Frivolous challenges would be deterred because the review process would not interfere with the publication of the findings and because a peer review confirming the science advisory committee's conclusions would bolster the credibility of the committee.

**>> Require agency leaders to provide an explanation when a science advisory committee's term is not renewed** and make the explanation available to the public, in order to hold administration officials accountable when they determine that scientific advice is no longer needed.<sup>146</sup>

These recommendations would increase the quality of the advice provided by science advisory committees. Additionally, they would give the public, the press, and Congress more insight into the motivations and deliberations of committee members, and create incentives for committees to improve their credibility as stewards of science working in the public interest, potentially deterring the types of abuses that have occurred with increasing frequency during recent administrations. Numerous scholars, scientific integrity advocates, and good-government groups have long called for similar reforms.<sup>147</sup> In 2016, 2017, and 2019, the House of Representatives passed, with bipartisan support, FACA amendments that would increase transparency and decrease conflicts of interest for advisory committees.<sup>148</sup>

## Proposal 5

---

### Congress should enact legislation requiring proactive disclosure of government research and data.

**Another success story underscores how legislation can** ensure that government research be available for public use. The National Climate Assessment, a major government report on climate change, is required by law to be submitted to Congress.<sup>149</sup> In 2018, the report was released on the day after Thanksgiving, which was seen by many as an attempt to downplay its findings by releasing them on a day when fewer Americans than usual were paying attention to the news.<sup>150</sup> President Trump told reporters, "I don't believe" the report's findings that the world's temperature is rising and human actions likely play a role in it.<sup>151</sup> And the administration announced plans to convene a White House panel to challenge established scientific conclusions about the severity of climate change and humanity's contributions to it.<sup>152</sup> Despite these attempts to discredit and bury the report's findings, experts' scientific conclusions are now available to Congress and the public, establishing a sound basis for policymaking, accountability, and scientific progress.

But there are plenty of valuable government research products that, unlike the National Climate Assessment, are not required by current law to be made public. To be sure, agencies throughout the federal government have a two-century-long history of proactively making completed research reports, finalized data, and similar materials produced and used by the government available to the public.<sup>153</sup> For instance, the CDC's Morbidity and Mortality Weekly Report (MMWR), an early version of which began publication in 1878,<sup>154</sup> is published to this day as a matter of agency practice, not law.<sup>155</sup> It has an international readership that consists predominantly of health-care practitioners, public health officials, epidemiologists, researchers, and educators.<sup>156</sup> If the MMWR were not published, or the information it contains were censored or manipulated for political purposes, life-saving research would be delayed or hampered.

The norm of proactively disseminating government research products is breaking down. There is an increasing tendency among political officials to restrict public access to government research and data, as documented in the Appendix.<sup>157</sup> For instance,<sup>157</sup> the EPA and the White House suppressed a report from HHS's Agency for Toxic

Substances and Disease Registry that showed that a class of toxic chemicals, which have contaminated water supplies near military bases, chemical plants, and other sites in several states, endangers human health at a far lower level than the EPA had previously called safe. Emails between White House and EPA officials show that the reason for suppressing the report was a concern that it would be a “public relations nightmare.”<sup>158</sup>

While many research and data products that the government proactively discloses could be obtained through FOIA requests in the event that agency officials withheld them, as noted above, FOIA requests can take a long time to be fulfilled.<sup>159</sup> Additionally, information is often withheld improperly in FOIA responses.<sup>160</sup> Thus, FOIA does not guarantee timely and complete access to research the government has historically shared with the public.

Building on past efforts,<sup>161</sup> Congress should codify guarantees for public access to government-funded research and data, in electronic form, and to impose safeguards against removal of this information from the public domain.<sup>162</sup> The legislation should contain provisions to:

**>> Codify the presumption of disclosure for government-funded research and data, and specify a time frame within which the information must be disclosed** after it is completed or published.<sup>163</sup> To the extent practicable, and in compliance with applicable legal restrictions, privileges, protections, and authorities, completed data<sup>164</sup> and research findings, such as peer-reviewed research papers accepted for publication in journals, should be made available to the public.<sup>165</sup>

**>> Require free online public access** to government-funded research and data that are in the public domain, with protections for intellectual property rights and other proprietary interests.<sup>166</sup> The legislation should also require that research and data repositories contain descriptions of available materials written in plain language.<sup>167</sup> Further, the legislation should put forth clear standards delineating the grounds for withholding government-funded research and data<sup>168</sup> and require agencies to memorialize in writing the grounds on which materials are withheld, with records to be maintained by the agency.

**>> Require agencies to establish safeguards against the removal of government research and data,**<sup>169</sup> including advance notice to the national archivist of planned data removal.<sup>170</sup>

**>> Create an enforcement mechanism to ensure compliance with public access requirements, along with remedies for noncompliance.**<sup>171</sup> These should include not only disclosure of the improperly withheld information and restoration of improperly removed information, but also penalties, such as cost-shifting in the event of agency wrongdoing and disci-

pline for responsible agency personnel, depending on the magnitude of and motive for noncompliance. The legislation should also permit private individuals and organizations to request that materials be made publicly available, and allow for the filing of complaints in federal court in the event that a request is denied or ignored.<sup>172</sup>

This proposal would codify and standardize a practice to which many agencies already adhere, whether pursuant to statute or agency practice. It aligns with other legislation recently passed by Congress that requires government data assets to be made publicly available in electronic form,<sup>173</sup> and numerous other bills lawmakers have introduced to further codify the norm of public access.<sup>174</sup> Guaranteeing public access to government-funded research and data would foster scientific progress, a more informed public, and greater accountability for policymakers.



## SCIENCE UNDER SIEGE

### FOOD

#### Agency

U.S. Department of Agriculture

#### Research and Analysis

The USDA studies and collects data on food, agriculture, natural resources, rural development, nutrition, and related issues.

#### Who Uses It

Farmers, businesses, investors, scientists, and public health officials rely on USDA research to improve farming techniques, make business decisions about agricultural production, and educate the public about nutrition.

#### Political Interference

In 2018, senior USDA officials [blocked](#) a news release about research showing that rice loses vitamins in a carbon-rich environment, a potentially serious health consequence of climate change for the 600 million people worldwide who rely on rice as a staple of their diet.

#### Consequences

Without widespread dissemination and publication of USDA reports, farmers, businesses, and investors may not make the most informed decisions about agricultural production. Suppressing research about the changing nutritional content of a staple crop such as rice can lead to malnutrition and poor health.

## Proposal 6

---

### Congress should enact legislation requiring disclosure of the nonpolitical expert regulatory analysis<sup>175</sup> that underlies agency rulemaking.

Laws passed by Congress tend to be broad policy mandates. Regulatory agencies are charged with using their expertise to craft the detailed rules and procedures needed to implement the law.<sup>176</sup> This means that, for all the press and public attention devoted to Capitol Hill, the success or failure of a new measure passed by lawmakers can often depend on what happens when agencies interpret and implement Congress's directives.

Pursuant to the APA,<sup>177</sup> agencies must publish a notice of a proposed rule,<sup>178</sup> give the public a chance to submit written data, views, or arguments regarding the proposed rule,<sup>179</sup> consider all relevant matter presented during the comment period,<sup>180</sup> and provide a statement of the basis and purpose for the final rule.<sup>181</sup> But existing mechanisms are inadequate to ensure real transparency. As discussed above, although litigation under the APA is possible,<sup>182</sup> it is costly and time-consuming, and past executive orders aimed at improving transparency and accountability in the rulemaking process have not gone far enough.<sup>183</sup> Recent manipulations of the rulemaking process,<sup>184</sup> such as on the issues of wetland protection<sup>185</sup> and food safety at slaughtering facilities,<sup>186</sup> make clear that it can be gamed with relative ease by determined political actors.

This kind of manipulation deprives courts, Congress, and the public of the expert analysis needed to evaluate the government's policy decisions. Indeed, by hiding or changing expert analysis, political officials can thwart agencies' statutory missions to protect public health and welfare and subvert the administrative process.<sup>187</sup>

To ensure public access to the regulatory analysis underlying rulemaking, Congress should:

>> **Require agencies to publish the nonpolitical expert analysis underlying regulatory actions as part of the administrative record.** Congress should specify that the version of the scientific analysis to be published is the final version prepared by nonpolitical agency experts, before it has been reviewed by political officials at the agency or in the White House.

>> **Require substantive alterations<sup>188</sup> of the regulatory analysis made by or at the suggestion of political officials — both in the agency and the White House — to be published in the administrative record,** as well, along with an explanation of the changes made to the analysis.

This proposal would address political interference in expert analysis of draft regulations that occurs within agencies, as well as when draft regulations reach the White House. It would not hinder political officials from exercising their prerogative to make policy decisions, or even from challenging the science and methodology of career experts, as is their right. It would merely preserve the nonpolitical analysis of agency experts for the public, Congress, and the courts to consider when evaluating agency decision-making — and, in the process, deter political officials from making changes for improper reasons.

The proposal would build on an existing framework. It would modestly extend the disclosure, required by the Clinton and Obama executive orders, of proposed rules that agencies submit to the Office of Management and Budget (OMB) and of changes made in the White House.<sup>189</sup> It would standardize a requirement that is found in a variety of existing laws.<sup>190</sup> It is in line with legislation introduced recently to address related issues.<sup>191</sup> And it responds to calls from both the Administrative Conference of the United States and outside scholars for improved transparency in the regulatory process.<sup>192</sup>



# Accountable and Qualified Government Officials

**The abuses we have documented reveal fissures in our democratic guardrails, but they originate with individual actors — often the president, but also his political appointees throughout the executive branch. These officials wield tremendous power. Recognizing there is no substitute for character and quality in those selected to occupy positions of public trust, we turn to the norms and practices for appointing professionals to critical government positions.**

Of all the president’s powers, his power to appoint top executive branch officials is among the most far-reaching.<sup>193</sup> Because no president can be personally involved in all of the countless actions taken by his administration each day, his ability to carry out change and improve the effectiveness of the federal government is in large part dependent on the people chosen to run it.

The Founders understood this — even at a time when the federal government was far smaller than today. “There is nothing I am so anxious about as good nominations,” Thomas Jefferson wrote soon after entering the White House in 1801, “conscious that the merit as well as reputation of an administration depends as much on that as on its measures.”<sup>194</sup>

That is why the Constitution extends our system of checks and balances to the appointment process by making the president’s authority to appoint senior officers subject to the Senate’s “advice and consent.”<sup>195</sup> The Senate, argued Alexander Hamilton in the *Federalist Papers*, would serve as “an excellent check upon a spirit of favoritism in the President” and a guard against “the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity.”<sup>196</sup>

It did not always work out that way. Though every president after Washington has had occasional nominees opposed by the Senate,<sup>197</sup> without recognized standards for evaluating nominees, presidents enjoyed substantial deference.<sup>198</sup> Early in our history, this contributed to the development of a patronage system, in which key government posts — usually those that did not require Senate confirmation, but sometimes also those that did — were doled out to political supporters and party functionaries.<sup>199</sup> By the late 19th century, the result was a federal government rife with corruption and cronyism, with few mechanisms to ensure that top officials were qualified for the

positions they held.<sup>200</sup>

As the government grew larger and more complex to keep pace with a rapidly industrializing economy, the need for reform became apparent. The Pendleton Act first established an apolitical civil service in 1883, run on principles of professionalism and merit.<sup>201</sup> And the high-profile Teapot Dome scandal of the 1920s helped push things further in the same direction. By the middle of the 20th century, a set of expectations had developed for the political appointments process: though presidents should have wide latitude in staffing their administrations, the Senate should ensure that nominees are reasonably well qualified and free from clear conflicts of interest.<sup>202</sup> And candidates for vacant positions should be nominated by the president, and have their nominations considered by the Senate, in a timely manner.<sup>203</sup>

These expectations were not always met, but they helped maintain Americans’ faith in the basic integrity and effectiveness of government and those who led it.

It was not inevitable that we would come to treat government jobs as public trusts rather than spoils to reward political supporters or friends and family. Indeed, the system has been threatened in the past: Watergate and associated scandals were enabled in part by the Nixon administration’s abuse of the federal bureaucracy and personnel process, including the placement in key posts of loyalists willing to put the president’s political fortunes ahead of the good of the country.<sup>204</sup> In response, Congress in 1978 passed, and President Jimmy Carter signed, the Ethics in Government Act and the Civil Service Reform Act, which reaffirmed many of the values first embodied in the Pendleton Act nearly a century earlier. They established tougher ethics rules, strengthened the merit system for hiring and promoting personnel, established protections against political retaliation for civil servants, invested greater authority in senior managers, and sought to incentivize high performance.<sup>205</sup>

Today, this system is at risk, threatened by hyperpartisanship and the erosion of key principles that were once championed by both parties. Again, Congress must respond.

Recent presidents have filled critical positions with unqualified cronies while leaving other posts vacant. They also have found ways to sidestep the Senate’s approval role, nullifying a crucial constitutional check.

And lawmakers have rubber-stamped some unqualified or conflicted nominees while dragging their feet on considering others, often based on whether or not the Senate and the president share a party.

This has culminated in the current administration's near disregard for the personnel principles embodied in earlier reforms.<sup>206</sup> President Trump has put family members in key adviser jobs. He has been credibly accused of politicizing the security clearance process, risking national security.<sup>207</sup> And he has installed a series of acting officials — who do not require Senate confirmation — in crucial government posts while often delaying nominating a permanent replacement. Two years into his administration, the secretaries of defense, homeland security, and the interior; the directors of the Office of Management and Budget, Immigration and Customs Enforcement, and the Federal Aviation Administration; the FDA commissioner; and the United Nations ambassador were all serving in an acting capacity. “I like acting because I can move so quickly,” Trump has said. “It gives me more flexibility.”<sup>208</sup>

In addition to representing a damaging end run around the Senate's advice and consent authority, the use of so many acting officials creates instability in the leadership of crucial agencies, including those responsible for national security. And the broader breakdown in the political appointments process seen over recent decades has even more dire consequences. It harms the government's ability to perform essential functions, deters qualified candidates from pursuing careers in public service, and undermines Americans' faith in the people and programs responsible for making and administering policy.<sup>209</sup>

To ensure an appointments process based on professionalism, merit, and an active role for the Senate, Congress needs to act.

## Streamlining, and Restoring Democratic Accountability to, the Appointment of Senior Executive Branch Officials

Of the approximately 4,000 political positions in the executive branch, the Senate provides advice and consent for around 1,200 of them, known as “PAS” positions (for “Presidential Appointments with Senate confirmation”).<sup>210</sup> The occupants of these positions wield tremendous influence — the most senior PAS officials manage entire departments responsible for protecting our environment, engaging in national defense, administering a fair and

impartial system of justice, promoting economic growth and business development, and representing America's interests abroad. Their significance is the reason why the Senate's advice and consent are required for the president to fill them.<sup>211</sup>

Congress has also recognized the need for some flexibility when vacancies arise. In 1868, Congress passed the Vacancies Act to provide “breathing room in the constitutional system for appointing officers,” authorizing presidents to temporarily fill critical positions while the confirmation process proceeded.<sup>212</sup> Through the Vacancies Act, Congress recognized the inherent dangers of long-term vacancies in the executive branch, but also sought to preserve the Senate's advice and consent authority.<sup>213</sup>

When Congress perceived abuses in the president's use of his Vacancies Act powers, it responded with additional safeguards. President Clinton was perceived as working around the Senate to permanently install an acting official to lead the Civil Rights Division of the Justice Department.<sup>214</sup> In response, Congress in 1998 passed the Federal Vacancies Reform Act (FVRA), which included a number of mechanisms to preserve the Senate's advice and consent authority even when the president appoints an acting official.<sup>215</sup> And in 2011, amid bipartisan concern about the slow pace of the Senate's confirmation process, Congress approved a law that cut the number of executive branch jobs requiring Senate approval.<sup>216</sup>

Today, the challenges facing the appointments process are even stiffer: there is no longer an expectation that presidents or Congress will even try to quickly fill important positions.<sup>217</sup> Critical posts are frequently left vacant for extended periods of time, either because the president does not make an appointment or because the Senate does not move to confirm a president's nominee. The Senate confirmation process for such positions now takes five times longer than it did 40 years ago.<sup>218</sup> Two years into the Trump administration (with a Senate dominated by members of the president's party), only 431 of 713 key positions requiring Senate confirmation were filled with Senate-confirmed personnel,<sup>219</sup> with less than half of the key positions filled at the Departments of Justice or the Interior.<sup>220</sup> This puts the Trump administration nine months behind the average presidential administration in filling key appointments in government, and with more positions vacant than at the same point in the past five presidential administrations.<sup>221</sup>

President Trump is not alone among recent presidents in having a high vacancy rate. One analysis of administrations from Presidents Carter to George W. Bush found that PAS positions were on average vacant for one-quarter of an administration's tenure, and the length of vacancies in federal agencies is on an upward trend.<sup>222</sup> The *9/11 Commission Report* found that the George W. Bush administration did not have critical

subcabinet officers in place until the summer of 2001, which created the potential for disruption in national security policy.<sup>223</sup> And with 15 months left in the Bush administration, a significant number of senior officials vacated their positions,<sup>224</sup> leaving three cabinet posts — at the Departments of Justice, Agriculture, and Veterans Affairs — to be filled by acting officials. Other PAS positions were filled by acting officials for extended periods, including the administrator of the Centers for Medicare and Medicaid Services, the general counsel of the Department of Homeland Security, and over a quarter of U.S. attorneys.<sup>225</sup> President Obama had his own challenges with vacancies long into his second term. About a quarter of the PAS positions at the State Department were vacant for months after his reelection, and it took him almost a year to name a secretary of commerce.<sup>226</sup> And the Transportation Security Administration had no permanent director when the “underwear bomber” tried to bring down a passenger plane headed to Detroit on Christmas Day 2009.<sup>227</sup>

The Senate’s obstruction is partly to blame. For example, senators sometimes tie political nominations to unrelated policy goals<sup>228</sup> or use anonymous holds to stall key nominees.<sup>229</sup> And the Senate now routinely holds pro forma sessions to prevent the president from making recess appointments while Congress is adjourned.<sup>230</sup> These tactics were deployed at unprecedented rates during the Obama administration when the Senate was controlled by the opposition party.<sup>231</sup>

Presidents deserve their share of blame, too. That is in part for nominating candidates who are more partisan, more hostile to the missions of their prospective agencies, and less qualified than previously.<sup>232</sup> More important, presidents have at times avoided putting forward nominees to fill vacant PAS positions at all, instead using legislative loopholes to employ acting officials for indefinite periods.<sup>233</sup> President Trump publicly admitted he was “in no hurry” to fill PAS positions with permanent staff.<sup>234</sup>

Other reasons are structural. There are many more PAS positions today than there were just a few decades ago.<sup>235</sup> This is because of new boards and commissions (and, less often, the creation of new agencies) in the federal government, as well as the continued thickening of government, with more layers of political leadership added during each new administration.<sup>236</sup> Meanwhile, the resources available to the executive branch for vetting nominees and to the Senate for evaluating them have not increased at anything like the same rate. As a result, Senate committees report ever-increasing nomination workloads.<sup>237</sup>

Causes aside, the drawn-out process creates a needless obstacle to the effective administration of government and undermines policymaking. Career civil servants, who typically act as temporary standard-bearers when vacancies arise, generally do not have the needed clout to drive policy or persuade other senior political officials.

They also may lack the standing to modify or push back against a president’s policy directives when necessary. It is troubling, for example, that President Trump adopted and implemented the first iteration of his “travel ban” without a director of Immigration and Customs Enforcement or a commissioner for Customs and Border Protection in place;<sup>238</sup> that he embarked on a historic diplomatic mission to North Korea without an ambassador to South Korea;<sup>239</sup> and that major preparations for the 2020 Census were made without a permanent director of the Census Bureau, the largest statistical agency in the federal government.<sup>240</sup> And it was troubling that the Fish and Wildlife Service had an acting director when the Obama administration was responding to the BP Deepwater Horizon oil spill.<sup>241</sup>

Research shows that long-term vacancies damage agencies in several other ways.<sup>242</sup> They can delay or hamper needed reforms to programs and services.<sup>243</sup> Opportunities for efficiencies or improvements are more likely to be ignored or put on the back burner.<sup>244</sup> Agency morale generally deteriorates.<sup>245</sup>

When presidents insist on leaving a PAS position vacant, rather than working with Congress to fill it, they are abrogating congressional authority — after all, the Senate either has the constitutional obligation to provide advice and consent or it has determined the position’s duties warrant its advice and consent.<sup>246</sup> Going further and exploiting statutory loopholes to circumvent the Senate entirely by installing in powerful posts acting officials, who are often political allies, is even worse. It gravely undermines democratic principles. Because these acting officials are not subject to Senate confirmation, their backgrounds and qualifications are subject to less scrutiny and public examination, and they are less accountable to Congress and the people once in place.

To restore an effective appointments system, presidents need to put forward qualified nominees in a timely manner, and Congress needs to expeditiously consider them. The following proposals would help ensure this happens.

# Proposal 7

---

## Congress should fix the Federal Vacancies Reform Act to prevent presidents from cutting the Senate out of the appointments process.

The FVRA of 1998 deploys multiple mechanisms to prevent presidents from circumventing the Senate’s advice and consent authority. It limits the classes of officials who are eligible to act in a PAS role and also the length of time (generally 210 days) during which they may act.<sup>247</sup> The time limit creates an incentive for the president to nominate individuals for Senate consideration. The statute also motivates the Senate to act on those nominations by suspending the time limit upon the president’s nomination, lest the Senate wants the acting official to continue serving without its review.<sup>248</sup>

But the FVRA has proven inadequate. The statute purports to limit presidents to selecting from three classes of individuals to serve as acting officials in vacant PAS roles: the “first assistant”<sup>249</sup> to the vacant office, another PAS official in the executive branch, or a senior official who has been serving in the same agency as the vacant office for at least 90 of the previous 365 days.<sup>250</sup> However, a loophole in the law allows presidents to insert people from outside these three classes — and wholly outside of government — into vacant offices and empower them to lead offices or agencies without submitting their nominations to the Senate.<sup>251</sup> Delays in the confirmation process, as well as genuine interest in keeping government running, contribute to the pressure on presidents to exploit this loophole. For example, after his earlier nominee to serve as assistant attorney general for civil rights in the Department of Justice was rejected by the Senate, President Obama appointed someone from outside of government to serve as the principal deputy assistant attorney general for civil rights and then elevated her (as the first assistant) to the role of acting assistant attorney general for civil rights. The Civil Rights Division has historically played a key role in handling difficult and publicly prominent cases, making evident a president’s interest in selecting and retaining a division head with aligned interests. Obama’s appointee ran the division for more than two years, well beyond the time limits imposed in the FVRA, and without the

### SCIENCE UNDER SIEGE



## CLIMATE CHANGE

---

### Agency

Multiple agencies, including the Departments of State, Defense, Energy, Commerce, and Health and Human Services, and NASA

### Research and Analysis

Numerous federal government studies have improved knowledge of the health and environmental effects of climate change. Federally funded climate science has led to government action to improve air and water quality, prevent property damage due to severe weather, protect wildlife, and reduce the spread of diseases that have become more prevalent because of climate change.

### Who Uses It

Climate science research informs the work of public health and land use experts to protect people and animals from the effects of climate change. Manufacturers respond to the federal government’s climate research and regulations by investing in technology to reduce carbon emissions and increase energy efficiency. Climate change impacts many other facets of the economy, from food production to real estate.

### Political Interference

In 2006, senior NASA officials [suppressed](#) and undercut the findings of a leading climate change expert.

### Consequences

Without access to objective government-sponsored climate research, healthcare professionals and urban planners lack the tools necessary to prevent and respond to diverse issues such as asthma, mosquito-borne illnesses, and flooding. Insurers and property owners cannot make informed decisions about where and how to invest in durable construction. The absence of climate policy based on federal science creates chaos for manufacturers that have committed to reducing carbon emissions.

president formally nominating her.<sup>252</sup>

President Trump has exploited the same loophole<sup>253</sup> and has recently taken it a step further. After the former director for U.S. Citizenship and Immigration Service (USCIS) departed, President Trump created a new first assistant position and then appointed former Virginia attorney general Ken Cuccinelli to fill it,<sup>254</sup> despite the fact that Cuccinelli had never previously served in the federal government and several senators, including members of the president's party, had expressed opposition to his potential nomination as USCIS director.<sup>255</sup> Once in the role, Cuccinelli became the acting director of USCIS, in apparent compliance with the FVRA.<sup>256</sup> This maneuver establishes a troubling precedent that future presidents may rely upon to appoint literally *anyone* to almost any vacant position, despite the FVRA's stated limitations.<sup>257</sup>

The FVRA is prone to abuse in another important way. As written, it is unclear whether the statute's provisions apply when the president terminates a PAS official.<sup>258</sup> This provides an avenue for a president to circumvent the confirmation process by firing officials and continuously appointing acting officers instead of nominating a permanent replacement. Some believe this abuse was exemplified by Jeff Sessions's recent departure as attorney general and the president's subsequent designation of Matthew Whitaker (who formerly served as chief of staff to Sessions, a non-Senate-confirmed role) as the acting attorney general.<sup>259</sup> Trump requested Sessions's resignation, after relentlessly attacking him in public,<sup>260</sup> despite the Senate's continued defense of Sessions.<sup>261</sup> The uncertainty over whether the FVRA is triggered when a president fires an official created doubt about whether Whitaker's designation was lawful.<sup>262</sup>

The FVRA also currently lacks an effective enforcement mechanism. This means that officials may serve, either intentionally or inadvertently, as acting officials for longer than permitted by law.<sup>263</sup> Currently, the law's primary enforcement mechanism relies on a person who has been injured by an agency's action challenging that action in court, based on the theory that it was taken by an improperly designated or appointed acting official.<sup>264</sup> But FVRA litigation is rare. The FVRA does require the comptroller general to report to the appropriate congressional committee when officers have served for longer than the allowable period. But this indirect reporting mechanism is time-consuming and does not impose sufficient accountability on the violating agency.<sup>265</sup>

To preserve its role in the appointments process and democratic accountability without hampering the effectiveness of federal agencies, Congress should pass legislation reforming the FVRA to eliminate avenues for the most egregious abuses. The legislation should at a minimum:

**>> Impose additional limits on the class of people who may serve as acting officers or perform the duties of a vacant PAS office until the president nominates a permanent replacement.**<sup>266</sup> The president should not be able to completely work around Congress by installing individuals from outside government to serve as acting PAS officials for seemingly indefinite periods of time. We do not believe Congress intended to arm the president with such broad and disrupting appointment powers — even with temporary effect — when it adopted the FVRA. Congress should strengthen the existing limits in the FVRA by conditioning an individual's ability to serve as an acting official on a minimum period of prior service in the federal government.<sup>267</sup> Furthermore, to minimize operational disruptions when vacancies arise, presidents should be required to first choose from eligible individuals within the same agency as the vacancy before selecting an official from an outside agency.<sup>268</sup>

As we are mindful of the president's appointment prerogatives, we recommend that once a formal nomination for a permanent successor is submitted to the Senate, the president should be free to select from the broader class of individuals currently eligible to serve as acting officials under the FVRA. By tying the nomination of a permanent successor to a broader class of eligible acting officials, Congress would create an incentive for presidents to nominate individuals for Senate confirmation — without a nominee, the president would be limited to selecting an individual who satisfies the new tenure-of-service requirement to serve as the acting officer.

Likewise, the prospects of the president selecting from a broader class of individuals to act in a vacant office should motivate the Senate to seriously and timely consider a nominee. Should the president name an individual who is obviously unconfirmable, the Senate could quickly reject the nominee and the class of eligible acting officials would once again be limited to the existing class in the FVRA. This proposal also protects the president's prerogatives should the Senate simply refuse to act on a nominee; in such situations, we believe the president's constitutional responsibilities and the effective functioning of government weigh in favor of additional executive flexibility.

**>> Limit the class of people eligible to serve as an acting officer when the vacancy arises from the president's firing of a Senate-confirmed official.** To prevent abuse, when the president fires a PAS official, only someone serving as the first assistant<sup>269</sup> to the vacant office at the time the vacancy arises, and who has served for a defined minimum period of time,<sup>270</sup> should be eligible to perform the functions of the vacant role. If the first assistant position is vacant, or the tenure requirement is not satisfied, then the statute could allow the president to select a senior career official from within the agency (who satisfies the tenure requirement) to serve as the acting officer.<sup>271</sup>

**>> Impose stricter and more transparent reporting requirements on executive agencies to prevent officials from serving in violation of the FVRA.** Agencies should regularly report to their congressional committees of jurisdiction on the status of all PAS vacancies and appointments made pursuant to the FVRA in their respective agencies. Congress and the agencies should also make this information more readily available to the public. Agencies could, for example, provide up-to-date information on agency websites, much as they provide up-to-date information in their online FOIA libraries.

These reforms would close a significant loophole in the FVRA, restoring what we believe was one of the driving purposes of the law: to prevent presidents from working around Congress to fill PAS positions. They would also reassert Congress’s role in the appointments process by limiting a president’s options when terminating a Senate-confirmed official. Finally, they would provide more transparency and accountability to the process for temporarily filling leadership positions, reducing the likelihood of abuse. We are not alone in recognizing that the FVRA needs reform. Scholars and nongovernmental organizations have highlighted these weaknesses and called for Congress to strengthen the law.<sup>272</sup> It has done so before — and recent abuses show it needs to do so again.

Congress should tightly couple these reforms to the FVRA with improvements to the Senate’s processing and consideration of nominations. Once the president nominates someone to permanently fill an office, the Senate should duly consider them.

## Proposal 8

---

### Congress should take concrete steps to streamline the nomination and confirmation process.

As many of us have experienced firsthand, the confirmation process simply takes too much time and requires too many resources at every stage.<sup>273</sup> It begins prior to the president’s nomination, where the longest reported delays occur.<sup>274</sup> Prospective nominees complete voluminous forms for the White House vetting process, the FBI background investigation, the Office of Government Ethics (OGE) conflict-of-interest analysis, and the appropriate Senate committee review (in some cases, more than one committee’s form).<sup>275</sup> These forms include duplicative

and overly broad questions that request information in varying formats, creating a maddening and time-consuming predicament for nominees.<sup>276</sup>

Then, the nominees wait for these concurrent reviews to be completed. Almost all of them undergo a “full field” background investigation by the FBI — an investigation that exceeds the broadest scope of investigation in use throughout the rest of the executive branch<sup>277</sup> — before their nomination is submitted to Congress.<sup>278</sup> This practice is generally followed regardless of whether the PAS position is part-time or full-time, and regardless of whether the position handles classified or national security information.<sup>279</sup> On average it takes between six and eight weeks, and it requires a lot of resources.<sup>280</sup>

Finally, nominees are formally considered by the Senate, where, as we have discussed, they may sit in purgatory for extended periods of time. Presidents George W. Bush and Obama each proposed that the Senate adopt rules to require timely consideration of nominees.<sup>281</sup> Such changes in Senate rules would be a good start. That being said, Congress does have a legitimate gripe that its resources for considering nominees have not kept pace with the increase in the number of nominees.<sup>282</sup>

There is no single solution for reducing the length of the nomination and confirmation process, but there are several steps Congress can take to begin moving in the right direction. Drawing from our collective experience in the executive and legislative branches, and from the wealth of good ideas that others have already put forward,<sup>283</sup> we propose focusing on three key reforms that we believe would have an immediate and lasting impact by returning a degree of normalcy to the confirmations process. Congress should:

**>> Create a task force to identify positions that should no longer require Senate confirmation.** The task force, in consultation with executive branch agencies, should determine which positions do not need Senate confirmation, and then delegate authority for filling these positions to agency heads or the president.<sup>284</sup> As a part of its review, the task force could also identify positions that should require Senate confirmation but currently do not, such as director of the CDC.<sup>285</sup>

**>> Reduce the paperwork burden associated with the vetting of nominees** by harmonizing the information requested on the forms required by the executive branch and various Senate committees, and by supporting the creation of a secure electronic “smart form” that can be used by both Congress and the executive branch. Creating a single set of core questions, which agencies and committees could supplement, would reduce both the time required by nominees to complete the forms and the risk of inadvertent errors or discrepancies.<sup>286</sup>

**>> Express support for the adoption of a tiered background investigation process for nominees.** Congressional committees could still require the White House to conduct “full field” investigations for senior nominees<sup>287</sup> while supporting less extensive investigations for part-time positions or those without national security implications. This system would continue to permit additional scrutiny if something of concern arises during the course of an investigation.

Almost everyone who has looked closely at this problem supports these solutions. In fact, legislation adopted in 2011 on a bipartisan basis, which removed the confirmation requirement from 163 positions,<sup>288</sup> shows there is an appetite for these reforms.<sup>289</sup> Still, there is more work to be done. For instance, the Morris K. Udall Scholarship Commission, the James Madison Memorial Fellowship Foundation, and the Barry Goldwater Scholarship and Excellence in Education Foundation together account for 19 PAS positions.<sup>290</sup> While these are valuable programs, it is worth examining whether confirmation is necessary. Other scholarship boards do not require Senate confirmation, and eliminating the confirmation requirement from positions like these would free up resources in the Senate, the White House, and the FBI for vetting and confirming nominees for higher-level positions.<sup>291</sup>

The Senate would not reduce its influence by eliminating the confirmation requirement from some positions.<sup>292</sup> It would retain its considerable oversight tools for ensuring accountability in government programs and functions. At the same time, reducing the nominations workload would allow it more time for other confirmation and legislative priorities.<sup>293</sup>

A bipartisan Working Group on Streamlining Paperwork for Executive Nominations (Working Group), established by the 2011 legislation, provided a road map for creating a core questionnaire for nominees that would make the executive branch’s and Senate committees’ forms more consistent, as well as for developing a smart form that would reduce redundancies in the forms. At the time of the Working Group’s review, the Senate and executive branch forms requested information on 18 similar topics, comprising an average of 60 percent of the total topics addressed by each of the forms in use.<sup>294</sup> Because the information is requested in slightly varying formats, the submission process is burdensome for nominees. For example, both questionnaires aim to identify potential conflicts of interest that run afoul of the same law, but they do so using slightly different questions, which may require different answers to ensure complete accuracy.<sup>295</sup>

The Working Group found that adopting one set of core questions, which committees and agencies could supplement if they saw fit, would reduce the time required by nominees to complete necessary paperwork. Developing an electronic smart form, in accordance with stringent

information-technology security standards, would do even more. It would allow nominees to insert biographical, professional, and other data into one system, with modifiable permissions, that could be accessed by executive branch agencies, as well as congressional staff. In addition to reducing the paperwork burden, it would increase efficiencies in officials’ reviews.<sup>296</sup> The cost savings would substantially outweigh the \$5 million price tag (and \$1 million annual operating expenses) estimated by the Working Group to develop and maintain the smart form.<sup>297</sup>

The Working Group also expressed support for a tiered background investigation system,<sup>298</sup> as have other experts.<sup>299</sup> As the Homeland Security Committee report states, it makes no sense to subject a nominee to the Postal Rate Commission to the same level of scrutiny or background investigation as the deputy secretary of defense.<sup>300</sup> It also makes no sense to conduct background investigations that are more extensive than those required for the highest level of security clearance on nominees to part-time boards and commissions who will never access classified information.<sup>301</sup>

Though presidents have the authority and discretion to order the level of background investigation they see fit for their nominees, they are unlikely to reduce the level of investigation without Congress’s express support (since Senate committees may demand — and have grown accustomed to — a heightened level of review).<sup>302</sup> This change would speed up the executive branch’s processing of nominees; it would reduce the average length of investigations for select positions, while also freeing up scarce FBI resources for investigations of other nominees.<sup>303</sup>

Both branches have incentives to act on these ideas. If Congress works to streamline the nomination process, the president is less likely to abuse his appointment authority by deploying acting officials or installing partisan advisers in lieu of duly confirmed officials. On the flip side, reform would benefit the president by making it easier for him to install permanent and duly confirmed officials at agencies, who are better able to implement his agenda and influence agencies’ work.<sup>304</sup>

## Ensuring That Qualified and Ethical Personnel Are Appointed to Leadership Positions

When public officials were increasingly placing their family members on the federal payroll, and after President Kennedy appointed his brother attorney general, Congress passed and the president signed a federal statute prohibiting nepotism in federal hiring, including in the appointment of officials to PAS positions. The reform put fairness

and merit above favoritism and privilege.<sup>305</sup> Then, when Watergate led the public to question the government's ability to impartially administer basic programs, Congress passed and the president signed the Ethics in Government Act and the Civil Service Reform Act.<sup>306</sup> These laws sought to bolster public trust by creating a more professionalized and ethically accountable government.<sup>307</sup>

These safeguards aim to protect the integrity of government decision-making at the highest levels. Nepotism stokes distrust in the idea that the government treats everyone the same. It undermines the integrity of policymaking — not just because the hired family member might not have the skills required for the position, or might put family interests over public ones, but also because it quashes open and honest dialogue by others.<sup>308</sup>

Of course, presidents still use some positions as rewards for friends and political allies. But this has typically been limited to positions that carry prestige and personal benefit but are without significant policymaking responsibility — like an ambassadorship in the Caribbean or membership on the Kennedy Center Board of Trustees.<sup>309</sup> Presidents have understood that certain critical positions require specialized skills or expertise or should be filled by people without partisan affiliation.<sup>310</sup>

In recent years, presidents have increasingly appointed people — often former associates or political allies — without the requisite qualifications for important positions. Michael Brown was famously appointed by President George W. Bush to run the Federal Emergency Management Agency (FEMA), despite lacking emergency management experience, and after a nine-year stint as commissioner of the International Arabian Horse Association. Brown reportedly got the FEMA job thanks to his friendship with Bush's 2000 campaign manager.<sup>311</sup> Members of both parties said Brown was at least partially to blame for FEMA underestimating the impact of Hurricane Katrina and then mishandling the response.<sup>312</sup>

President Obama's nominees to several ambassadorial posts in his second term were criticized for their surprising lack of knowledge about their prospective host countries.<sup>313</sup> Some argued that, unlike his predecessors', President Obama's picks were inappropriate due to the importance of the posts he sought to fill with political allies — with one nominated to serve in Hungary at a time of growing international alarm over far-right Hungarian lawmakers' attitudes toward minorities.<sup>314</sup> President Trump has gone further, appointing more ambassadors based on personal connections or political patronage than any president in the past 40 years.<sup>315</sup>

Worse, the current administration has embraced candidates who lack relevant qualifications or who are opposed to the objectives of the office or agency they have been tapped to lead. Secretary of Energy Rick Perry was nominated despite not knowing that the Department of Energy managed the nuclear stockpile of the United States, and



## ENVIRONMENT

### Agency

Environmental Protection Agency

### Research and Analysis

Science at the EPA provides the foundation for credible decision-making to safeguard human health and ecosystems from pollutants.

### Who Uses It

EPA research informs U.S. policies on natural resources, human health, economic growth, energy, transportation, agriculture, and manufacturing. Companies act so they are in accordance with environmental regulations. The public relies on the EPA to identify and solve health and safety issues to ensure clean water and air. Businesses use the EPA's expertise to avoid damaging the environment and plan their activities accordingly.

### Political Interference

In 2016, Obama administration officials [inserted](#) a misleading phrase into a public draft report on fracking that downplayed the impact on drinking water. The phrase was later removed after EPA scientists objected to it, but not before the draft report received widespread press attention.

### Consequences

Allowing excessive pollutants into the environment results in increased health problems. In addition to the hardships this causes on an individual level, there are also negative economic effects more broadly, like increased health care costs and decreased productivity.

despite previously suggesting that the department should be abolished.<sup>316</sup> Ben Carson is the secretary of housing and urban development, though he has no previous government, housing, or development experience and publicly tried to persuade President Trump that there were better ways he could serve the administration.<sup>317</sup>

The Trump administration's approach to positions not requiring Senate confirmation has been worse. For instance, President Trump has appointed his son's wedding planner as a regional administrator at the Department of Housing and Urban Development, and the husband of a former household employee to a position in a regional Environmental Protection Agency office. Neither had relevant qualifications.<sup>318</sup>

These appointments set a troubling precedent for future



presidents. Installing unqualified candidates in critical positions — for both PAS and non-PAS appointments — undermines faith in government and politicizes traditionally nonpartisan government functions, such as national security, scientific research, and the Census. And it has real-world consequences when agencies are incapable of responding to crises or otherwise carrying out their missions, as the Hurricane Katrina tragedy showed. The public expects qualified professionals to lead the Department of Energy’s groundbreaking energy research, run the system of national laboratories, develop policies for handling radioactive waste, and manage the country’s nuclear arsenal. That is why the two previous secretaries of energy were a nuclear physicist and a Nobel Prize-winning physicist.<sup>319</sup> Similarly, the public depends on a highly trained diplomatic corps to inform the government’s response to international crises and national security threats. That is why over the last 30 years — as the world has become more interconnected and national security threats more complex — around 70 percent of ambassadors have been professional foreign service officers.<sup>320</sup> Filling these critical positions with unqualified political appointees puts the government’s most essential functions, and the public’s faith in government, at risk.

It is clear from recent appointments that existing laws and practices are insufficient. It is time for Congress to redouble its efforts to protect the integrity of the federal workforce and ensure that qualified appointees are serving at the highest levels of government.

## Proposal 9

---

### Congress should amend the federal anti-nepotism law to make clear that it applies to presidential appointments in the White House.

**For most of its history, it was uncontested that the anti-nepotism statute broadly applied to all federal officials, including the president.**<sup>321</sup> Despite this, presidents have from time to time considered installing family members in official positions. For example, President Carter considered formally appointing family members to a presidential commission and a position in the White House.<sup>322</sup> President Reagan considered appointing a family member to the Presidential Advisory Committee on Private Sector Initiatives.<sup>323</sup> And more recently, in 2009, President Obama considered appointing his brother-in-

law and his half-sister to two advisory commissions.<sup>324</sup> All past presidents were advised by the office principally charged with interpreting laws for the executive branch, the Department of Justice’s Office of Legal Counsel (OLC), that doing so would violate the anti-nepotism statute.<sup>325</sup> This has not disturbed the traditional role that the first lady has played in championing substantive policy issues during the president’s term in office. Indeed, courts have recognized the first lady’s unique role exists in harmony with the policy goals of the anti-nepotism statute.<sup>326</sup>

In 2017, the OLC changed course and concluded that the anti-nepotism statute does not extend to presidential appointments to positions in the White House, opening the door for President Trump to depart from his predecessors and appoint his daughter and son-in-law to senior positions.<sup>327</sup> Though neither family member has any government experience, they have been assigned expansive portfolios. The president’s son-in-law, Jared Kushner, has responsibility for managing some of the country’s most sensitive national security challenges, despite having no previous expertise or professional experience in them.<sup>328</sup> The president’s daughter, Ivanka Trump, meanwhile, has been appointed as a senior adviser despite her lack of policy experience, and has sat in on several multilateral diplomatic negotiations — raising questions about the White House’s approach to foreign policy.<sup>329</sup>

This highlights nepotism’s corrosive effects on democratic governance. It communicates that family loyalty is more important than expertise and experience. It implies that a different set of rules applies to the most senior government officials, who do not need to abide by standard ethics or hiring rules. This sets a dangerous example for other federal leaders and managers.

Nepotism also may impact the White House’s official decision-making process, particularly when the president’s family members work in proximity to the president. Indeed, for a period of time, Kushner participated in the presidential daily briefing (PDB), where intelligence officials brief the president on the most sensitive national security matters of the day.<sup>330</sup> When members of the president’s family participate in policy deliberations, more expert staffers may be less inclined to provide candid advice or voice disagreement for fear of alienating the president or his family.<sup>331</sup> In this way, nepotism not only undermines public trust; it threatens to weaken government policy. Perhaps most troubling, people who owe their jobs to nepotism may prioritize the president’s personal standing over the nation’s — one reason they may have been appointed in the first place.

These are the risks Congress sought to protect against by passing the anti-nepotism statute. To respond to the OLC’s 2017 opinion that the statute does not apply to presidential appointments in the White House,<sup>332</sup> Congress should amend the statute to clarify that it does.

Some have argued that even if the statute applied to

the White House, it would only prevent the president's family members from receiving a salary, not from serving in their official roles.<sup>333</sup> Accordingly, Congress should also bolster the statute's existing enforcement mechanism to require the removal of anyone appointed in violation of the statute.

Before the OLC's 2017 opinion, most assumed the anti-nepotism statute applied to the White House.<sup>334</sup> But now that the norm has been breached, there is a danger that future presidents may follow in President Trump's footprints. Amending the statute would restore the former, widely held interpretation.<sup>335</sup> Congress has the authority to impose this reasonable limitation on the president's appointment powers, which is similar to other congressionally imposed limitations, such as those in the Hatch Act, the criminal conflict-of-interest law, and other regulations on federal employees' conduct.<sup>336</sup>

## Proposal 10

---

### Congress should adopt additional statutory qualifications for certain senior executive branch positions.

As detailed above, recent presidents have appointed unqualified friends or political allies to important government posts that have the authority to influence government policy in the areas of science and national security, among others. To prevent further abuse, Congress should conduct a review of senior executive branch positions (to include critical management positions or positions at the assistant secretary level and above)<sup>337</sup> and adopt additional statutory qualifications for those positions that warrant subject-matter or other appropriate expertise. The qualifications should set a floor for future incumbents. They should not be so restrictive that they preclude appointments of people from diverse and varying backgrounds, to the detriment of the country.

There is a long history of Congress mandating by statute that presidential appointees and career personnel meet specified requirements.<sup>338</sup> Some statutory qualification provisions require that executive branch personnel have certain experience, skills, or educational backgrounds. For instance, the Post-Katrina Emergency Management Reform Act of 2006 established a requirement that the director of FEMA have knowledge of emergency management and five years' leadership and

management experience.<sup>339</sup> Other statutory qualification provisions address characteristics such as citizenship status and residency, requirements that have often been applied across the board to personnel at federal agencies.<sup>340</sup>

Additionally, Congress has required that certain appointments be made without regard to political affiliation and that others reflect specific political party affiliations, often to maintain the ideological balance of multimember commissions.<sup>341</sup> Statutes may also prevent appointees from having specific conflicts of interest. For instance, the U.S. trade representative cannot have "directly represented, aided, or advised a foreign entity . . . in any trade negotiation, or trade dispute, with the United States."<sup>342</sup> Similarly, the National Security Act of 1947, amended in relevant part in 2008, requires that the secretary of defense be a civilian who has not been in military service for at least seven years.<sup>343</sup> As we have seen, Congress is able to waive these statutory qualifications, as it did for President Trump's former secretary of defense, James Mattis.<sup>344</sup>

### Reforming the Security Clearance Process for Senior Government Officials

Recent testimony and news reports have revealed significant vulnerabilities in the White House's security clearance process. The Trump White House has reportedly overturned an unprecedented number of clearance determinations made by career security professionals.<sup>345</sup> A significant number of senior White House staff have been permitted to operate with interim security clearances for extended periods of time.<sup>346</sup> Information that in other administrations would likely have been grounds for denial of a security clearance or even termination has been overlooked for senior staff.<sup>347</sup> And nominees to cabinet and other senior positions have been put forward for Senate confirmation without the completion of their background investigations.<sup>348</sup>

It is increasingly clear that existing White House procedures for issuing security clearances do not ensure fairness or consistency and do not protect against erroneous outcomes. For example, notwithstanding his obligation to disclose on his security clearance questionnaire that his ex-wife had obtained a restraining order against him, former White House staff secretary Rob Porter held an interim security clearance for months.<sup>349</sup> He resigned when allegations of domestic abuse — with accompanying documentary evidence — became public.<sup>350</sup> If not for the public reports, the White House might have continued

to ignore the derogatory information.

The dustup over Porter revealed that a reported 30 to 40 White House officials were still operating with interim clearances over a year into the administration.<sup>351</sup> Most troubling among them was Kushner, who omitted important information about his foreign contacts from his security clearance questionnaire and has reportedly been identified by foreign adversaries as a manipulable target. Nonetheless, Kushner operated with an interim clearance for over a year and received access to highly classified information, including in the PDB.<sup>352</sup> Kushner's top secret security clearance was reportedly rejected by two White House security specialists, but their supervisor overruled them and approved the clearance.<sup>353</sup> Kushner's was one of at least 30 cases in which the White House personnel security director is reported to have overruled career security experts and approved top secret security clearances for Trump officials.<sup>354</sup>

Taken together, these actions demonstrate a stunning disregard for a process that is critical to protecting national security. Recognizing that the president retains ultimate authority for deciding who has access to classified information,<sup>355</sup> there are meaningful steps Congress should take to reform the existing security clearance process in the White House.

The White House has partially attributed the use of interim clearances to a backlog in the background investigation process.<sup>356</sup> It has a point. As of early 2018, approximately 700,000 people across the government were waiting to get their clearances approved or renewed.<sup>357</sup> While Congress and the executive branch are moving forward with proposals to reduce this longstanding backlog, Congress should also take concrete steps to improve the White House's security clearance process.<sup>358</sup>

## Proposal 11

# Congress should reform the White House security clearance process.

**Presidents from both parties have established procedures for issuing security clearances that are meant to protect information that could threaten national security if it got into the wrong hands.<sup>359</sup> The procedures establish minimum and uniform standards, though they create exceptions that appropriately recognize a president's constitutional authority, as commander in chief, to share classified information with individuals when they deem it necessary.<sup>360</sup>**

Following the revelations about Porter, President



### SCIENCE UNDER SIEGE

## FINANCIAL SYSTEM

### Agency

Federal Reserve

### Research and Analysis

The Federal Reserve develops economic and financial data and analyses to assess the health of the labor market and to understand how prices and other macroeconomic indicators are changing, in order to formulate and implement monetary and financial regulatory policies.

### Who Uses It

The Federal Reserve's data and analyses play a key role in financial markets. Businesses rely on these data to make decisions affecting production and profitability, as well as to make financial products available to consumers. Consumers, in turn, rely on the data to plan for major personal financial decisions, including education, home ownership, and retirement.

### Political Interference

Expressing his opposition to the Federal Reserve's decisions regarding interest rates, President Trump has [called](#) the Federal Reserve "loco" and "the biggest threat" to the U.S. economy. Other presidents, including Lyndon Johnson, Richard Nixon, and Ronald Reagan, have attempted to influence interest rates. For instance, President Nixon's staff planted a false story about the head of the Federal Reserve wanting a pay raise in order to pressure him to reduce interest rates.

### Consequences

The very perception that the Fed's monetary policy decisions are based on flawed analysis or improper personal or partisan motivations could increase economic uncertainty and instability. Weakened public confidence in Federal Reserve data and analyses can lead businesses and consumers to make poor financial decisions.

Trump's then chief of staff, John Kelly, acknowledged the need for reform.<sup>361</sup> In fact, as an initial step, Kelly suspended the issuance of interim clearances absent extraordinary circumstances and his explicit approval,<sup>362</sup> and supported the revocation of long-term interim clearances.<sup>363</sup> More substantial and permanent reforms are needed.

Specifically, Congress should reduce the backlog in the White House's background investigation process and install safeguards in the security clearance process by passing legislation to:

**>> Allocate more resources to the FBI for completing background investigations** for White House security clearances and presidential nominees. In addition to reducing the average processing time for an investigation, additional FBI resources would reduce the need for the White House to prioritize different candidates' or nominees' investigations over others.

**>> Limit the length of time that White House officials may operate with interim clearances.** This would make permanent a reform supported by Kelly to discontinue long-term interim clearances issued to White House officials.<sup>364</sup>

**>> Require that the director of the White House personnel security office be a career professional** with specific expertise in the security clearance process.

Similar to existing executive orders and presidential directives, the legislation could also explicitly recognize a president's unique power to provide access to classified materials as the president sees fit. The measures would help ensure that appointees serving in senior positions satisfy the same security standards that apply to other national security officials, while providing additional resources for relieving an existing bottleneck in the background investigation process.

Such steps are within Congress's authority. Although the Supreme Court has recognized the president's constitutional authority to grant security clearances,<sup>365</sup> it has also suggested that Congress may regulate that authority,<sup>366</sup> and Congress has imposed restrictions on both the interim<sup>367</sup> and permanent<sup>368</sup> security clearance processes without constitutional challenge. Limiting the duration or validity of interim security clearances would be a restriction on the process for granting security clearances, similar to the process restrictions Congress has imposed before.<sup>369</sup> The president could continue to prioritize or expedite investigations of security clearance applicants, and no applicant who went through the proper procedures would be denied a security clearance if the president wanted that person to have a clearance.

Legislation introduced in the last Congress would require the president to submit a report to Congress every three months listing the security clearance information for everyone working in the White House and the Executive Office of the President.<sup>370</sup> This legislation serves the same goal as our proposal: to strengthen, and improve the accountability of, the background check and security clearance process. It is important for Congress not only to monitor the security clearance status of White House personnel but also to safeguard the security clearance process by reducing the access to sensitive information enjoyed by unvetted personnel, and by ensuring that security clearance determinations are made in the national interest.

# Checks and Balances to Safeguard Democracy and Rule of Law

**In this report, we have proposed ways to strengthen the guardrails that promote fundamental democratic values and protect against abuse by the executive branch. But these guardrails depend on a functioning system of checks and balances.<sup>371</sup> The Constitution establishes three coequal branches,<sup>372</sup> intended to blunt arbitrary power and the potential for tyranny.<sup>373</sup> This system is threatened by both internal and external forces: Congress’s ability to appropriately check abuse has atrophied,<sup>374</sup> the independence of the judiciary has been called into question,<sup>375</sup> and the integrity of the entire political system is jeopardized by the corrosive influence of money in politics.<sup>376</sup> For our proposals to protect essential democratic values, our system of checks and balances needs to be recalibrated and defended.**

## Congress

**Congress needs to reestablish itself as an appropriate check on abuse — from the executive and also from its own ranks. Members of Congress are meant to serve not only as legislators, but also as investigators who seek “the fullest information in order to do justice to the country and to public offices.”<sup>377</sup> This necessarily requires Congress to operate as a separate and independent branch, regardless of the president in power. However, congressional procedures and customs have evolved to hinder the ability of Congress to perform as a coequal branch — while also allowing legislators to abuse their power — and complicate the ability of voters to hold their representatives and Congress as a whole accountable.<sup>378</sup> This is epitomized in the Senate’s rubber-stamping of unqualified nominees put forward by presidents of the same party as the Senate’s majority, discussed at length above. In this and many other ways, Congress appears to have tolerated executive branch abuse of shared constitutional powers, without providing Americans with a transparent explanation for its actions.<sup>379</sup> For instance, war powers are shared under the Constitution, but Congress has appeared to defer to the executive instead of responding when it oversteps.<sup>380</sup> Trump’s use of the National Emergencies Act to marshal resources for building a wall on the country’s southern border is the most recent example.<sup>381</sup> Congress failed to block the president’s national emergency declaration,<sup>382</sup>**

despite his explicitly circumventing Congress’s appropriations power and strong public opposition to his move.<sup>383</sup>

The lack of meaningful congressional oversight when the same parties occupy Congress and the White House also warrants highlighting. Investigatory authority is an essential component of the legislative power endowed to Congress; it is a mechanism for ensuring that laws are faithfully executed without bias or malfeasance.<sup>384</sup> When used right, it can uncover fraud and waste in federal programs, protect the rights of minorities, or uncover abuses of power and corruption.<sup>385</sup> But in today’s polarized environment, the majority party appears to use this authority for its own political benefit, rather than for ensuring good policy and governance.<sup>386</sup> The result is increased opportunity for executive branch abuse due to a lack of oversight when the president is of the same party as the majority in Congress,<sup>387</sup> and increased potential for legislators’ abuse of power and political grandstanding when the president is of a different party.<sup>388</sup>

Congress also needs to keep its own houses in order. By exempting itself from ethics, employment, and accountability laws, Congress has created a clear double standard.<sup>389</sup> Recent scandals involving insider trading allegations and the use of taxpayer funds for settling sexual misconduct cases highlight the deficiencies in its ethics regime.<sup>390</sup> For Congress to serve as an effective and independent check on the executive, it must meet the same standards it should demand of the executive.

To that end, Congress needs to develop a more robust oversight structure, with mechanisms for insulating the process from hyperpartisanship.<sup>391</sup> Reform of the National Emergencies Act is also badly needed to eliminate a tool for presidential abuse. The Brennan Center for Justice has put forward a package of reforms that would, among other things, refine the criteria for emergency declarations, require a connection between the nature of the emergency and the powers invoked, and prohibit indefinite emergencies.<sup>392</sup> There is growing momentum for some of these reforms with the Article One Act, which advanced out of the Senate Homeland Security and Governmental Affairs Committee at the end of July.<sup>393</sup>

As another means to fulfill its constitutional duties, Congress should renew its longstanding commitment to nonpartisan congressional research agencies, such as the Congressional Budget Office, including by creating a

modernized technology assessment entity, so that Congress can more effectively perform oversight, guard against executive branch manipulation of research and data, and make informed policy decisions in response to — and in anticipation of — 21st century technological needs.<sup>394</sup>

Finally, Congress must seriously consider ways to reform its institutional culture. There is no shortage of proposals.<sup>395</sup> Holding members of Congress personally liable for sexual harassment and retaliation settlements was a good place to start.<sup>396</sup> Extending the Freedom of Information Act and conflict-of-interest rules to Congress would substantially further the effort.<sup>397</sup> Momentum is growing for reform, and we are confident Congress can meet the challenge, as it has before.<sup>398</sup>

## Judiciary

**Likewise, our democratic system depends on an independent judiciary.** We believe the judiciary has held up as an effective check on executive abuse,<sup>399</sup> but recent political attacks on judges threaten judicial independence and risk undermining public confidence in the courts.

While there is nothing wrong with publicly disagreeing with a court ruling, criticism of judicial decisions should not turn into personal attacks on judges and their heritage.<sup>400</sup> This is particularly true when the president is the messenger, given the bully pulpit presidents enjoy. Nor should presidents allege, without evidence, that a judge was biased or the courts unfair simply because they ruled against him.<sup>401</sup>

Such attacks can put judges' safety at risk. They also threaten the legitimacy of the judiciary in the eyes of the public.<sup>402</sup> Our legal system relies on a shared understanding that even when you are on the losing side of a court case, you need to respect the outcome. President Trump's issuance of a pardon to former Arizona sheriff Joe Arpaio for disobeying a court order hints at a future where court orders are not respected by all parties.<sup>403</sup>

The broader political context heightens the need for vigilance. The judicial confirmation process is more politicized than ever in recent memory — with the Senate taking extraordinary steps to eliminate procedural safeguards that previously ensured a semblance of bipartisanship in the process.<sup>404</sup> And public confidence in the Supreme Court is declining.<sup>405</sup> Fortunately, the American judicial system is among the strongest and most resilient in the world.<sup>406</sup> To protect against continued abuse by the executive branch, that must remain the case.

## Money in Politics

**The unfettered flow of money into our political system** contributes to a culture that is more accepting and inviting of abuse. The current rules allow moneyed interests to provide substantial support to public officials before, during, and *after* their public service.<sup>407</sup> These rules create incentives for public officials to put their personal or political interests ahead of the public interest. They also reduce the likelihood that other public officials will hold bad actors accountable.

The Founders recognized these risks when they enshrined the Foreign and Domestic Emoluments Clauses in the Constitution, prohibiting federal officials from receiving payments that might bias them.<sup>408</sup> The Due Process Clauses of the Fifth and Fourteenth Amendments serve a similar purpose by, among other things, prohibiting judges from presiding in cases in which they have a personal interest.<sup>409</sup>

The norms and unwritten rules we have considered — including those concerning conflicts of interest and financial disclosure guidelines, and the evenhanded administration of the law<sup>410</sup> — serve to mitigate the threats posed by money in our politics. As they have eroded, the power of money in politics has become more pronounced.<sup>411</sup>

If the country is serious about preventing abuses of power, Congress should consider ways to interrupt and reduce the unfettered flow of money into our political system at the same time that it moves to shore up long-standing democratic norms. This is not a partisan issue — past reforms have been led by leaders of both political parties.<sup>412</sup> And there is no shortage of ideas. The Brennan Center for Justice has put forward a number of proposals, including small-donor public financing of political campaigns,<sup>413</sup> transparency rules for “dark money” organizations,<sup>414</sup> safeguards against foreign funds in elections,<sup>415</sup> and stronger contribution limits to reduce the influence of super PACs.<sup>416</sup> These reforms are possible even within the current legal framework established by the Supreme Court's recent campaign finance jurisprudence.<sup>417</sup> The public broadly supports reform<sup>418</sup> — and we believe members of all political parties can come together, as they have in previous eras, to pass effective campaign finance laws.

# Appendix of Scientific Integrity Issues

---

## Threats to Scientific Integrity

- When responding to questions from a Senate committee, the secretary of the interior cherry-picked facts and misrepresented research performed by the Fish and Wildlife Service (FWS) about caribou in the Arctic National Wildlife Refuge to support her case for oil exploration there.<sup>419</sup> (George W. Bush administration)
- A White House aide and former oil industry lobbyist edited government reports to downplay links between carbon emissions and climate change.<sup>420</sup> (George W. Bush administration)
- Environmental Protection Agency (EPA) officials allowed the White House to make last-minute edits to proposed public health standards and misrepresented an internal scientific committee's research in publicly defending the standards.<sup>421</sup> (George W. Bush administration)
- The public affairs office at the National Aeronautics and Space Administration (NASA) added uncertainty to scientific findings, changed report titles, and altered scientists' quotes, undercutting research on the threat of climate change. One political appointee in the public affairs office denied a request from NPR to interview a top climate scientist, saying his own job was "to make the president look good."<sup>422</sup> (George W. Bush administration)
- EPA officials made last-minute changes to a major public-facing draft report on the impact of fracking on drinking water, downplaying the risks. After EPA scientists challenged the edits, they were removed from the final report.<sup>423</sup> (Obama administration)
- National Institutes of Health (NIH) officials met with alcohol industry representatives to solicit funding to study the benefits of moderate drinking, then allowed the industry representatives to give input on the study's design.<sup>424</sup> (Obama administration)
- The secretary of health and human services (HHS) publicly overruled the Food and Drug Administration's (FDA) determination that over-the-counter emergency contraceptives were safe for minors, questioning the underlying research despite her lack of scientific training.<sup>425</sup> Her decision was immediately criticized as politically motivated, and a judge presiding over a lawsuit challenging the action agreed, finding the secretary's action "politically motivated, scientifically unjustified, and contrary to agency precedent."<sup>426</sup> (Obama administration)
- EPA officials blocked agency scientists and contractors from presenting research about climate change and related ecological issues at a professional conference.<sup>427</sup> Agency officials at the Departments of Agriculture, Energy, and the Interior have similarly prevented staff from attending scientific conferences.<sup>428</sup> (Trump administration)

- At HHS, the Centers for Disease Control and Prevention (CDC), and the United States Geological Survey (USGS), agency officials increased scrutiny of scientists' communications with congressional representatives and the media about their research.<sup>429</sup> For instance, at the CDC, scientists were prohibited from responding to press inquiries "even for a simple data-related question" without prior clearance from the agency's communications office, and at the USGS, scientists were required to submit reporters' questions and their proposed answers to the communications office for review. (Trump administration)
- An employee at the National Parks Service reported being instructed to avoid using terms such as "climate change" in project proposals.<sup>430</sup> (Trump administration)
- The CDC censored scientific language, including terms related to research on gender identity and reproductive health, informing staff that the terms could not be used in official documents under preparation for the agency's budget.<sup>431</sup> The move was condemned as an effort to limit the effectiveness of public health.<sup>432</sup> (Trump administration)
- Political officials censored a press release about a USGS study, removing references to the dire effects of climate change in the release. The officials also delayed the press release for several months.<sup>433</sup> (Trump administration)
- The authority and reach of a nuclear facilities safety board were curtailed, despite safety risks to American nuclear workers and the general public.<sup>434</sup> (Trump administration)
- The EPA introduced a proposed "transparent science" rule that would prevent the agency from using research for which underlying data are not made publicly available.<sup>435</sup> Oftentimes, the underlying data in environmental and public health research are not published because they involve personally identifiable health information that is protected by privacy laws.<sup>436</sup> The effect of the "transparent science" rule will be to limit EPA scientists' access to high-quality research, thereby interfering with the scientific process.<sup>437</sup> (Trump administration)
- Officials from the White House's Office of Legislative Affairs, Office of Management and Budget, and National Security Council barred the Office of the Geographer and Global Issues, a State Department intelligence agency, from submitting written testimony to the House Intelligence Committee warning that climate change is "possibly catastrophic."<sup>438</sup> The scientist whose work was edited subsequently resigned.<sup>439</sup> (Trump administration)
- The Department of Agriculture (USDA) required agency scientists to label their finalized peer-reviewed scientific publications "preliminary" and "not . . . formally disseminated by the U.S. Department of Agriculture," misleading terms suggesting that the research was not complete and should not be relied upon.<sup>440</sup> (Trump administration)
- High-level Department of the Interior (DOI) officials altered an environmental assessment for seismic surveying prepared by career scientists in order to underplay the potential impact of oil and gas development on Alaska's coastal plain. They reversed a Bureau of Land Management (BLM) biologist's conclusion and removed large portions of an agency anthropologist's analysis of potential impacts on native communities. A third BLM scientist, who studies fish and water resources, identified fundamental inaccuracies that were introduced into his research without his knowledge.<sup>441</sup> (Trump administration)



- EPA career scientists recommended that the agency ask the Army Corps of Engineers to conduct a new environmental review for a copper and gold mine planned upstream from Alaska's premier salmon fishery, due to deficiencies the scientists identified in the environmental review. Political officials at the EPA reviewed the analysis, which was revised to downplay the scientists' concerns.<sup>442</sup> (Trump administration)
- The National Oceanic and Atmospheric Administration (NOAA) released a statement contradicting government meteorologists' forecast and supporting the president's repeated inaccurate claims that Alabama would be affected by a hurricane, including when he displayed a map of the storm's path that had been altered to include Alabama. NOAA issued the statement after the acting White House chief of staff reportedly instructed the secretary of commerce to have NOAA — a branch of the Department of Commerce — publicly disavow an earlier statement by NOAA's National Weather Service (NWS) clarifying that Alabama was not in the storm's path, and the secretary of commerce reportedly threatened to fire top employees at NOAA if they did not repudiate NWS's statement.<sup>443</sup> (Trump administration)

### **Contacts Between Political Officials and Career Experts That Undermine Scientific Integrity**

- DOI officials frequently interfered with the work of government scientists in order to weaken wildlife protections. In one case, an agency official with no background in biology forced scientists to reverse findings that would have made a species of prairie dog eligible for protection.<sup>444</sup> (George W. Bush administration)
- Officials at the FWS, which is part of the DOI, removed warnings from career scientists about the impact of a proposed border wall on local wildlife from a letter sent to U.S. Customs and Border Protection. Before the letter was drafted, DOI political aides told FWS officials, "we are to support the border security mission."<sup>445</sup> (Trump administration)
- Department of Labor (DOL) officials ordered career researchers to revise a study showing the negative financial effects on restaurant workers of a proposed "tip pooling" rule,<sup>446</sup> which would reverse a previous regulation that stated tips are the property of employees, and permit restaurant managers to take tips from tip pools over workers' objections.<sup>447</sup> (Trump administration)
- After EPA researchers produced a study showing economic benefits to protecting wetlands from pollution, aides to the agency's administrator told them to produce a new study showing no such benefits.<sup>448</sup> (Trump administration)
- After a field supervisor for the FWS determined that it was "reasonably certain" that threatened and endangered species could be harmed by a development project and called for a biological assessment to be performed, a high-level political appointee at the DOI communicated that the field supervisor's determination "was not the position of the administration," and he was pressured to reverse his determination.<sup>449</sup> (Trump administration)

## **Retaliation and Threatened Retaliation Against Career Experts**

- A senior biologist at the DOI's FWS was fired after he filed a legal complaint alleging that agency officials knowingly used flawed science in the agency's assessment of the endangered Florida panther's habitat and viability in order to facilitate proposed real estate development. The FWS subsequently conceded that it had used flawed science, reinstated the biologist, and published a revised analysis.<sup>450</sup> (George W. Bush administration)
- The director of the Centers for Medicare and Medicaid Services threatened to fire a top actuary if he shared his estimates of the cost of the administration's Medicare prescription drug bill. The actuary's estimate was significantly higher than the one released by the Congressional Budget Office.<sup>451</sup> (George W. Bush administration)
- A senior radiation biologist in the low-dose radiation research program at the Department of Energy was reassigned and then fired for insubordination and inappropriate workplace communication after she spoke favorably about the program during a congressional briefing. At the time, the department was planning to end the program and reallocate funds to different research projects. The scientist was subsequently reinstated.<sup>452</sup> (Obama administration)
- The DOI's top climate change scientist was reassigned to an accounting role, despite no training in accounting, after he highlighted the dangers climate change poses for Alaska's Native communities.<sup>453</sup> Five days after the reassignment, the interior secretary testified before Congress that the department planned to use reassignments as part of its effort to reduce employees, the inference being that he expected employees to quit in response to undesirable transfers.<sup>454</sup> The climate scientist eventually resigned from government service.<sup>455</sup> (Trump administration)
- A scientist working under a contract with the National Park Service resisted efforts by federal officials to remove all references to human causes of climate change in her scientific report, drawing media attention. She was previously told that she would be hired for a new project but was later told that no funding was available for the work. The scientist asked her supervisor at the agency, "Is this because of the climate change stuff?" He responded, "I don't want to answer that."<sup>456</sup> (Trump administration)
- Economists in the Economic Research Service (ERS) of the USDA published findings showing the negative financial impacts on farmers of the administration's trade and tax policies. Subsequently, the secretary of the USDA announced a restructuring plan that would reduce the ERS's insulation from political officials and require staff relocation across the country. Six economists quit on a single day due to concerns about retaliation for the conclusions of their research.<sup>457</sup> (Trump administration)

## **Attacks on Science Advisory Committees**

- Advisory committees at HHS were disbanded when they attracted opposition from religious and industry groups for their scientific conclusions.<sup>458</sup> (George W. Bush administration)
- The secretary of HHS removed experts on pediatric lead exposure from a CDC ad-

visory committee that issues recommendations to prevent childhood lead poisoning, replacing them with members who had direct ties to the lead industry.<sup>459</sup> The move came just weeks before the committee was set to decide whether to lower the level at which the government believed lead in the blood represents a health concern.<sup>460</sup> The revamped panel ultimately recommended against lowering the level, despite research showing that lead at lower levels than those then deemed safe could cause serious cognitive damage.<sup>461</sup> (George W. Bush administration)

- A candidate for a position on an advisory board that researches Arctic issues — including the impact of proposed drilling in a wildlife refuge, a key administration priority — said the first question she was asked in an interview was, “Do you support the president?”<sup>462</sup> (George W. Bush administration)
- The EPA issued a memo that discouraged members of its Science Advisory Board from speaking publicly, even in their outside capacity, about any scientific issue under consideration by the board, without EPA approval. Watchdogs warned that the new rule could lead scientists to avoid contributing to the public conversation on key issues.<sup>463</sup> (Obama administration)
- A proponent of a debunked theory about links between vaccines and autism was appointed to the President’s Committee for People with Intellectual Disabilities,<sup>464</sup> and a major donor to Democratic candidates and the Clinton Foundation was appointed to the State Department’s International Security Advisory Board, despite his lack of background in nuclear security.<sup>465</sup> (Obama administration)
- The Advisory Committee on Climate Change and Natural Resource Science, established to offer advice to the interior secretary about climate change, stopped meeting. A scheduled meeting was canceled, and then the panel’s charter expired.<sup>466</sup> (Trump administration)
- The National Park System Advisory Board, which works with DOI officials to designate national historic and natural landmarks, did not convene for an entire year, leading ten of its 12 members to quit in frustration.<sup>467</sup> The board was later reconstituted with new members who were all either registered Republicans or had voted in Republican primaries. Three had given more than \$500,000 to Republican candidates and causes, while a fourth was a former national chair of the American Legislative Exchange Council, an influential conservative lobbying group. Whereas the board’s members had previously included professors from universities, none of the 11 new members was an academic.<sup>468</sup> (Trump administration)
- The Department of Energy’s advisory committees held fewer meetings in 2017 than in any year since 1997, when records began.<sup>469</sup> Throughout 2017, the administration did not contact members of the Secretary of Energy Advisory Board, a high-level committee that produces detailed reports on complex scientific topics and has been used frequently by past secretaries.<sup>470</sup> The department subsequently announced the reconstituted board’s eight new members, five of whom were from industry.<sup>471</sup> The chair was the chief executive officer of a major oil company.<sup>472</sup> She replaced a professor emeritus of chemistry at the Massachusetts Institute of Technology.<sup>473</sup> (Trump administration)
- At the EPA, political officials abandoned the practice of deferring to career staff’s recommendations for appointment of advisory committee members, increasing the membership of political actors and industry representatives.<sup>474</sup> (Trump administration)

- The number of industry representatives and consultants quadrupled on the EPA's Science Advisory Board, while representation of academics decreased from 79 to 50 percent.<sup>475</sup> The list of new appointees to the Science Advisory Board includes industry representatives, officials from Republican state administrations, and independent scientists who have criticized major federal environmental regulations.<sup>476</sup> (Trump administration)
- The EPA announced that it would not renew members of the Board of Scientific Counselors (BOSC) with expiring appointments — contrary to past practice — and cancelled upcoming meetings of the board's subcommittees.<sup>477</sup> Those who did not return to the BOSC included university professors, as well as employees of a scientific foundation, an engineering consulting company, and government agencies or laboratories.<sup>478</sup> (Trump administration)
- By statute, the composition of the EPA's Clean Air Science Advisory Committee (CASAC) must include at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies.<sup>479</sup> Of the seven current members of CASAC, which informs the agency's standards on ozone and other pollutants, only one has a deep background in air pollution research.<sup>480</sup> This member is also the only independent academic scientist on the committee; other members include state regulators with scientific views outside of the scientific mainstream.<sup>481</sup> Additionally, the chairman of CASAC has questioned studies that connect serious human health problems to air pollution; he has accepted research funding from the American Petroleum Institute (API), an oil industry lobbying group, and the organization reviewed his findings before publication.<sup>482</sup> (Trump administration)
- The EPA disbanded a subcommittee of air pollution experts that helped it decide how much soot in the atmosphere is safe to breathe.<sup>483</sup> That task is now handled by the CASAC, a smaller, less expert panel.<sup>484</sup> The CASAC chair wrote a letter to the EPA administrator criticizing the agency's use of science to set air pollution standards and questioning the long-established scientific view that fine particulate airborne matter is linked to early deaths.<sup>485</sup> "It is hard to overstate just how jarring this is," one expert at a nongovernmental organization wrote in response.<sup>486</sup> (Trump administration)
- After the release of the 2018 National Climate Assessment, a major government report on climate change, the administration announced plans to convene a White House panel to challenge established scientific conclusions about the severity of climate change and humanity's contributions to it.<sup>487</sup> (Trump administration)
- The EPA barred scientists who receive grants from the agency from serving on its advisory committees.<sup>488</sup> The move was presented as an effort to avoid conflicts of interest, but the agency already had policies to prevent such conflicts, and the new rule did not apply to scientists who receive funding from industry. As a result, there are more advisory board members affiliated with industry and fewer university-affiliated researchers.<sup>489</sup> Because the leading experts on topics of concern to the EPA are those who are most likely to obtain highly competitive federal grants, the rule prevents the EPA from getting input from some of the most knowledgeable voices in the field.<sup>490</sup> A former chair of the EPA's Science Advisory Board called the move "clearly political, not ethical" and said it was aimed at "eliminating independent science advice."<sup>491</sup> (Trump administration)

## Restriction of Public Access to Government Research and Data

- The Federal Bureau of Investigation removed from its annual crime report significant amounts of information that had been included in previous years. The missing data covered violent crime — a top administration priority — as well as domestic violence and drug crimes.<sup>492</sup> (Trump administration)
- The EPA stopped collecting data on oil and gas companies' methane emissions<sup>493</sup> and took down web pages containing information about climate change.<sup>494</sup> (Trump administration)
- The USDA took offline animal welfare enforcement records, including abuses in dog breeding operations and records of horse farms that alter the gait of horses through the controversial practice of “soring” the animals' legs.<sup>495</sup> (Trump administration)
- USDA officials ordered the department's main research arm to stop communicating with the public.<sup>496</sup> The DOI, the Department of Transportation, and HHS implemented similar rules.<sup>497</sup> (Trump administration)
- The Treasury Department removed from its website an economic analysis that found workers pay only a small share of the corporate tax burden. The analysis undercut the administration's claims that reducing the corporate tax rate, a top priority, would primarily benefit workers.<sup>498</sup> (Trump administration)
- Amid criticism of the administration's response to Hurricane Maria, the Federal Emergency Management Agency removed from its website information about how many people in Puerto Rico had access to drinking water and electricity.<sup>499</sup> (Trump administration)
- A Consumer Financial Protection Bureau (CFPB) report omitted warnings about boilerplate deals enabling banks to charge students fees, which had been included in previous agency reports. An unpublished draft of the report states that more than 100 colleges reported being paid by banks to promote “college-sponsored” bank accounts to students, despite the fact that the CFPB had previously “expressed concern over the relationship between revenue sharing provisions in contracts and fees charged to student account holders.” Though the CFPB's mission is to protect consumers from abusive financial practices, the report contained no discussion of those abusive practices.<sup>500</sup> (Trump administration)
- White House and EPA officials suppressed a report from the HHS's Agency for Toxic Substances and Disease Registry that showed that a class of toxic chemicals, which have contaminated water supplies near military bases, chemical plants, and other sites in several states, endanger human health at a far lower level than the EPA previously called safe. One White House official said the report's release would cause a “public relations nightmare.”<sup>501</sup> (Trump administration)
- The USDA departed from its longstanding practice of disseminating department and department-funded research studies. For instance, in the case of a groundbreaking discovery that rice loses vitamins in a carbon-rich environment — a potentially serious health concern for the 600 million people worldwide whose diet consists mostly of rice — USDA officials withheld a department news release and sought to prevent dissemination of the findings by the department's research partners.<sup>502</sup> (Trump administration)

## Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis Underlying Regulatory Actions

- The EPA proposed a sharp reduction in the permissible levels of ozone, a key component of smog.<sup>503</sup> Industry groups and local governments lobbied against the rule. Staff at the Office of Information and Regulatory Affairs (OIRA), a division of the White House Office of Management and Budget (OMB) charged with reviewing agencies' regulations staffed primarily with economists, lawyers, and people with public policy training,<sup>504</sup> manipulated the EPA's scientific analysis of the proposed ozone rule to cast doubt on the benefits of a lower standard.<sup>505</sup> (George W. Bush administration)
- OIRA altered the EPA's scientific findings underlying a rule to regulate coal ash. The EPA initially stated that using ponds for storing the most toxic form of coal ash did "not represent the best available technology for controlling pollutants in almost all circumstances." Revisions made during OIRA review recommended eliminating this conclusion, giving no explanation why. Other changes made during OIRA review included softening data, such as reducing coal-fired power plants' share of toxic pollutants discharged to surface water from "at least 60 percent" to "50–60 percent."<sup>506</sup> (Obama administration)
- As noted above, DOL officials proposed a "tip pooling" rule, proposing that the policy would increase the paychecks of low-wage kitchen workers. When career employees at the department produced an economic analysis showing that the proposed "tip pooling" rule would cause restaurant workers to lose money, senior department staff ordered them to revise the analysis to reach a more favorable result with no scientific basis. Senior political staff at OMB were reportedly involved in the decision to delete the unfavorable data. Ultimately, the DOL proceeded with the notice-and-comment process for the rule without publicly disclosing the department's analysis on the rule's impact.<sup>507</sup> (Trump administration)
- During the effort to repeal the EPA's prior definition of the regulatory term "waters of the United States"<sup>508</sup> (WOTUS), career economists complied with agency political officials' instruction to change their methodology in order to reach the predetermined conclusion that there was no quantifiable benefit to preserving wetlands. Contrary to standard practice, no records were made to document the methodological changes the career staff were ordered to make.<sup>509</sup> When the new definition was announced, the EPA's head stated that "a detailed mapping of all the wetlands in the country" had not been performed,<sup>510</sup> and the EPA Office of Water chief told reporters that there were no data about the number of streams and wetlands removed from protection under the new definition of WOTUS.<sup>511</sup> However, documents obtained by means of Freedom of Information Act requests show that EPA and Army Corps of Engineers staff determined the percentage of streams and wetlands that would not be protected under the proposed rule, and this information was presented to leaders of both agencies during the course of deliberations about the regulation.<sup>512</sup> (Trump administration)
- The DOL proposed to roll back a safety rule requiring 16- and 17-year-olds in the nursing home industry to be supervised when using hoisting equipment to move patients.<sup>513</sup> In 2011, the National Institute for Occupational Safety and Health (NIOSH) concluded that there were serious safety risks associated with minors' unsupervised operation of these devices.<sup>514</sup> The DOL was not forthcoming about whether and to what extent department officials consulted with the NIOSH before issuing the rule.<sup>515</sup> In the rulemaking announcement, the DOL refused to publicly

release a survey of vocational training programs it claimed supported the rule.<sup>516</sup> An advocacy group that obtained the survey identified serious methodological flaws.<sup>517</sup> (Trump administration)

- The USDA's Food Safety and Inspection Service (FSIS) proposed a rule that would allow factories to speed up line processing for pork while removing some federal food safety inspectors from the premises,<sup>518</sup> before it had completed the required peer review of the rule's risk assessment.<sup>519</sup> The rule cites a pilot program — which replaced government inspectors with companies' own employees — as the basis for concluding that the proposed rule would be more effective in ensuring food safety.<sup>520</sup> However, the USDA's Office of Inspector General (OIG) previously determined that the pilot program was flawed.<sup>521</sup> The USDA also asserted that worker injuries went down in plants participating in the pilot program but did not make that data or analysis publicly available.<sup>522</sup> Researchers who obtained work injury data by means of Freedom of Information Act requests concluded that there were significant limitations in the data used by FSIS to draw its conclusion about worker injury rates.<sup>523</sup> The USDA's OIG is evaluating whether the agency concealed information and used flawed data to develop and promote the rule.<sup>524</sup> (Trump administration)

# About the Task Force Members

---



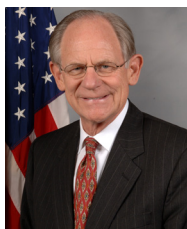
## **Preet Bharara, Co-Chair**

Preet Bharara is an American lawyer who served as U.S. Attorney for the Southern District of New York from 2009 to 2017. His office prosecuted cases involving terrorism, narcotics and arms trafficking, financial and health-care fraud, cybercrime, public corruption, gang violence, organized crime, and civil rights violations. In 2012, Bharara was featured on *Time*'s "100 Most Influential People in the World." On April 1, 2017, Bharara joined the NYU School of Law faculty as a Distinguished Scholar in Residence. He is Executive Vice President at Some Spider Studios, where he hosts a CAFE podcast, *Stay Tuned*, focused on questions of justice and fairness. He is also the author of a top-five *New York Times* bestselling book, *Doing Justice: A Prosecutor's Thoughts on Crime, Punishment, and the Rule of Law*.



## **Christine Todd Whitman, Co-Chair**

Christine Todd Whitman is President of the Whitman Strategy Group, a consulting firm specializing in environmental and energy issues. She served in the cabinet of President George W. Bush as Administrator of the Environmental Protection Agency from 2001 to 2003, and was Governor of New Jersey from 1994 to 2001. During her time in government, she gained bipartisan support and was widely praised for championing common-sense environmental improvements. Gov. Whitman is involved in numerous national nonprofit organizations focused on legal and environmental causes, including the American Security Project and the O'Connor Judicial Selection Advisory Committee at the Institute for the Advancement of the American Legal System. She is a graduate of Wheaton College in Norton, Massachusetts.



## **Mike Castle**

Mike Castle is a former two-term governor, nine-term member of Congress, lieutenant governor, deputy attorney general, and state senator of his home state of Delaware. Recently retired from the law firm DLA Piper, Gov. Castle served on the Financial Services, Intelligence, and Education and Workforce Committees during his tenure in the U.S. House of Representatives, and also led a number of congressional caucuses. Since leaving office in January 2011, he has been honored by the Delaware Chamber of Commerce and the University of Delaware, and politicians of both parties have heralded Gov. Castle as a bipartisan leader. As a partner at DLA Piper, he worked on financial issues, international trade, legislative affairs, and health care. He is the Board Chair for Research!America. He received his B.A. from Hamilton College and his J.D. from Georgetown University.



## **Christopher Edley, Jr.**

Christopher Edley, Jr. is the Honorable William H. Orrick, Jr. Distinguished Professor of Law at UC Berkeley School of Law, after serving as dean from 2004 through 2013. Before Berkeley, he was a professor at Harvard Law School for 23 years and cofounded the Harvard Civil Rights Project. Prof. Edley co-chaired the congressionally chartered National Commission on Education Equity and Excellence from 2011 to 2013. He served in White House policy and budget positions under Presidents Jimmy Carter and Bill Clinton, held senior positions in five presidential campaigns, and worked on two presidential transitions. He is a fellow or member of the American Academy of Arts & Sciences, the National Academy of Public Administration, the Council on Foreign Relations, the American Law Institute, the advisory board of the Hamilton Project, the Brookings Institution, and the board of Inequality Media. As a National Associate of the National Research Council, he recently chaired committees to evaluate National Assessment of Educational Progress performance standards and design a national system of education equity indicators. Prof. Edley is a graduate of Swarthmore College, Harvard Kennedy School, and Harvard Law School.





### **Chuck Hagel**

Chuck Hagel served as the 24th Secretary of Defense from 2013 to 2015. He is the only Vietnam veteran and enlisted combat veteran to serve as Secretary of Defense. He represented the state of Nebraska in the U.S. Senate from 1997 to 2009.

In the Senate, Sec. Hagel was a senior member of the Foreign Relations; Banking, Housing and Urban Affairs; and Intelligence Committees. Previously, Sec. Hagel was Co-Chairman of the President's Intelligence Advisory Board, a Distinguished Professor at Georgetown University, Chairman of the Atlantic Council, Chairman of the United States of America Vietnam War Commemoration Advisory Committee, Co-Chairman of the Vietnam Veterans Memorial Fund Corporate Council, President and CEO of the USO, and Deputy Administrator of the Veterans Administration. He currently serves on the RAND Board of Trustees, PBS Board, Corsair Capital Advisory Board, and American Security Project Board, and is a Senior Advisor to Gallup. He is a graduate of the University of Nebraska at Omaha.



### **David Iglesias**

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



### **Amy Comstock Rick**

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



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

Donald B. Verrilli, Jr. is a partner at Munger, Tolles & Olson LLP, and the founder of its Washington, D.C., office. He served as Solicitor General of the United States from June 2011 to June 2016. During that time, he was responsible for representing

the U.S. government in all appellate matters before the Supreme Court and in the courts of appeals, and was a legal adviser to President Barack Obama and the Attorney General. Earlier, he served as Deputy White House Counsel and as Associate Deputy Attorney General in the U.S. Department of Justice. He clerked for U.S. Supreme Court Justice William J. Brennan, Jr., and the Honorable J. Skelly Wright on the U.S. Court of Appeals for the D.C. Circuit. He received his B.A. from Yale University and J.D. from Columbia Law School.

# Endnotes

---

- 1 National Aeronautics and Space Administration Office of the Inspector General, *Investigative Summary Regarding Allegations That NASA Suppressed Climate Change Science and Denied Media Access to Dr. James E. Hansen, a NASA Scientist* (Washington, D.C.: National Aeronautics and Space Administration, 2008), available at [https://oig.nasa.gov/docs/OI\\_STI\\_Summary.pdf](https://oig.nasa.gov/docs/OI_STI_Summary.pdf). The inspector general's office found that the public affairs office added uncertainty to scientific findings, changed report titles to obscure findings, eliminated controversial terms such as "global warming," and altered quotations from scientists. *Ibid.*, 22, 27–32.
- 2 Tom DiChristopher, "Major EPA Fracking Study Downplayed Risks to US Water Supply, Investigation Finds," *CNBC*, Dec. 1, 2016, <https://www.cnbc.com/2016/12/01/major-epa-fracking-study-downplayed-risks-to-us-water-supply-investigation-finds.html>. Records of communications obtained through Freedom of Information Act requests indicate that the changes were made after EPA officials and media consultants met with advisers to President Obama to discuss marketing the study. Scott Tong and Tom Scheck, "EPA's Late Changes to Fracking Study Downplay Risk of Drinking Water Pollution," *Marketplace*, Nov. 30, 2016, <https://www.marketplace.org/2016/11/29/world/epa-s-late-changes-fracking-study-portray-lower-pollution-risk>. The EPA's Science Advisory Board contested the report's conclusions on the grounds that they either lacked quantitative evidence or were inconsistent with underlying data and recommended that the EPA revise the report's findings to clearly link to evidence provided in the report. Letter from Peter S. Thorne, chair, Science Advisory Board, and David A. Dzombak, chair, SAB Hydraulic Fracturing Research Advisory Panel, to Gina McCarthy, administrator, Environmental Protection Agency (Aug. 11, 2016), available at <https://www.documentcloud.org/documents/3011057-EPA-SAB-16-005-Unsigned.html>.
- 3 Dino Grandoni and Juliet Elperin, "Interior Dept. Officials Downplayed Federal Wildlife Experts' Concerns About Trump's Border Wall, Documents Show," *Washington Post*, Dec. 10, 2018, <https://www.washingtonpost.com/energy-environment/2018/12/11/interior-officials-downplayed-federal-wildlife-experts-concerns-about-trumps-border-wall-documents-show>.
- 4 For instance, when the media revealed that the chief of staff for the White House Council on Environmental Quality under President George W. Bush rewrote sections of climate change reports, despite his lack of scientific training, he resigned. Andrew C. Revkin, "Former Bush Aide Who Edited Reports Is Hired by Exxon," *New York Times*, June 15, 2005, <https://www.nytimes.com/2005/06/15/politics/former-bush-aide-who-edited-reports-is-hired-by-exxon.html>. And a political official at the DOI under President George W. Bush who forced scientists to reverse findings without scientific basis resigned after the department's inspector general scrutinized her conduct. Charlie Savage, "Report Finds Meddling in Interior Dept. Actions," *New York Times*, Dec. 15, 2008, <http://www.nytimes.com/2008/12/16/washington/16interior.html>.
- 5 Michael E. Mann, "The Serengeti Strategy: How Special Interests Try to Intimidate Scientists, And How Best to Fight Back," *Bulletin of the Atomic Scientists* 71(1) (2015).
- 6 See, e.g., David Harsanyi, "'Impartial' Fact-checkers Are Revealing Their Partisanship Against Trump," *New York Post*, Feb. 9, 2019, <https://nypost.com/2019/02/09/impartial-fact-checkers-are-revealing-their-partisanship-against-trump/>.
- 7 See examples under "Retaliation and Threatened Retaliation Against Career Experts" in the Appendix.
- 8 In 2013 and 2014, officials and scientists from the National Institutes of Health (NIH) met with alcohol industry representatives to solicit funding for a study of the benefits of moderate drinking. They also allowed industry representatives to give input on study design. After their actions were publicly reported, the NIH ended the trial. Rony Caryn Rabin, "Major Study of Drinking Will Be Shut Down," *New York Times*, June 15, 2018, <https://www.nytimes.com/2018/06/15/health/alcohol-nih-drinking.html>.
- 9 Rachel Leven, "Bad Science Underlies EPA's Air Pollution Program," *Scientific American*, Jan. 29, 2018, <https://www.scientificamerican.com/article/bad-science-underlies-epa-rsquo-s-air-pollution-program/>.
- 10 "History," National Academy of Sciences, accessed Mar. 1, 2019, <http://www.nasonline.org/about-nas/history/archives/founding-and-early-work.html>.
- 11 "A Companion to Science and Engineering Indicators 2008," National Science Board, accessed Apr. 15, 2019, <https://wayback.archive-it.org/5902/20160210222347/http://www.nsf.gov/statistics/nsb0803/start.htm?CFID=14442646&CFTOKEN=37871803&jsessionid=f0301d4aa9e1cebd0e3b624695d26e5853a4>. See also Jeffrey Mervis, "Data Check: U.S. Government Share of Basic Research Funding Falls Below 50%," *Science*, Mar. 9, 2017, <https://www.sciencemag.org/news/2017/03/data-check-us-government-share-basic-research-funding-falls-below-50>; Art Jahnke, "Who Picks Up the Tab for Science?" *BU Research*, accessed Apr. 15, 2019, <http://www.bu.edu/research/articles/funding-for-scientific-research/>.
- 12 Genna Reed et al., *Abandoning Science Advice*, Union of Concerned Scientists, 2018, 3, <https://www.ucsusa.org/sites/default/files/attach/2018/01/abandoning-science-advice-full-report.pdf>.
- 13 The CRS was created to provide "comprehensive and reliable legislative research." "Congressional Research Service: History and Mission," Library of Congress, last modified Nov. 15, 2012, accessed July 2, 2019, <http://www.loc.gov/crsinfo/about/history.html>.
- 14 The JCT was established to assist in "every aspect of the tax legislative process." "JCT About Page Overview," The Joint Committee on Taxation, accessed July 2, 2019, <https://www.jct.gov/about-us/overview.html>.
- 15 Technology Assessment Act of 1972, 2 U.S.C. §§ 471–481.
- 16 The CBO was established to provide objective, nonpartisan information to assist Congress in making effective budget and economic policy. Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601–688.
- 17 Science Advisory Board, *Second Report of the Science Advisory Board, September 1, 1934 to August 31, 1935* (Washington, D.C.: National Academy of Sciences, 1935), 15–16.
- 18 Bush wrote that government scientists should work in an environment "free from the adverse pressure of convention, prejudice, or commercial necessity" that would "provide the scientific worker with a strong sense of solidarity and security, as well as a substantial degree of personal intellectual freedom." Vannevar Bush, *Science — The Endless Frontier* (Washington, D.C.: United States Government Printing Office, July 1945), available at <https://www.nsf.gov/od/lpa/nsf50/vbush1945.htm>.
- 19 Gretchen Goldman et al., *Preserving Scientific Integrity in Federal Policymaking: Lessons from the Past Two Administrations and What's at Stake Under the Trump Administration*, Union of Concerned Scientists, 2017, 1, available at <https://www.ucsusa.org/sites/default/files/attach/2017/01/preserving-scientific-integrity-in-federal-policy-making-ucs-2017.pdf>.
- 20 *Public Papers of the Presidents of the United States: Lyndon B. Johnson* (Washington, D.C.: United States Government Printing Office, 1967), 2:699, quoted in H.R. Rep. No. 104-795, at 8 (1996).
- 21 For instance, President Reagan's surgeon general, C. Everett Koop, a political conservative who was deeply religious and had authored a book opposing abortion, was lauded for writing a comprehensive report about Acquired Immune Deficiency Syndrome (AIDS) that laid out sound, science-based public health policy objectives. In the foreword of the report, he wrote, "At the beginning of the AIDS epidemic, many Americans had little sympathy for people with AIDS."

The feeling was that somehow people from certain groups 'deserved' their illness. Let us put those feelings behind us. We are fighting a disease, not people . . . ." John-Manuel Andriote, "Doctor, Not Chaplain: How a Deeply Religious Surgeon General Taught a Nation About HIV," *Atlantic*, Mar. 4, 2013, <https://www.theatlantic.com/health/archive/2013/03/doctor-not-chaplain-how-a-deeply-religious-surgeon-general-taught-a-nation-about-hiv/273665/>. An eight-page version of his report was mailed to every American household in 1988. Eyder Peralta, "C. Everett Koop, Surgeon General Who Fought Against Smoking, AIDS, Dies," *NPR*, Feb. 25, 2013, <https://www.npr.org/sections/thetwo-way/2013/02/25/172907525/c-everett-koop-surgeon-general-who-fought-against-smoking-aids-dies>.

**22** 5 U.S.C. §§ 551–559. For more details about the Administrative Procedure Act, see Proposal 6.

**23** 5 U.S.C. § 552. For more details about FOIA and government science, see Proposal 5.

**24** Emily Berman and Jacob Carter, "Policy Analysis: Scientific Integrity in Federal Policymaking Under Past and Present Administrations," *Journal of Science Policy and Governance* 13, (1) (2018), available at [http://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/berman\\_emily\\_carter\\_jacob.pdf](http://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/berman_emily_carter_jacob.pdf).

**25** "Congress Ends U.S. Funding of Supersonic Aircraft," *CQ Almanac*, 27th ed. (Washington, D.C.: Congressional Quarterly, 1981), 513–21, available at [http://library.cqpress.com/cqalmanac/document.php?id=cqal71-1252799#H2\\_8](http://library.cqpress.com/cqalmanac/document.php?id=cqal71-1252799#H2_8).

**26** David Z. Robinson, "Politics in the Science Advising Process," *Technology in Society* 2 (1980): 162; Dave Levitan, "When a President Banishes Science from the White House," *Atlantic*, Oct. 31, 2016, <https://www.theatlantic.com/science/archive/2016/10/when-a-president-banishes-science-from-the-white-house/505937/>.

**27** Warren E. Leary, "'Star Wars' Runs into New Criticism," *New York Times*, Apr. 25, 1988, <https://www.nytimes.com/1988/04/25/world/star-wars-runs-into-new-criticism.html>; Christopher Joyce, "Software for SDI Is 'Too Complex to Work,'" *New Science*, June 9, 1988, 39.

**28** Steven Thomma, "Gore Says OMB Editing Amounts to 'Science Fraud,'" *Philadelphia Inquirer*, May 9, 1989.

**29** See examples listed under "Threats to Scientific Integrity" and "Contacts Between Political Officials and Career Experts That Undermine Scientific Integrity" in the Appendix.

**30** See examples listed under "Retaliation and Threatened Retaliation Against Career Experts" in the Appendix.

**31** See, e.g., Andrew Bergman and Toly Rinberg, "In Its First Year, the Trump Administration Has Reduced Public Information Online," *Sunlight Foundation*, Jan. 4, 2018, <https://sunlightfoundation.com/2018/01/04/in-its-first-year-the-trump-administration-has-reduced-public-information-online/>; "Silencing Science Tracker," Columbia Law School, Sabin Center for Climate Change Law, accessed Mar. 1, 2019, <http://columbiaclimatelaw.com/resources/silencing-science-tracker/>. See also Jacob Carter et al., *The State of Science in the Trump Era: Damage Done, Lessons Learned, and a Path to Progress*, Union of Concerned Scientists, 2019, 10–12, 30, available at <https://www.ucsusa.org/sites/default/files/attach/2019/01/ucs-trump-2yrs-report.pdf>. See also examples listed under "Restriction of Public Access to Government Research and Data" in the Appendix.

**32** Wendy Ginsberg and Casey Burgat, *Federal Advisory Committees: An Introduction and Overview*, CRS Report No. R44253 (Washington, D.C.: Congressional Research Service, 2016), 17, <https://fas.org/sgp/crs/secretary/R44253.pdf>.

**33** See *ibid.*; Steven P. Croley and William F. Funk, "The Federal Advisory Committee Act and Good Government," *Yale Journal on Regulation* 14 (1997): 459. The Department of Justice (DOJ) issued guidelines for advisory committees in 1950. See *Hearings on WOCs [Without Compensation Government Employees] and Government Advisory Groups Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 84th Cong. 586–87 (1955) (reprinting DOJ guidelines). In 1962, President John F. Kennedy issued

an executive order that built on the DOJ's guidelines. 3 C.F.R. 573 (1959–1963).

**34** Robert C. Cowen, "Reagan Adviser Keyworth on Administration's Science Policy," *Christian Science Monitor*, Jan. 22, 1985, <https://www.csmonitor.com/1985/0122/zee.html>.

**35** Exec. Order No. 12,700, 3 C.F.R. 271 (1990).

**36** Exec. Order No. 12,882, 3 C.F.R. 681 (1993); Exec. Order No. 13,226, 3 C.F.R. 792 (2001); Exec. Order No. 13,539, 3 C.F.R. 209 (2010); Tony Romm, "A Key White House Science Council Is Still Vacant — But the Trump Administration Doesn't Plan to Kill It," *Recode*, Sept. 2, 2017, <https://www.recode.net/2017/9/2/16236724/white-house-trump-president-science-tech-vacant>.

**37** See Appendix for examples of political interference in government research during the Bush administration.

**38** "Scientific Integrity," White House Office of Science and Technology Policy, accessed May 23, 2019, [https://en.wikisource.org/w/index.php?title=Page:Title\\_3\\_CFR\\_1959-1963\\_Compilation.djvu/573&action=edit&redlink=1](https://en.wikisource.org/w/index.php?title=Page:Title_3_CFR_1959-1963_Compilation.djvu/573&action=edit&redlink=1).

**39** See "Scientific Integrity Policies," Public Employees for Environmental Responsibility, accessed Mar. 20, 2019, <https://www.peer.org/campaigns/whistleblowers-scientists/scientific-integrity/scientific-integrity-policies.html>; Goldman et al., *Preserving Scientific Integrity*; United States Government Accountability Office, *Scientific Integrity Policies: Additional Actions Could Strengthen Integrity of Federal Research*, GAO-19-265 (Washington, D.C.: Government Accountability Office, 2019), <https://www.gao.gov/assets/700/698231.pdf>.

**40** Richard H. Pildes and Cass R. Sunstein, "Reinventing the Regulatory State," *University of Chicago Law Review* 62 (1995): 19 and n. 70.

**41** Exec. Order No. 12,866, 3 C.F.R. 638, § 6(a)(3)(E)(ii)–(iii) (1993). President Obama issued Executive Order 13,563, which supplemented and reaffirmed the principles of regulatory review established in Executive Order 12,866. 3 C.F.R. 215 (2011).

**42** Exec. Order No. 12,866, 3 C.F.R. 638, § 6(a)(3)(E)(ii)–(iii) (1993).

**43** Exec. Order No. 13,563, 3 C.F.R. 215, § 5 (2011).

**44** National Science and Technology Policy, Organization, and Priorities Act of 1976, Pub. L. No. 94-282, 90 Stat. 459 (1976). See also John F. Sargent, Jr. and Dana A Shea, *Office of Science and Technology Policy (OSTP): History and Overview*, CRS Report No. R43935 (Washington, D.C.: Congressional Research Service, 2017), 2, <https://fas.org/sgp/crs/misc/R43935.pdf>.

**45** Technology Assessment Act of 1972, Pub. L. No. 92-484, §§ 2(a)(2), 2(d)(1), 86 Stat. 797–803 (1972). See also Gregory C. Kunkle, "New Challenge or the Past Revisited? The Office of Technology Assessment in Historical Context," *Technology in Society* 17 (1995): 176 ("The idea for the organization emerged in a period of technological revisionism characterized by the Supersonic Transport (SST) and Anti-Ballistic Missile (ABM) controversies and the closely related burgeoning environmental concerns of the 1960s and 1970s."); Ed O'Keefe, "When Congress Wiped an Agency off the Map," *Washington Post*, Nov. 29, 2011, [https://www.washingtonpost.com/blogs/federal-eye/post/when-congress-wiped-an-agency-off-the-map/2011/11/29/gIQAItQJ9N\\_blog.html](https://www.washingtonpost.com/blogs/federal-eye/post/when-congress-wiped-an-agency-off-the-map/2011/11/29/gIQAItQJ9N_blog.html).

**46** 5 U.S.C. app. 2 §§ 1–16.

**47** See *ibid.* §§ 2(b)(5), 5(b)(2)–(3). The General Services Administration has issued guidance to agencies about advisory committees, Federal Advisory Committee Management, 41 C.F.R. pt. 102-3 (2001), and the Government Accountability Office has made recommendations for the executive branch to improve the balance of advisory committees. Robin M. Nazarro, United States Government Accountability Office, *Testimony Before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives: Federal Advisory Committee Act: Issues Related to the Independence and Balance of Advisory Committees*, GAO-08-611T (Washington, D.C.: Government Accountability Office, 2008), <https://www.gao.gov/new>

[items/d08611t.pdf](#). The EPA's scientific integrity policy specifies that the selection of advisory committee members should be based on expertise, balance of the scientific or technical points of view, and consideration of conflicts of interest. "Scientific Integrity Policy," U.S. Environmental Protection Agency, last modified 2012, 9, [https://www.epa.gov/sites/production/files/2014-02/documents/scientific\\_integrity\\_policy\\_2012.pdf](https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf).

**48** Eliot Marshall, "Hit List at EPA?" *Science*, Mar. 18, 1983, <http://science.sciencemag.org/content/219/4590/1303>; Scott Waldman, "Political Appointees Once Kept a Scientist 'Hit List,'" *Climatewire*, May 14, 2018, <https://www.eenews.net/stories/1060081559>.

**49** Environmental Research, Development, and Demonstration Act of 1983, S. 2577, 97th Cong. (1982); H.R. 6323, 97th Cong. (1982).

**50** Ronald Reagan, *Message from the President of the United States: Returning Without My Approval S. 2577, a Bill to Authorize Appropriations for Environmental Research, Development, and Demonstration for the Fiscal Years 1983 and 1984, and for Other Purposes*, S. Doc. No. 97-37 (Oct. 22, 1982), available at <https://www.senate.gov/reference/Legislation/Vetoes/Messages/ReaganR/S2577-Sdoc-97-37.pdf>

**51** Paul Shinoff, "Nuclear Workers' Health Monitored but Debate Grows," *Washington Post*, May 22, 1978, <https://www.washingtonpost.com/archive/business/1978/05/22/nuclear-workers-health-monitored-but-debate-grows/a99224cc-627d-4f43-ac17-3aaf390837cb>.

**52** *Legislative Hearing on Radiation Measures: Hearings on H.R. 1811, S. 1002, and S. 453, Before the Subcomm. on Compensation, Pension and Insurance of the Comm. on Veterans' Affairs*, 100th Cong. (1987).

**53** Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. No. 100-321, 102 Stat. 485 (1988). See also Clifford T. Honnicker, "America's Radiation Victims: The Hidden Files," *New York Times*, Nov. 19, 1989, <https://www.nytimes.com/1989/11/19/magazine/america-s-radiation-victims-the-hidden-files.html>; David Michaels, *Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health* (New York: Oxford University Press, 2008), 218.

**54** Radiation Exposure Compensation Act of 1990, Pub. L. No. 101-426, 104 Stat. 920 (1990). See also Michaels, *Doubt Is Their Product*, 220.

**55** See, e.g., National Aeronautics and Space Administration Office of the Inspector General, *Allegations That NASA Suppressed Climate Change Science*.

**56** "Federal Government Sets New Record for Censoring, Withholding Files Under FOIA," *CBS News*, Mar. 12, 2018, <https://www.cbsnews.com/news/foia-federal-government-sets-new-record-for-censoring-withholding-files-trump-administration/>.

**57** The DOI and the EPA implemented policies that allow political officials to review responses to FOIA requests, giving them leeway to withhold requested documents. Rebecca Beitsch, "Pressure Mounts Against EPA's New FOIA Rule," *The Hill*, July 10, 2019, <https://thehill.com/policy/energy-environment/452425-pressure-mounts-on-epa-to-withdraw-new-foia-rule>. See also Rebecca Beitsch, "Bipartisan Senators Fight 'Political Considerations' in EPA's New FOIA Rule," *The Hill*, July 22, 2019, <https://thehill.com/policy/energy-environment/454189-bipartisan-senators-fight-political-considerations-in-epa-foia-rule>. For instance, when processing a FOIA request at the DOI, FOIA officers identified 96 pages of potentially responsive materials, but released only 16 pages after review by political officials. Michael Doyle and Jennifer Yachnin, "Department's FOIA Program Prompts IG Complaint," *E&E News*, June 17, 2019, <https://www.eenews.net/eenewspm/2019/06/17/stories/1060613483>.

**58** For instance, during the Obama administration, Health and Human Services Secretary Kathleen Sebelius publicly overruled the Food and Drug Administration's determination that over-the-counter emergency contraceptives were safe for minors, questioning the underlying research despite her lack of scientific training. Gardiner Harris, "Plan to Widen Availability of Morning-After Pill Is Rejected," *New*

*York Times*, Dec. 7, 2011, <https://www.nytimes.com/2011/12/08/health/policy/sebelius-overrules-fda-on-freer-sale-of-emergency-contraceptives.html>. Her decision was immediately criticized as politically motivated, and a judge presiding over a lawsuit challenging the action agreed, finding the secretary's action "politically motivated, scientifically unjustified, and contrary to agency precedent." Pam Belluck, "Judge Strikes Down Age Limits on Morning-After Pill," *New York Times*, Apr. 5, 2013, <https://www.nytimes.com/2013/04/06/health/judge-orders-fda-to-make-morning-after-pill-available-over-the-counter-for-all-ages.html> (quoting *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 192 (E.D.N.Y. 2013)).

**59** 5 U.S.C. §§ 551–559.

**60** America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Reauthorization Act or "America COMPETES Reauthorization Act of 2010," Pub. L. No. 111-358, § 103(a), 124 Stat. 3982 (2010).

**61** The Public Access Memo mandates the creation of public-access plans and clarifies that the push for disclosure does not extend to laboratory notebooks, preliminary analyses, drafts of scientific papers, plans for future research, peer review reports, or communications with colleagues. John Holdren, Director, Office of Science and Technology Policy, "Increasing Access to the Results of Federally Funded Scientific Research" (official memorandum, Washington, D.C.: Executive Office of the President, 2013).

**62** Jerry Sheehan, "Making Federal Research Results Available to All," *White House*, Jan. 9, 2017, <https://obamawhitehouse.archives.gov/blog/2017/01/09/making-federal-research-results-available-all>.

**63** See examples under "Restriction of Public Access to Government Research and Data" in the Appendix.

**64** For example, the first sentence of a news release drafted by a scientist was, "The 'ozone hole' that develops over Antarctica was larger this year than in 2004 and was the fifth largest on record." The public affairs office changed that sentence to read, "NASA researchers[] . . . determined the seasonal ozone hole that developed over Antarctica this year is smaller than in previous years." National Aeronautics and Space Administration Office of the Inspector General, *Allegations That NASA Suppressed Climate Change Science*. See also Andrew C. Revkin, "Climate Expert Says NASA Tried to Silence Him," *New York Times*, Jan. 29, 2006, <https://www.nytimes.com/2006/01/29/science/earth/climate-expert-says-nasa-tried-to-silence-him.html>. George Deutsch, a politically appointed public affairs officer at NASA, rejected a request from a producer at NPR to interview James E. Hansen, then director of NASA's Goddard Institute for Space Studies, reportedly calling NPR "the most liberal" media outlet in the country and that his job was "to make the president look good." *Ibid*.

**65** The National Aeronautics and Space Act, 51 U.S.C. § 20112(a) (3).

**66** National Aeronautics and Space Administration Office of the Inspector General, *Allegations That NASA Suppressed Climate Change Science*.

**67** Michael Griffin, Administrator, "Statement on Scientific Openness," National Aeronautics and Space Administration, Feb. 4, 2006, [https://www.nasa.gov/about/highlights/griffin\\_science.html](https://www.nasa.gov/about/highlights/griffin_science.html).

**68** "NASA Policy on the Release of Information to News and Information Media," National Aeronautics and Space Administration, Mar. 30, 2006, [https://www.nasa.gov/pdf/145687main\\_information\\_policy.pdf](https://www.nasa.gov/pdf/145687main_information_policy.pdf).

**69** See examples listed under "Threats to Scientific Integrity" in the Appendix.

**70** Lisa Friedman, "E.P.A. Cancels Talk on Climate Change by Agency Scientists," *New York Times*, Oct. 22, 2017, <https://www.nytimes.com/2017/10/22/climate/epa-scientists.html?emc=eta1>; Arianna Skibell, "Agency Keeps Scientists from Speaking at Watershed Conference," *Greenwire*, Oct. 23, 2017.

**71** Elliot Negin, “Energy Department Scientists Barred from Attending Nuclear Power Conference,” *Huffington Post*, Aug. 1, 2017, [https://www.huffpost.com/entry/energy-department-scientists-barred-from-attending\\_b\\_597f7e2ee4b0cb4fc1c73b8e](https://www.huffpost.com/entry/energy-department-scientists-barred-from-attending_b_597f7e2ee4b0cb4fc1c73b8e); Brittany Patterson, “Govt. Scientist Blocked from Talking About Climate and Fire,” *E&E News*, Oct. 31, 2017, <https://www.eenews.net/stories/1060065143>; Sarah Kaplan, “Government Scientists Blocked from the Biggest Meeting in Their Field,” *Washington Post*, Dec. 22, 2017, <https://www.washingtonpost.com/news/speaking-of-science/wp/2017/12/22/government-scientists-blocked-from-the-biggest-meeting-in-their-field/>; Dino Grandoni, “The Energy 202: Interior Agency Blocks Group of Archaeologists from Attending Scientific Conference,” *Washington Post*, May 3, 2018, <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/05/03/the-energy-202-interior-agency-blocks-group-of-archaeologists-from-attending-scientific-conference/>.

**72** Lance Leggett, Chief of Staff, Office of the Secretary, “Congressional Relations” (official memorandum, Washington, D.C.: Department of Health and Human Services, May 3, 2017), available at <https://www.washingtonpost.com/news/post-nation/wp-content/uploads/sites/23/2017/05/HHSMemo.pdf>; Sam Baker, “CDC Cracks Down on Communications with Reporters,” *Axios*, Sept. 12, 2017, <https://www.axios.com/cdc-cracks-down-on-communications-with-reporters-1513305443-0a94d025-172c-44f1-b26c-e02885bdf40.html>; Rong-Gong Lin II, “Trump Administration Tightens Rules for Federal Scientists Talking to Reporters,” *Los Angeles Times*, June 22, 2018, <https://www.latimes.com/local/lanow/la-me-ln-trump-policy-usgs-scientists-20180621-story.html>.

**73** Center for Science and Democracy, *Science Under President Trump: Voices of Scientists Across 16 Federal Agencies*, Union of Concerned Scientists, 2018, 7, available at <https://www.ucsusa.org/sites/default/files/attach/2018/08/science-under-trump-report.pdf>.

**74** Robinson Meyer, “Trump’s Interference with Science Is Unprecedented,” *Atlantic*, Nov. 9, 2018, <https://www.theatlantic.com/science/archive/2018/11/experts-warn-trump-epa-meddling-scientific-method/575377/>.

**75** The EPA’s proposed “transparent science” rule would require that scientific studies that support “pivotal regulatory science” publish their underlying data, models, and assumptions, which would often entail disclosure of personal health and other private information of study participants, in contravention of privacy laws. Robinson Meyer, “Even Geologists Hate the EPA’s New Science Rule,” *Atlantic*, July 17, 2018, <https://www.theatlantic.com/science/archive/2018/07/scott-pruitts-secret-science-rule-could-still-become-law/565325/>.

**76** Audra J. Wolfe, “Yes, Radiation Is Bad for You. The EPA’s ‘Transparency Rule’ Would Be Even Worse,” *Washington Post*, Oct. 8, 2018, <https://www.washingtonpost.com/outlook/2018/10/08/yes-radiation-is-bad-you-epas-transparency-rule-would-be-even-worse/>. See also Scott Waldman, “How Pruitt’s Science Plans Might Help Industry Fight Rules,” *E&E News*, May 1, 2018, <https://www.eenews.net/stories/1060080501> (“Offering more raw data[] . . . could allow industry to take data out of context and to rework it with predetermined findings that it will claim invalidates the work of established and independent researchers[.]”); Bernard Goldstein, “Why the EPA’s ‘Secret Science’ Proposal Alarms Public Health Experts,” *The Conversation*, May 18, 2018, <https://theconversation.com/why-the-epas-secret-science-proposal-alarms-public-health-experts-96000> (providing historical context for “transparent science” rule).

**77** The 2017 version of the Scientific Integrity Act would have required that scientific integrity policies apply “to each employee or contractor who conducts, handles, communicates, supervises, or manages federally funded scientific research for the [f]ederal agency or for a federally funded research and development center sponsored by the [f]ederal agency.” Scientific Integrity Act, H.R. 1358, 115th Cong. § 6(a) (2017); Scientific Integrity Act, S. 338, 115th Cong. § 6(a) (2017). Of note, some of the scientific integrity policies that agencies have adopted apply to contractors, states, and other partners.

See Public Employees for Environmental Responsibility, *Scientific Integrity Report Card Factors*, § I(B)(2), available at [https://www.peer.org/assets/docs/Factors\\_RC\\_Point\\_System.pdf](https://www.peer.org/assets/docs/Factors_RC_Point_System.pdf); Public Employees for Environmental Responsibility, *Scientific Integrity Report Card Comparison Charts*, available at [https://www.peer.org/assets/docs/SI\\_Report\\_Card\\_Comparison\\_Chart%20-%20Sorted%20by%20Score.pdf](https://www.peer.org/assets/docs/SI_Report_Card_Comparison_Chart%20-%20Sorted%20by%20Score.pdf).

**78** See Scientific Integrity Act, H.R. 1709, 116th Cong. § 2(3) (2019); Scientific Integrity Act, S. 775, 116th Cong. § 3(3) (2019).

**79** See Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

**80** See Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019). See also Holly Doremus, “Scientific and Political Integrity in Environmental Policy,” *Texas Law Review* 86 (2008): 1647–48 (“Outside of regulatory agencies, federal research units modeled along academic lines should allow scientists to speak out just as academic scientists are free to do. Within regulatory agencies, there is some justification for overseeing contacts with the press; at some level those agencies must speak with one voice. But no such concern exists with respect to research science units. . . . It is never appropriate for any political appointee or public affairs officer to screen submissions of scientific literature.”).

**81** See *ibid.*, 1645 (advocating for creation of dissent channels at agencies where scientific research is performed). See also Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

**82** See *ibid.* See also Doremus, “Scientific and Political Integrity,” 1645–46 (calling for independent scientific ombudsmen to whom agency technical staff could forward concerns about scientific underpinnings of regulatory decisions and public communications). Congress has created similar positions, such as the director of the Office of Research Integrity in HHS, 42 U.S.C. § 289b(a)(2). The director is required by statute to be experienced and specially trained in the conduct of research and have experience in the conduct of investigations of research misconduct and is appointed by the secretary of the department.

Some agencies have scientific integrity officers (SIOs) to administer scientific integrity policies. See, e.g., U.S. Environmental Protection Agency, *Scientific Integrity Policy* (Washington, D.C.: Environmental Protection Agency, 2017), 10, available at [https://www.peer.org/assets/docs/epa/1\\_17\\_EPA\\_Final\\_SIP.pdf](https://www.peer.org/assets/docs/epa/1_17_EPA_Final_SIP.pdf); “Maryam Daneshvar, PhD, Director, Office of Scientific Integrity,” Centers for Disease Control and Prevention, accessed Mar. 1, 2019, <https://www.cdc.gov/od/science/aboutus/maryam-daneshvar.htm>; “Scientific Integrity Officers,” U.S. Department of the Interior, accessed Mar. 1, 2019, <https://www.doi.gov/scientificintegrity/Scientific-Integrity-Officers>; “Agency and Departmental Scientific Integrity Officers,” U.S. Department of Agriculture, accessed Mar. 1, 2019, <https://www.usda.gov/our-agency/staff-offices/office-chief-scientist-ocs/agency-and-departmental-scientific-integrity>.

**83** See Jeff Ruch, “Emerging Law of Scientific Integrity — A Bumpy Birth,” *Fisheries* 42 (2017): 354–55 (emphasizing need for independent review of scientific integrity complaints).

**84** See Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019). See also Doremus, “Scientific and Political Integrity,” 1648 (advocating training on the roles of technical and political staff).

**85** Carl Meyers, “Canada Moves to Protect Its Federal Scientists from Political Interference,” *Canada’s National Observer*, July 30, 2018, <https://www.nationalobserver.com/2018/07/30/news/canada-moves-protect-its-federal-scientists-political-interference>. See also “Resources,” European Network of Research Integrity Offices, accessed Mar. 21, 2019, <http://www.enrio.eu/resources/> (listing national and international codes of conduct for research integrity, open data policies, and other resources).

**86** The Scientific Integrity Act would require scientific integrity

policies to ensure, inter alia, that: scientific conclusions are not made based on political considerations; personnel actions for scientific personnel are not made based on political considerations; procedures are in place as are necessary to ensure the integrity of scientific and technological information and processes on which the federal agency relies in its decision-making or otherwise uses. Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

**87** The Data Quality Act (DQA, also known as the Information Quality Act) directs the White House Office of Management and Budget (OMB) to issue guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000). This appears to provide modest protections for the quality of government data disseminated to the public. However, the DQA has been criticized as a vehicle for special interest groups to impede or suppress government research by means of nonmeritorious petitions challenging the objectivity of government data. See Wendy Wagner, “The Perils of Relying on Interested Parties to Evaluate Scientific Quality,” *American Journal of Public Health* 95 (2005); Thomas O. McGarity et al., *Truth and Science Betrayed: The Case Against the Information Quality Act*, Center for Progressive Reform, 2005, 2, <http://www.progressivereform.org/articles/iga.pdf>. In many instances, such challenges have relied on industry-funded studies, which have themselves been faulted by mainstream scientific opinion. See Stephen M. Johnson, “Junking the Junk Science Law: Reforming the Information Quality Act,” *Administrative Law Review* 58 (2006): 37; Derek Araujo, Daniel Horowitz, and Ronald A. Lindsay, *Protecting Scientific Integrity*, Center for Inquiry, 2007, 7, <https://centerforinquiry.org/wp-content/uploads/2018/05/scientific-integrity.pdf>. For these reasons, we believe that another legislative approach is warranted to protect scientific integrity.

**88** U.S. Department of the Interior Office of the Inspector General, *Investigative Report on Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks* (Washington, D.C.: Department of the Interior, 2006), available at <https://www.doiig.gov/sites/doiig.gov/files/Macdonald.pdf>; Scientific Integrity Program, *Political Interference in Endangered Species Science: A Systemic Problem at the U.S. Fish and Wildlife Service*, Union of Concerned Scientists, 2006, available at [https://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific\\_integrity/white-tailed-prairie-dog.pdf](https://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/white-tailed-prairie-dog.pdf); Savage, “Report Finds Meddling.”

**89** See examples listed under “Contacts Between Political Officials and Career Experts That Undermine Scientific Integrity” in the Appendix.

**90** Bruce Rocheleau, *Wildlife Politics* (New York: Cambridge University Press, 2017), 55.

**91** Grandoni and Eilperin, “Interior Dept. Officials Downplayed Concerns.”

**92** Letter from Regional Director to Paul Enriquez, Real Estate and Environmental Branch Chief, U.S. Customs and Border Protection (Oct. 13, 2017), available at <https://apps.washingtonpost.com/g/documents/national/fish-and-wildlife-services-final-letter-on-border-walls-environmental-impacts/3345/>. See also Grandoni and Eilperin, “Interior Dept. Officials Downplayed Concerns.”

**93** Grandoni and Eilperin, “Interior Dept. Officials Downplayed Concerns.”

**94** “About the U.S. Fish and Wildlife Service,” U.S. Fish and Wildlife Service, accessed Mar. 21, 2019, [https://www.fws.gov/help/about\\_us.html](https://www.fws.gov/help/about_us.html) (“Our Mission is to [w]ork with others to conserve, protect and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people.”).

**95** The recently introduced Scientific Integrity Act calls for agencies to have “the appropriate rules, procedures, and safeguards . . . in place to ensure the integrity of the scientific process within the covered agency.” Scientific Integrity Act, H.R. 1709, 116th Cong. § 3

(2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

**96** See, e.g., Jack Quinn, Counsel to the President, “Contacts with Agencies” (official memorandum, Washington, D.C.: The White House, Jan. 16, 1996), 3, 5, available at <https://clinton.presidentiallibraries.us/items/show/27001> (advising that White House staff should not communicate with independent agencies about rulemaking matters and, with respect to executive branch departments, requiring White House contacts intended to influence the outcome of a pending rulemaking to be pre-approved by the relevant assistant or deputy assistant to the president and coordinated with the administrator of OIRA for advice on the appropriateness of the contact); see also Donald Rumsfeld, White House Chief of Staff, “Standards of Conduct: Contacts with Regulatory Agencies and Procurement Officers” (official memorandum, Washington, D.C.: White House, Oct. 10, 1975), 1–3, available at <https://www.fordlibrarymuseum.gov/library/document/0204/1511945.pdf>.

**97** See, e.g., 47 C.F.R. § 1.1200 et seq. (Federal Communications Commission regulations governing ex parte communications).

**98** See, e.g., Wendy Wagner and Tom McGarity, “Deregulation Using Stealth ‘Science’ Strategies,” *Duke Law Journal* 68 (2019): 1783–1800 (calling for firewalling of scientific literature review and analysis from policy input); Science for Policy Project, *Improving the Use of Science in Regulatory Policy*, Bipartisan Policy Center, 2009, 4, available at <https://bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC%20Science%20Report%20fnl.pdf> (calling for measures to differentiate between questions that involve scientific judgments and questions that involve judgments about economics, ethics, and other matters of policy); Angus Macbeth and Gary Marchant, “Improving the Government’s Environmental Science,” *New York University Environmental Law Journal* 17 (2008): 157 (proposing institutional separation of scientific assessments from the political environment inherent to regulatory decisions); Doremus, “Scientific and Political Integrity,” 1644–45 (calling for contacts between political appointees and nonmanagement career technical staff to be limited during the technical stages of regulatory development and requiring agencies to establish procedures for making science-intensive regulatory decisions, as well as for the preparation of scientific reports to Congress and the public); *Alternative Facts on the Rise in Federal Decision Records*, Public Employees for Environmental Responsibility, Jan. 31, 2019, <https://www.peer.org/news/press-releases/alternative-facts-on-the-rise-in-federal-decision-records.html> (linking to suggested statutory clarification, “Antidote to Alternatives Facts Act,” which would require administrative record to include “[c]ommunications that the agency received from other agencies and from the public, and any responses to those communications,” “[m]inutes from meetings and the memorialization of pertinent telephone conversations,” and “[n]on-printed communications, not limited to e-mail, computer tapes, discs, and other electronic records, as well as microfilm and microfiche”).

**99** For instance, after the EPA’s Clean Air Science Advisory Committee (CASAC) publicized the OMB’s changes to the committee’s research, Senator Barbara Boxer requested that the EPA provide her material showing the agency’s contacts with the OMB and representatives of the mining and agricultural industries. Janet Wilson, “EPA Panel Advises Agency Chief to Think Again,” *Los Angeles Times*, Feb. 4, 2006, <https://www.latimes.com/archives/la-xpm-2006-feb-04-epa4-story.html>.

**100** For examples of politically motivated manipulation of government research, and retaliation against government scientists for their research, see “Retaliation and Threatened Retaliation Against Career Experts” in the Appendix.

**101** 65 Fed. Reg. 76,260 (Dec. 6, 2000).

**102** Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989), amended by the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 et seq. (2012). See also letter from Carolyn Lerner, special counsel, to Barack Obama, president (Sept. 27, 2016), available at <https://osc.gov/PublicFiles/FY2016/16-60-DI-16-3709/16-60-DI-16-3709-Letter-to->

[the-President.pdf](#) (reporting results of investigation of whistleblower claim by scientist who was demoted after challenging government's recommended Zika test); Lena H. Sun, "CDC Whistleblower Claims Agency Has Been Using Wrong Zika Test," *Washington Post*, Sept. 28, 2016, <https://www.washingtonpost.com/news/to-your-health/wp/2016/09/27/cdc-whistleblower-claims-agency-has-been-using-wrong-zika-test/>.

**103** See, e.g., "Cases Received: FY2007–FY2017," Whistleblower Protection Programs, accessed Mar. 1, 2019, <https://www.whistleblowers.gov/sites/default/files/3DCharts-FY2007-FY2017.pdf>; Bruce Rolfsen, "Whistleblower Complaints Up; Investigator Count Down," *Bloomberg Environment*, Feb. 20, 2019, <https://news.bloombergenvironment.com/safety/whistleblower-complaints-up-investigator-count-down>; Anne Kates Smith, "The Elusive Rewards and High Costs of Being a Whistleblower," *Kiplinger*, June 2013, <https://www.kiplinger.com/article/business/T012-C000-S002-high-costs-of-being-a-whistleblower.html>. Additionally, discipline is "almost unheard of" for the managers who retaliate against whistleblowers. Joe Davidson, "New Law Targets Managers Who Retaliate Against Federal Whistleblowers," *Washington Post*, Oct. 31, 2017, <https://www.washingtonpost.com/news/powerpost/wp/2017/10/31/new-law-targets-managers-who-retaliate-against-federal-whistleblowers/>; *Chances of Whistleblower Success Remain Slim*, Public Employees for Environmental Responsibility, Sept. 9, 2013, <https://www.peer.org/news/press-releases/chances-of-whistleblower-success-remain-slim.html>. There are numerous proposals from good government groups to improve whistleblower protections. See, e.g., *Protecting Science at Federal Agencies: How Congress Can Help*, *Climate Science Legal Defense Fund*, et al., 2018, 26–30, available at <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2018/11/Protecting-Science-at-Federal-Agencies-Report.pdf>.

**104** See, e.g., U.S. Department of the Interior Office of the Inspector General, *Allegations Against Julie MacDonald*; National Aeronautics and Space Administration Office of the Inspector General, *Allegations That NASA Suppressed Climate Change Science*.

**105** *Ibid.*, 1 (citing the statutory and regulatory requirement of "the widest practicable and appropriate dissemination" of information concerning the agency's activities and results).

**106** 5 U.S.C. app. 6 § 4(a)(5) (inspectors general have the responsibility to "recommend corrective action").

**107** We believe that the term "government official" should be defined to include at least federal employees and contractors who, *inter alia*, engage in or manage scientific activities, analyze or publicly communicate information resulting from scientific activities, or use scientific information in policymaking. See Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

**108** As a point of comparison, the recently introduced Scientific Integrity Act would prohibit "dishonesty, fraud, deceit, misrepresentation, coercive manipulation, or other scientific or research misconduct." *Ibid.* § 4 (2019). See also Restore Scientific Integrity to Federal Research and Policymaking Act, H.R. 839, 109th Cong. § 3(a) (2005); S. 1358, 109th Cong. § 3(a) (2005).

**109** As a reference point, the Scientific Integrity Act would prohibit suppression, alteration, interference, or otherwise impeding the timely release and communication of scientific or technical findings, as well as the implementation of institutional barriers to cooperation and the timely communication of scientific or technical findings. Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 3 (2019). See also Restore Scientific Integrity to Federal Research and Policymaking Act, H.R. 839, 109th Cong. (2005); S. 1358, 109th Cong. (2005).

**110** Of note, the 2005 Restore Scientific Integrity bill would have prohibited this conduct. H.R. 839, 109th Cong. § 3(a) (2005); S. 1358, 109th Cong. § 3(a) (2005).

**111** See *ibid.* See also Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019) (pro-

hibiting the following conduct: intimidating or coercing an individual to alter or censor, or retaliate against an individual for failure to alter or censor, scientific or technical findings).

**112** See 65 Fed. Reg. 76,262 (Dec. 6, 2000) ("A finding of research misconduct requires" that "[t]here be a significant departure from accepted practices of the relevant research community[.]").

**113** *Ibid.* The 2005 Restore Scientific Integrity bill would have required that the employee directing the dissemination of scientific information know that the information was false or misleading as a predicate for liability. Restore Scientific Integrity to Federal Research and Policymaking Act, H.R. 839, 109th Cong. § 3(a) (2005); S. 1358, 109th Cong. § 3(a) (2005).

**114** See 65 Fed. Reg. 76,262 (Dec. 6, 2000) (requiring that an allegation of scientific misconduct be proven by a preponderance of the evidence). The DOI's Scientific Integrity Policy uses the same standard for scientific integrity violations. U.S. Department of the Interior, *Scientific Integrity Procedures Handbook* (305 DM 3), Dec. 16, 2014, ch. 3, § 3.7(b)(3)(i)–(iii), [https://www.doi.gov/sites/doi.gov/files/elips/documents/305%20DM%203\\_%20Handbook%20-%20Scientific%20Integrity%20Procedures.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/305%20DM%203_%20Handbook%20-%20Scientific%20Integrity%20Procedures.pdf).

**115** Many agencies' scientific integrity policies have outlined procedures for handling allegations of scientific integrity violations. See Goldman et al., *Preserving Scientific Integrity*, Appendix B, available at <https://www.ucsusa.org/sites/default/files/attach/2017/01/preserving-scientific-integrity-appendix-b.pdf>.

**116** See Toxic Substances Control Act, 15 U.S.C. § 2622(a); Clean Water Act, 33 U.S.C. § 1367(a); Clean Air Act, 42 U.S.C. § 7622(a); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Resource Conservation and Recovery Act, 42 U.S.C. § 6971(a); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610(a).

**117** Scientific Integrity Act, H.R. 1709, 116th Cong. § 3 (2019); Scientific Integrity Act, S. 775, 116th Cong. § 4 (2019).

**118** Restore Scientific Integrity to Federal Research and Policymaking Act, H.R. 839, 109th Cong. § 3(b) (2005); Restore Scientific Integrity to Federal Research and Policymaking Act, S. 1358, 109th Cong. § 3(b) (2005).

**119** "Advisory Committees," Consumer Financial Protection Bureau, accessed Aug. 12, 2019, <https://www.consumerfinance.gov/about-us/advisory-committees/>; "Financial Research Advisory Committee," Office of Financial Research, accessed Aug. 12, 2019, <https://www.financialresearch.gov/frac/>.

**120** "Charter," Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria, accessed Aug. 12, 2019, <https://www.hhs.gov/ash/advisory-committees/paccarb/index.html>.

**121** See, e.g., 5 U.S.C. app. 2 §§ 1–16.

**122** See examples under "Attacks on Science Advisory Committees" in the Appendix.

**123** Exec. Order No. 12,838, 3 C.F.R. 590 (1993); Exec. Order No. 13,875, 84 Fed. Reg. 28,711 (June 14, 2019).

**124** Rick Weiss, "HHS Seeks Science Advice to Match Bush Views," *Washington Post*, Sept. 17, 2002, <https://www.washingtonpost.com/archive/politics/2002/09/17/hhs-seeks-science-advice-to-match-bush-views/cbe5071b-4426-403d-949b-e27769026780/>.

**125** Gerald Markowitz and David Rosner, "Politicizing Science: The Case of the Bush Administration's Influence on the Lead Advisory Panel at the Centers for Disease Control," *Journal of Public Health Policy* 24, no. 2 (2003): 112–19.

**126** "Lead Astray in Ohio: Bush Admin. Stymies Added Protections," *Environmental Working Group*, May 3, 2004, <https://www.ewg.org/research/lead-astray/bush-admin-stymies-added-protections>.

**127** Michelle Diamant, "Critics Question Obama Choice for Disability Committee," *Disability Scoop*, Jan. 13, 2012, <https://www.disability-scoop.com/2012/01/13/critics-question-obama-choice/14766/>.

**128** Matthew Mosk, Brian Ross, and Cho Park, "How Clinton Donor Got on Sensitive Intelligence Board," *ABC News*, June 10, 2016,

<https://abcnews.go.com/Politics/clinton-donor-sensitive-intelligence-board/story?id=39710624>.

**129** See examples under “Attacks on Science Advisory Committees” in the Appendix. See also Reed et al., *Abandoning Science Advice*, 5 (showing that as many as 70 percent of science advisory committees at agencies such as the FDA and the EPA failed to meet as often as their charters directed in 2017).

**130** For nearly six months in 2018, then secretary of labor Alexander Acosta failed to fill vacancies on the Advisory Board on Toxic Substances and Worker Health, created to address the needs of workers at the nation’s nuclear facilities who developed work-related radiation- and chemically-induced diseases. Rebecca Moss, “Injured Nuclear Workers Finally Had Support. The Trump Administration Has Mothballed It.” *ProPublica*, Mar. 9, 2018, <https://www.propublica.org/article/injured-nuclear-workers-finally-had-support-the-trump-administration-has-mothballed-it>. See also Reed et al., *Abandoning Science Advice*, 8 (reporting that, as of 2018, total membership of science advisory committees at the Department of Commerce was down 13 percent from 2016).

**131** See examples under “Attacks on Science Advisory Committees” in the Appendix. See also Coral Davenport, “E.P.A. Dismisses Members of Major Scientific Review Board,” *New York Times*, May 7, 2017, <https://www.nytimes.com/2017/05/07/us/politics/epa-dismisses-members-of-major-scientific-review-board.html> (reporting on dismissals of several advisory committee members from academia). The EPA instituted a rule to bar agency grant recipients from serving on advisory committees, which has had the effect of limiting the participation of academic researchers. Warren Cornwall, “Trump’s EPA Has Blocked Agency Grantees from Serving on Science Advisory Panels. Here Is What It Means,” *Science*, Oct. 31, 2017, <https://www.sciencemag.org/news/2017/10/trump-s-epa-has-blocked-agency-grantees-serving-science-advisory-panels-here-what-it>; Lisa Friedman, “E.P.A. to Disband a Key Scientific Review Panel on Air Pollution,” *New York Times*, Oct. 11, 2018, <https://www.nytimes.com/2018/10/11/climate/epa-disbands-pollution-science-panel.html>. The number of industry representatives and consultants quadrupled on the EPA’s Science Advisory Board, while representation of academics decreased from 79 to 50 percent. Reed et al., *Abandoning Science Advice*, 6.

**132** Mark Hand, “Government Watchdog to Investigate Scott Pruitt’s Shakeup of EPA Advisory Boards,” *ThinkProgress*, Mar. 7, 2018, <https://thinkprogress.org/gao-investigating-epa-advisory-boards-b615407c3644/> (“Normally, when candidates are nominated to serve on advisory committees, EPA’s career scientists and lawyers provide input to the administrator regarding which nominees have the right scientific expertise and which have conflicts [sic] of interests. And normally, the administrator follows the career staff’s recommendations. But under Pruitt, political appointees are playing key roles in selecting committee members.”). A recent report from the Government Accountability Office found that the EPA did not follow agency protocols to document staff input on advisory committee candidates and did not consistently ensure that committee members met federal ethics requirements. United States Government Accountability Office, *EPA Advisory Committees: Improvements Needed for the Member Appointment Process*, GAO-19-280 (Washington, D.C.: Government Accountability Office, 2019), [https://www.eenews.net/assets/2019/07/15/document\\_gw\\_05.pdf](https://www.eenews.net/assets/2019/07/15/document_gw_05.pdf). See examples under “Attacks on Science Advisory Committees” in the Appendix.

**133** This is already the practice of some advisory committees. For instance, the EPA’s Science Advisory Board (SAB) publishes the criteria for selection of committee members. See United States Environmental Protection Agency, *Reorganization of the EPA Science Advisory Board: A Report of the EPA Science Advisory Board Staff Office*, EPA-SAB-04-001 (Washington, D.C.: Environmental Protection Agency, 2003), 7, 9, [https://yosemite.epa.gov/sab/sabproduct.nsf/Web/ReorgOfSAB/\\$File/sab04001.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/Web/ReorgOfSAB/$File/sab04001.pdf).

**134** See, e.g., Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. § 2(b) (2019) (providing for a public

nomination process, with public comment); Science for Policy Project, *Improving the Use of Science* (calling for greater transparency in the selection process); National Academies of Sciences, Engineering, and Medicine, *Optimizing the Process for Establishing the Dietary Guidelines for Americans: The Selection Process* (Washington, D.C.: National Academies Press, 2017), 67–80, available at <https://www.nap.edu/read/24637/chapter/5> (discussing ways to increase transparency in advisory committee member nomination and selection process, including by allowing the public to comment on nominees). In the case of discretionary advisory committees, federal regulations require agencies to develop a membership balance plan that describes how the agency will attain fairly balanced membership. 41 C.F.R. § 102-3.60.

**135** The EPA routinely seeks nominees from the National Academies of Sciences, Engineering, and Medicine as a matter of agency practice. See United States Environmental Protection Agency, *Reorganization of the EPA Science Advisory Board*, 7 (“The Committee [Designated Federal Officer] has responsibility for developing a list of candidates, based on recommendations from credible sources, such as . . . the National Academy of Sciences[.]”).

**136** Congress has established similar requirements in some circumstances. See, e.g., Clean Air Act, 42 U.S.C. § 7409(d)(2) (requiring the EPA administrator to appoint “at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies” to CASAC); Occupational Safety and Health Act of 1970, 29 U.S.C. § 656(a)(1) (requiring the National Advisory Committee on Occupational Safety and Health to be composed of representatives of management, labor, occupational safety and occupational health professions, and the public, to be selected upon the basis of their experience and competence in the field of occupational safety and health).

**137** The Environmental Research, Development, and Demonstration Act of 1983, S. 2577, 97th Cong. (1982); H.R. 6323, 97th Cong. (1982), would have required that the terms of board members be one to three years and be staggered so that the terms of no more than a third of the total membership of the board expires within a single fiscal year, and that each member of the board serve a full term unless such member were unable, for involuntary reason, to discharge board duties or had violated conflict of interest regulations.

**138** See *ibid.* (requiring that, if a vacancy on the board were not filled by the administrator within 90 days, the nominating committee would appoint, within 60 days, a member to fill such vacancy from its list of recommended nominees). See also Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. § 3(b) (2019) (establishing process for filling vacancies occurring before scheduled solicitation for nominations by means of appointing a member from among individuals who were previously nominated for membership on the advisory committee); Agricultural Marketing Service, “Fruit and Vegetable Industry Advisory Committee (FVIAC): Notice of Intent to Renew Charter and Call for Nominations,” 82 Fed. Reg. 147 (Aug. 2, 2017) (“[T]he USDA is seeking nominations to fill future unexpected vacancies . . . . These nominations will be held as a pool of candidates that the Secretary of Agriculture can draw upon as replacement appointees if unexpected vacancies occur.”).

**139** Advisory committee participants include “special government employees” (SGEs) and “representatives.” See 18 U.S.C. § 202 (defining “special government employee”). Advisory committee participants who are categorized as SGEs are covered by the financial disclosure provisions of the Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101–111 (1978). A representative is not a government employee and is not subject to federal disclosure requirements. “Advisory Committee Members,” United States Office of Government Ethics, accessed Mar. 26, 2019, <https://www.oge.gov/Web/oge.nsf/Resources/Advisory+Committee+Members>. Many have long called for reforms to prevent abuse of representative status as a means to shield conflicts of interest from disclosure. See, e.g., United States General Accounting Office, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*,



GAO-04-328 (Washington, D.C.: General Accounting Office, 2004), <https://www.gao.gov/assets/250/242039.pdf>; “Memorandum from United States Office of Government Ethics to Designated Agency Ethics Officials” (official memorandum, Washington, D.C.: Office of Government Ethics, 2004), available at [https://www.oge.gov/web/OGEnsf/0/2473B073FCBB70D85257E96005FBCF6/\\$FILE/04x9.pdf](https://www.oge.gov/web/OGEnsf/0/2473B073FCBB70D85257E96005FBCF6/$FILE/04x9.pdf); *Examining the Federal Advisory Committee Act — Current Issues and Developments: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 54 (2008) (statement of Sidney A. Shapiro, associate dean for research and development, Wake Forest School of Law, on behalf of the Center for Progressive Reform) (advocating for greater clarity in characterizing members as either SGEs or representatives at the time of appointment); Protecting Science, Climate Science Legal Defense Fund et al., 13–14 (calling for representatives and nonvoting members to provide information on affiliation and conflicts of interest).

**140** See, e.g., Sidney Shapiro, *Closing the Door on Public Accountability*, Center for Progressive Reform, 2009, <http://www.progressivereform.org/perspFACA.cfm> (proposing disclosure of the historical affiliations of advisory committee members and sources of funding); National Academies of Sciences, Engineering, and Medicine, *Establishing the Dietary Guidelines*, 83 (advocating for policy to address biases and conflicts of interest); Berman and Carter, “Policy Analysis: Scientific Integrity” (calling for requiring both voting and nonvoting advisory committee members to provide complete information on affiliations and conflicts of interest); Daniel Schuman, “Is It Time to Revisit the Federal Advisory Committee Act?” *Sunlight Foundation*, Sept. 23, 2009, <https://sunlightfoundation.com/2009/09/23/revisit-faca/> (proposing that all members of federal advisory committees file financial disclosure reports and conflict of interest forms and that there be regular audits).

**141** The standard for granting conflict of interest waivers for SGEs serving on FACA committees is more lenient than the standard for other federal employees. Compare 18 U.S.C. §§ 208(b)(1) and 208(b)(3). See also Stephen D. Potts, Director, Office of Government Ethics, “Summary of Ethical Requirements Applicable to Special Government Employees” (official memorandum, Washington, D.C.: Office of Government Ethics, 2000), 14–15, available at [https://www.oge.gov/Web/OGEnsf/0/DDABAE34F0273E5F85257E96005FBDD/\\$FILE/00x1.pdf](https://www.oge.gov/Web/OGEnsf/0/DDABAE34F0273E5F85257E96005FBDD/$FILE/00x1.pdf).

There is substantial support among legislators and experts for increased transparency around recusal agreements and conflict of interest waivers for advisory committee members. See Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. § 4(a) (2019) (requiring disclosure of recusal agreements). See also Shapiro, *Closing the Door* (advocating public disclosure of “the existence of a waiver and to explain the nature of the conflict of interest and the grounds for the waiver” at the time the waiver is made); Science for Policy Project, *Improving the Use of Science* (calling for greater clarity in defining conflicts of interest and public disclosure of waivers).

**142** See Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. §§ 4(a)–(b) (2019) (requiring advisory committee charters to contain the estimated number and frequency of meetings and requiring charters, notices of future meetings, and meeting minutes to be published on agency websites).

**143** 5 U.S.C. app. § 10(a)(2).

**144** See, e.g., Letter from Dr. Peter S. Thorne, chair, Science Advisory Board, to Gina McCarthy, director, Environmental Protection Agency, *Review of Conclusions in Efficacy of Ballast Water Treatment Systems: A Report by the Science Advisory Board* (Dec. 20, 2016), available at [https://yosemite.epa.gov/sab/sabproduct.nsf/36a1ca3f683ae57a85256ce9006a32d0/C4BE173378D01F-408525808F0059A321/\\$File/EPA-SAB+2017-002+Unsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/36a1ca3f683ae57a85256ce9006a32d0/C4BE173378D01F-408525808F0059A321/$File/EPA-SAB+2017-002+Unsigned.pdf) (reporting findings of work group convened to respond to inquiries from some members of the former Ecological Processes and Effects Committee Augmented for the Ballast Water Advisory and a current SAB member that conclusions in the report required correction). See

also Hank Black, “Air Pollution Panel, in Divisive Session, Asks EPA to Reverse Course and Provide Expert Help,” *Birmingham Watch*, Mar. 29, 2019, <https://birminghamwatch.org/air-pollution-panel-divisive-session-asks-epa-reverse-course-provide-expert-help/> (reporting that CASAC asked EPA Administrator Andrew Wheeler to give it more expert help to review hundreds of recent scientific studies on effects of microscopic particles of soot on human mortality).

**145** For instance, in 2001, the Bush administration asked the National Academy of Sciences to review the findings of the Intergovernmental Panel on Climate Change (IPCC) and provide further assessment of climate science. The National Academy of Sciences’ panel affirmed the IPCC’s conclusions. National Research Council, *Climate Change Science: An Analysis of Some Key Questions* (Washington, D.C.: National Academies Press, 2001), available at <https://www.nap.edu/read/10139/chapter/1>.

**146** See Exec. Order No. 12,838, 3 C.F.R. 590 (1993) (requiring that reasons be provided for the termination of advisory committees). Under FACA, the General Services Administration (GSA) is charged with performing an annual review to determine, among other things, whether advisory committees should be abolished. 5 U.S.C. app. § 7(b)(4).

**147** See *Examining the Federal Advisory Committee Act* (statement of Sidney A. Shapiro, on behalf of the Center for Progressive Reform); Science for Policy Project, *Improving the Use of Science*; National Academies of Sciences, Engineering, and Medicine, *Establishing the Dietary Guidelines*; *Protecting Science*, Climate Science Legal Defense Fund et al.

**148** Federal Advisory Committee Act Amendments of 2016, H.R. 2347, 114th Cong. (2016); Federal Advisory Committee Act Amendments of 2017, H.R. 70, 115th Cong. (2017); Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. (2019).

**149** Global Climate Change Research Act of 1990, Pub. L. No. 101-606, §§ 106–107, 104 Stat. 3096–3104 (1990).

**150** Doyle Rice, “Buried? Feds to Release Major Climate Report Day after Thanksgiving,” *USA Today*, Nov. 21, 2018, <https://www.usatoday.com/story/news/nation/2018/11/21/climate-change-report-released-friday-after-thanksgiving/2080298002/>; Uma-ir Irfan, “Trump White House Issues Climate Change Report Undermining Its Own Policy,” *Politico*, Nov. 26, 2018, <https://www.vox.com/2018/11/26/18112505/national-climate-assessment-2018-trump>.

**151** Chris Cillizza, “Donald Trump Buried a Climate Change Report Because ‘I Don’t Believe It,’” *CNN*, Nov. 27, 2018, <https://www.cnn.com/2018/11/26/politics/donald-trump-climate-change/index.html>.

**152** Benjamin J. Hulac, “Creation of a Panel Disputing Climate Change Causes White House Infighting,” *Roll Call*, Mar. 14, 2019, <https://www.rollcall.com/news/congress/panel-dispute-climate-science-facing-debate-white-house>; Juliet Eilperin, Josh Dawsey, and Brady Dennis, “White House to Set Up Panel to Counter Climate Change Consensus, Officials Say,” *Washington Post*, Feb. 24, 2019, <https://wapo.st/2TfwlXo>. The panel would not have operated under FACA. David Armiak, “Trump Taps Climate Denier to Lead a Secret White House Climate Panel,” *PR Watch*, Mar. 12, 2019, <https://www.pr-watch.org/news/2019/03/13454/trump-taps-climate-denier-lead-secret-white-house-climate-panel>. As discussed in Proposal 4, FACA requires certain procedural safeguards that help ensure high-quality science advice. Noncompliance with these statutory requirements raises doubts about the scientific integrity of this proposed panel.

**153** For instance, in 1813, Congress established the Federal Depository Library Program to ensure the American public’s access to government information, including government reports about health, nutrition, agriculture, science, and technology. “FDLP: Free Document Dissemination through the Federal Depository Library Program,” Government Printing Office, accessed Mar. 1, 2019, <https://www.gpo.gov/how-to-work-with-us/agency/services-for-agencies/federal-depository-library-program>; 44 U.S.C. § 1901 et seq. The program is still in existence. Library Technical Services, Superintendent of Docu-

ments, “List of Classes of United States Government Publications Available for Selection by Depository Libraries,” U.S. Government Publishing Office, Nov. 2015, <https://www.fdlp.gov/file-repository/collection-management/list-of-classes/2682-list-of-classes-print-version-revised-11-2015>.

In 1950, Congress enacted legislation to make the results of technological research and development — both foreign and domestic — more readily available to the general public, establishing the Department of Commerce as a clearinghouse for this technical information. 15 U.S.C. § 1151 et seq.; 15 U.S.C. § 3704b. The clearinghouse disseminated catalogues of recently published research reports and technical briefs; members of the public could request copies of specific reports. See 15 U.S.C. § 1151. Nowadays, these materials are available in electronic form on the clearinghouse’s website. “Welcome to the National Technical Reports Library,” National Technical Information Service, accessed Apr. 26, 2019, <https://classic.ntis.gov/products/ntrl/>.

**154** Centers for Disease Control and Prevention, “Public Health Then and Now: Celebrating 50 Years of MMWR at CDC,” *Morbidity and Mortality Weekly Report* 60 (2011): 2, <https://www.cdc.gov/mmwr/pdf/other/su6004.pdf>.

**155** Dr. Charlotte Kent, acting editor in chief and executive editor, *Morbidity and Mortality Weekly Report (MMWR) Series*, Chief, Scientific Publications Branch, Division of Public Health Information Dissemination, Center for Surveillance, Epidemiology, and Laboratory Services, Office of Public Health Scientific Services, email message to Martha Kinsella, counsel, Brennan Center for Justice, Oct. 4, 2018.

**156** “About the Morbidity and Mortality Weekly Report (MMWR) Series,” Centers for Disease Control and Prevention, accessed Mar. 1, 2019, <https://www.cdc.gov/mmwr/about.html>. International distribution of the MMWR was critical in the history of AIDS research. For instance, Willy Rozenbaum, a doctor in Paris who was treating patients with symptoms of the then unknown disease and later became a renowned AIDS researcher, subscribed to the MMWR and read the edition that contained the first report of AIDS in a publication for medical practitioners. Eric Favereau, “Juin 1981, L’Étrange Maladie des Gays,” *Libération*, June 8, 2006, [https://www.liberation.fr/planete/2006/06/08/juin-1981-l-etrange-maladie-des-gays\\_44030](https://www.liberation.fr/planete/2006/06/08/juin-1981-l-etrange-maladie-des-gays_44030); Centers for Disease Control and Prevention, “Public Health Then and Now”: 2–3.

**157** See examples under “Restriction of Public Access to Government Research and Data” in the Appendix.

**158** Annie Snider, “White House, EPA Headed Off Chemical Pollution Study,” *Politico*, May 14, 2018, <https://www.politico.com/story/2018/05/14/emails-white-house-interfered-with-science-study-536950>.

**159** “New Record for Censoring,” *CBS News*.

**160** *Ibid.* (“In more than one-in-three cases, the government reversed itself when challenged and acknowledged that it had improperly tried to withhold pages. But people filed such appeals only 14,713 times, or about 4.3 percent of cases in which the government said it found records but held back some or all of the material.”).

**161** See, e.g., 51 U.S.C. § 20112(a)(3) (providing for “the widest practicable and appropriate dissemination of information concerning [NASA’s] activities and the results thereof”). In 2015, Congress enacted legislation requiring the secretary of defense to “promote, monitor, and evaluate programs for the communication and exchange of research, development, and technological data,” “through development and distribution of clear technical communications to the public, . . . and civilian . . . decision-makers that convey successes of research and engineering activities supported by the Department and the contributions of such activities to support national needs.” National Defense Authorization Act of Fiscal Year 2016, Pub. L. 114-92, 129 Stat. 726, 768 (2015).

At Congress’s behest, the Obama administration issued a directive requiring federal agencies to create public-access plans to proactively make available government-generated scientific data and peer-re-

viewed, published research, including outside data and research funded by government grants. America Competes Reauthorization Act of 2010, Pub. L. No. 111-358, § 103(a), 124 Stat. 3982, 3986–88 (2010). The Public Access Memo clarifies that the push for disclosure does not extend to laboratory notebooks, preliminary analyses, drafts of scientific papers, plans for future research, peer review reports, or communications with colleagues. John Holdren, “Increasing Access to the Results.”

**162** This proposal is different from the “transparent science” rule announced at the EPA, “Strengthening Transparency in Regulatory Science.” 83 Fed. Reg. 18,768 (Apr. 30, 2018). Our proposal seeks to standardize and modernize the longstanding practice of making completed, peer-reviewed government-funded research and data available to the public. For more information about the “transparent science” rule, see Proposal 1.

**163** See Sarah Lamdan, “Lessons from DataRescue: The Limitations of Grassroots Climate Change Data Preservation and the Need for Federal Records Law Reform,” *University of Pennsylvania Law Review Online* 166 (2018): 242 (noting that the Freedom of Information Act makes federal agency records access a right, part of which is the proactive disclosure of records of public importance, see 5 U.S.C. § 552(a)(1)–(2)(2012) (requiring proactive disclosure of many types of public records), and arguing that all federal records management rules should be crafted with this right in mind). The Fair Access to Science and Technology Research Act (FASTR Act) would require public dissemination within six months after publication in peer-reviewed journals. H.R. 3427, 115th Cong. § 4(b)(4) (2017). Cf. FASTR Act, S. 1701, 115th Cong. § 4(b)(4) (2017). The Public Access Memo specifies a “twelve-month post-publication embargo period as a guideline for making research papers publicly available.” Public Access Memo 3.

**164** For a definition of “data,” see Save America’s Science Act, H.R. 1232, 115th Cong. § (2) (2017).

**165** For a workable scope of research to be proactively disclosed, see FASTR Act, H.R. 3427, 115th Cong. § 4(d) (2017); S. 1701, 115th Cong. § 4(d) (2017).

**166** Of relevance, under the Bayh-Dole Act (the Patent and Trademark Law Amendments Act), 35 U.S.C. §§ 200–212 (1980), small businesses and nonprofit organizations may elect to retain ownership of the inventions made under federally funded research and contract programs, while also giving the government the license to practice the subject invention. In turn, the organizations are expected to file for patent protection and to ensure commercialization upon licensing for the benefit of public health.

**167** Dating back to the 1950s, the executive and legislative branches have established plain-language standards for government communications. “Brief Timeline of Plain Language Movement,” National Conference of State Legislatures, accessed Mar. 1, 2019, <http://www.ncsl.org/Portals/1/Documents/lsss/PlainLangTimeline.pdf>. More recently, Congress passed the Plain Writing Act of 2010, which applies to government communications about government benefits and services, as well as information about how to comply with requirements the government administers or enforces. Pub. L. No. 111-274, 124 Stat. 2861–63 (2010).

**168** The Public Access Memo indicates that national, homeland, and economic security are legitimate grounds for withholding government research and data. Public Access Memo 3. The National Technical Information Service is required to “respect and preserve the security classification of any scientific or technical information, data, patents, inventions, or discoveries in, or coming into, the possession or control of the Department of Commerce, the classified status of which the President or his designee or designees certify as being essential in the interest of national defense[ . . . ]” 15 U.S.C. § 1155.

**169** See Paperwork Reduction Act, 44 U.S.C. § 3506(d)(3) (1980) (requiring agencies to “provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products”). See also Lamdan, “Lessons from DataRescue,” 244 (“A statutory solution . . . would be to include explicit language

requiring continued access to and online archives for electronic government records.”).

**170** See 44 U.S.C. § 3303a (requiring the archivist to publish notice in the Federal Register before disposing of federal records).

**171** A useful model is the Federal Records Act, pursuant to which agency heads and the archivist can initiate actions through the attorney general for recovery or other redress. Federal Records Act, 44 U.S.C. § 3106 (1950). The Save America’s Science Act contains the same mechanism for recovery of removed data. H.R. 1232, 115th Cong. § (2) (2017). The FASTR Act does not have an enforcement mechanism, but agencies are required to submit reports to Congress with information about the effectiveness of their public access plans. H.R. 3427, 115th Cong. § (4)(f) (2017); S. 1701, 115th Cong. § (4)(f) (2017).

**172** See Public Online Information Act of 2017, S. 621, 115th Cong. § 7(e)(1) (2017). See also Lamdan, “Lessons from DataRescue,” 246–47 (advocating to provide citizens with a cause of action when the government obstructs online access to government records or destroys online materials without creating an accessible historical archive).

**173** Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. No. 115-435 (2019).

**174** See, e.g., For the People Act of 2019, H.R. 1, 116th Cong. §§ 9301–9307 (2019); Public Online Information Act of 2017, S. 621, 115th Cong. (2017). The FASTR Act, introduced with bipartisan support, would require federal agencies to develop public access plans that follow common procedures for the collection of research papers, emphasizing the importance of digital access to such resources. H.R. 3427, 115th Cong. (2017); S. 1701, 115th Cong. (2017). The Save America’s Science Act, H.R. 1232, 115th Cong. (2017), was introduced to respond to reports of destruction of and revocation of public access to scientific data produced by the federal government. “McCollum Introduces Save America’s Science Act to Safeguard Federal Scientific Data,” Mar. 3, 2017, <https://mccollum.house.gov/press-release/mccollum-introduces-save-america%E2%80%99s-science-act-safe-guard-federal-scientific-data>.

Additionally, the National Academies of Sciences, Engineering, and Medicine held a workshop on transparency and reproducibility in federal statistics, which included panelists from the United Kingdom and Canada, who spoke about transparency of government data in their countries. Michael L. Cohen, *Methods to Foster Transparency and Reproducibility of Federal Statistics: Proceedings of a Workshop* (Washington, D.C.: National Academies Press, 2018), available at <https://www.nap.edu/read/25305/chapter/1>.

**175** The term “nonpolitical expert regulatory analysis” refers to all factual information and data, not limited to technical information, sampling results, survey information, and engineering reports or studies, used to support an agency’s regulatory actions. See *Alternative Facts*, Public Employees for Environmental Responsibility (linking to suggested statutory clarification, “Antidote to Alternatives Facts Act”); Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

**176** See Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, “The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy,” *Wake Forest Law Review* 47 (2012): 472 (discussing the belief that “[m]odern regulatory statutes can provide no more than the skeleton, and must leave to administrative bodies the addition of flesh and blood necessary for a living body”).

**177** Administrative Procedure Act of 1946, 5 U.S.C. §§ 551–559.

**178** 5 U.S.C. § 553(b).

**179** 5 U.S.C. § 553(c).

**180** *Ibid.*

**181** *Ibid.*

**182** See, e.g., Ben Penn, “Worker Attorneys Plot Lawsuit to Block Trump Tip Pool Rule,” *Bloomberg BNA*, Jan. 26, 2018, <https://news.bloomberglaw.com/daily-labor-report/worker-attorneys-plot-law-suit-to-block-trump-tip-pool-rule> (“Several worker rights’ groups are

analyzing whether the new proposed rule’s absence of a quantitative economic analysis may run afoul of the [Administrative Procedure Act] . . . if the final version of the rule does in fact include the full analysis[] . . . . That’s because this might prove the DOL was capable of running a similar analysis in the proposed rule, but chose not to, rendering the entire process ‘arbitrary and capricious[.]’”).

**183** See Exec. Order No. 12,866, 3 C.F.R. 638, § 6(a)(3)(E)(ii)–(iii) (1993). President Obama issued Executive Order 13,563, 3 C.F.R. 215 (2011), which supplemented and reaffirmed the principles of regulatory review established in Executive Order 12,866.

**184** See examples under “Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis Underlying Regulatory Actions” in the Appendix.

**185** See the example about the “waters of the United States” (WOTUS) rule under “Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis Underlying Regulatory Actions” in the Appendix.

**186** See the example about the USDA’s Food Safety and Inspection Service (FSIS) under “Politically Motivated Interventions in Nonpolitical Expert Regulatory Analysis underlying Regulatory Actions” in the Appendix.

**187** Under the Administrative Procedure Act, courts review the administrative record to ensure that agency regulations are not arbitrary and capricious. 5 U.S.C. § 706(2)(A). If agency officials manipulated or suppressed underlying scientific analysis of regulations, however, it would be difficult for reviewing courts to properly determine whether the agency’s action was arbitrary and capricious.

**188** By “substantive alterations,” we mean changes to the principal conclusions reached in the regulatory analysis or the methodology used to reach those conclusions, including the discounting of scientific studies relied upon in the analysis. It is not intended to include changes concerning typographical errors, or changes that do not alter data or conclusions reached in the underlying analysis.

**189** To the extent that presidents’ administrations might assert executive privilege to shield political decision-making from exposure, law professor Nina Mendelson argues that communications from OIRA to agencies would not likely qualify as a privileged “presidential communication” because it is not a communication to or by the president or a communication made for the purpose of assisting a direct decision made by the president. Nina A. Mendelson, “Disclosing ‘Political’ Oversight of Agency Decision Making,” *Michigan Law Review* 108 (2010): 1170 n. 210. We find this analysis persuasive. Cf., e.g., *Center for Biological Diversity v. Norton*, 336 F. Supp. 2d 1155, 1161 (D.N.M. 2004) (upholding determination that deliberative process privilege shields details of agency scientific recommendations from disclosure in litigation).

**190** For instance, the Clean Air Act requires the EPA to disclose the factual data on which proposed rules are based, as well as the methodology used in obtaining and analyzing the data. 42 U.S.C. § 7607(d)(3)(A)–(B). Similarly, pursuant to statute, if the secretary of HHS receives a recommendation from the department’s Advisory Commission on Childhood Vaccines, the secretary must either conduct a rulemaking in accordance with the recommendation or publish a “statement of reasons” for refusing to do so in the Federal Register. 42 U.S.C. § 300aa-14(c)(2). Moreover, the secretary may not propose a regulation without giving the commission an opportunity to provide recommendations and comments. *Ibid.*, § 300aa-14(d).

**191** For instance, the 2017 version of the Scientific Integrity Act would have required that each federal agency make publicly available scientific or technological findings that are considered or relied upon in policy decisions and regulatory proposals. Scientific Integrity Act, H.R. 1358, 115th Cong. § 6(a) (2017); Scientific Integrity Act, S. 338, 115th Cong. § 6(a) (2017). The Anti-Corruption and Public Integrity Act would require agencies to disclose changes to draft rules made by the OMB and, in the event that rules are withdrawn after they are submitted to the OMB, to publish the reasons for the withdrawal. Anti-Corruption and Public Integrity Act, S. 3357, 115th Cong. §§

303–304 (2018).

**192** See *Administrative Conference Recommendation 2013-3: Science in the Administrative Process*, Administrative Conference of the United States, 2013, available at [https://www.acus.gov/sites/default/files/documents/Science%20Recommendation%20AAP-PROVED-FINAL\\_1.pdf](https://www.acus.gov/sites/default/files/documents/Science%20Recommendation%20AAP-PROVED-FINAL_1.pdf); Mendelson, “Disclosing ‘Political’ Oversight,” 1164 (proposing to require agencies to summarize the content of regulatory review in issuing rulemaking documents); Science for Policy Project, *Improving the Use of Science* (“[I]n reviewing studies relevant to regulatory policy, . . . [agencies] should make their methods for filtering and evaluating those studies more transparent.”); Holly Doremus, “A Challenge for the Obama Team: Put Science and Federal Scientists to Better Use,” *Ecology Law Currents* 136 (2009): 157 (calling for disclosure of unvarnished recommendations of agency scientists that feed into policy decisions); Sidney A. Shapiro, “‘Political’ Science: Regulatory Science After the Bush Administration,” *Duke Journal of Constitutional Law and Public Policy* 4 (2009): 42 (calling for publication of scientific documents without edits or alterations by agency officials); Wendy Wagner and Rena Steinzor, eds., *Rescuing Science from Politics: Regulation and the Distortion of Scientific Research* (New York: Cambridge University Press, 2006), 293 (“Congress . . . should require mandatory disclosures of health and safety information used to formulate public policy.”); *Alternative Facts*, Public Employees for Environmental Responsibility (linking to suggested statutory clarification, “Antidote to Alternatives Facts Act,” which would require administrative record to include “all factual information and data, not limited to technical information, sampling results, survey information, engineering reports or studies” and “[d]raft documents that were circulated for comment either outside the agency or outside the author’s immediate office, if changes in these documents reflect significant input into the decision-making process”).

**193** Congress recognizes the importance of this power and has historically deferred to the president’s judgment on important appointments, particularly at the cabinet level. In fact, only eight nominees for cabinet positions have ever been rejected. Michael J. Gerhardt, “Norm Theory and the Future of the Federal Appointments Process,” *Duke Law Journal* 50 (2001): 1690–91.

**194** Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (New York: Cambridge University Press, 2007), 157.

**195** “[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2.

**196** The Federalist No. 76 (Alexander Hamilton).

**197** Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Durham: Duke University Press, 2004), 38.

**198** See Russell L. Weaver, “Advice and Consent in Historical Perspective,” *Duke Law Journal* 64 (2015): 1730.

**199** See Harvard Law Review Association, “Developments in the Law: Public Employment,” *Harvard Law Review* 97 (1984): 1623–25 (explaining that, although partisan patronage in government appointments was not routine at the republic’s founding, it grew along with party politics and found a champion in President Andrew Jackson, who embraced a spoils system).

**200** See Harvard Law Review Association, “Public Employment,” 1626 (discussing the civil service reform movement as a “moral crusade” that perceived an “inherent evil” in the spoils system).

**201** Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883). For a discussion of the historical context in which the Pendleton Act was implemented, see Gerhardt, *The Federal Appointments Process*, 275–77 (explaining that the perception of corruption and cronyism under President Grant, followed by a major cronyism scandal in New

York and the assassination of President Garfield, led to the successful passage of civil service reform nationally).

**202** See Gerhardt, *The Federal Appointments Process*, 143–53.

**203** Burdett Loomis, “The Senate and Executive Branch Appointments: An Obstacle Course on Capitol Hill?” Brookings Institution, Mar. 1, 2011, <https://www.brookings.edu/articles/the-senate-and-executive-branch-appointments-an-obstacle-course-on-capitol-hill/> (discussing the lengthening delay in the Senate for consideration of presidential nominees).

**204** For instance, President Nixon’s attorney general, John Mitchell, controlled a Nixon reelection campaign fund prior to his resignation from the Department of Justice to serve on the official campaign committee. Carl Bernstein and Bob Woodward, “Mitchell Controlled Secret GOP Fund,” *Washington Post*, Sept. 29, 1972, <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/092972-1.htm>. He was later found guilty of several crimes in connection with the Watergate scandal. G. Calvin MacKenzie and Michael Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* (Washington, D.C.: Brookings Institution Press, 2002), 28–30.

**205** Ethics in Government Act, Pub. L. No. 95-121, 92 Stat. 1824 (1978); Civil Service Reform Act, Pub. L. No. 95-454, §§ 101, 202 (merit system principles and system protecting employees from political retaliation), 402 (vesting broad authority in a senior executive service), 501 (incentivizing performance through merit pay), 92 Stat. 1111 (1978).

**206** Career civil servants have also felt the impact, with career officials reporting declining morale, politically motivated harassment and forced retirements and relocations. See, e.g., U.S. Department of State Office of the Inspector General, *Review of Allegations of Politicized and Other Improper Personnel Practices in the Bureau of International Organizations* (Washington, D.C.: Department of State, 2019), available at <https://www.stateoig.gov/system/files/esp-19-05.pdf> (concluding employees were harassed and retaliated against for their perceived political views); Joe Davidson, “Report Shows Sharp Drop in Federal Employee Morale Under Trump,” *Washington Post*, Dec. 12, 2018, <https://www.washingtonpost.com/politics/2018/12/12/report-shows-sharp-drop-federal-employee-morale-under-trump/>; Ryan McCrimmon, “Economists Flee Agriculture Dept. After Feeling Punished Under Trump,” *Politico*, May 7, 2019, <https://www.politico.com/story/2019/05/07/agriculture-economists-leave-trump-1307146?cid=apn>.

**207** See, e.g., Aileen Xenakis, “The Danger of Politicizing Security Clearances,” *Newsweek*, Mar. 16, 2019, <https://www.newsweek.com/ivanka-trump-jared-kushner-security-clearance-opinion-1362891>.

**208** Brett Samuels, “Trump Learns to Love Acting Officials,” *The Hill*, Apr. 14, 2019, <https://thehill.com/homenews/administration/438660-trump-learns-to-love-acting-officials>.

**209** Committee on Homeland Security and Government Affairs, U.S. Senate, *Report to Accompany S. 679 to Reduce the Number of Executive Positions Subject to Senate Confirmation*, S. Rep. No. 112-24, at 3 (2011) (“The expanding numbers of Senate-confirmed positions to be filled and the delays in filling them have inexorably led to a great increase in vacancies — a situation that cannot help but yield significant consequences for government administration and policy making.”); Paul C. Light, “The Glacial Pace of Presidential Appointments,” Brookings Institution, Apr. 4, 2001, <https://www.brookings.edu/opinions/the-glacial-pace-of-presidential-appointments/> (discussing the burdensome processes that deter talented individuals from accepting presidential appointments to executive branch positions); “Public Trust in Government: 1958–2019,” *Pew Research Center*, Apr. 11, 2019, <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/> (showing Americans’ trust in government continuing to hover near its all-time low).

**210** This number has increased over time as PAS positions are added. “When President Kennedy entered office, he had 850 Senate-confirmed positions to fill. That number had increased to 1143 by the time President George W. Bush took office, and by the

beginning of the Obama Administration, there were 1215 executive branch positions subject to Senate confirmation." S. Rep. No. 112-24, at 2. See also Maeve P. Carey, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, CRS Report No. R41872 (Washington, D.C.: Congressional Research Service, 2012), 7, <https://fas.org/sgp/crs/misc/R41872.pdf>.

**211** See Carey, *Presidential Appointments*, 10–11.

**212** *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 211 (D.C. Cir. 1998), *superseded on other grounds by statute*, Federal Vacancies Reform Act of 1998, as recognized by *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 2019 WL 1430505 (D.C. Cir. Apr. 1, 2019).

**213** Congress, in passing the 1868 Vacancies Act, sought to balance the need for "breathing room in the constitutional system for appointing officers to vacant positions" while recognizing that there are "political and legal consequences of staffing high positions with non-appointed 'acting' officials." *Doolin*, 139 F.3d at 211.

**214** In August 2000, President Clinton used a congressional recess to appoint Bill Lann Lee the assistant attorney general for civil rights at the Department of Justice. Reports indicate that Senate confirmation was unlikely due to Lee's stance on affirmative action and other programs. Lee had been filling that role, albeit in an acting capacity, for two and a half years prior to the recess appointment. John M. Broder, "Clinton, Softening Slap at Senate, Names 'Acting' Civil Rights Chief," *New York Times*, Dec. 16, 1997, <https://www.nytimes.com/1997/12/16/us/clinton-softening-slap-at-senate-names-acting-civil-rights-chief.html>; Christopher Marquis, "Clinton Sidesteps Senate to Fill Civil Rights Enforcement Job," *New York Times*, Aug. 4, 2000, <https://www.nytimes.com/2000/08/04/us/clinton-side-steps-senate-to-fill-civil-rights-enforcement-job.html>; "The Right Move on Bill Lann Lee," *Washington Post*, Dec. 17, 1997, <https://www.washingtonpost.com/archive/opinions/1997/12/17/the-right-move-on-bill-lann-lee/a6bdf9b-dfdd-4742-894f-bccbc88a8741/>.

**215** See *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 936 (2017); Committee on Governmental Affairs, U.S. Senate, *Report Together with Additional and Minority Views to Accompany S. 2176*, S. Rep. No. 105-250, at 3 (1998). Several statutes governing the president's ability to appoint acting officials preceded the FVRA. Its immediate predecessor, the Vacancies Act of 1868, had created a default rule that the "first assistant" perform the functions of a vacant office but allowed the president to appoint another PAS official to the vacancy. Act of July 23, 1868, ch. 227, 15 Stat. 168. The Vacancies Act authorized only 10 days of service by an acting official, though it was later lengthened to 30 days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733.

**216** Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012); see S. Rep. No. 112-24, at 4–5.

**217** See John Kruzal, "Why Trump Appointments Have Lagged behind Other Presidents," *Politifact*, Mar. 16, 2018, <https://www.politifact.com/truth-o-meter/statements/2018/mar/16/don-ald-trump/why-trump-appointments-have-lagged-behind-other-pr/>; Jenny Hopkinson, "Trump Hires Campaign Workers Instead of Farm Experts at USDA," *Politico*, Sept. 21, 2017, <https://www.politico.com/story/2017/09/21/trump-agriculture-department-usda-campaign-workers-242951>; Light, "Presidential Nominations."

**218** "White House Transition Project," accessed Mar. 29, 2019, <http://whitehousetransitionproject.org/>.

**219** Partnership for Public Service and *Washington Post*, "Tracking How Many Key Positions Trump Has Filled So Far," *Partnership for Public Service*, updated Feb. 12, 2019, available at <https://web.archive.org/web/20190212124612/https://ourpublicservice.org/political-apointee-tracker/>.

**220** *Ibid.*

**221** "Appointments," White House Transition Project, accessed Mar. 25, 2019, <http://www.whitehousetransitionproject.org/appointments/>.

**222** Anne Joseph O'Connell, "Vacant Offices: Delays in Staffing Top Agency Positions," *Southern California Law Review* 82 (2008): 921, 965.

**223** Thomas H. Kean et al., *The 9/11 Commission Report*, National Commission on Terrorist Attacks upon the United States, 2004, 422, available at <https://9-11commission.gov/report/911Report.pdf>.

**224** Philip Shenon, "Interim Heads Increasingly Run Federal Agencies," *New York Times*, Oct. 15, 2007, <https://www.nytimes.com/2007/10/15/washington/15interim.html> ("While exact comparisons are difficult to come by, researchers say the vacancy rate for senior jobs in the executive branch is far higher at the end of the Bush administration than it was at the same point in the terms of Mr. Bush's recent predecessors in the White House.").

**225** *Ibid.*

**226** Michael D. Shear, "Politics and Vetting Leave Key U.S. Posts Long Unfilled," *New York Times*, May 2, 2013, <https://www.nytimes.com/2013/05/03/us/politics/top-posts-remain-vacant-through-out-obama-administration.html>.

**227** Eric Lipton, "U.S. Struggles Anew to Ensure Safety as Gaps Are Revealed," *New York Times*, Dec. 28, 2009, <https://www.nytimes.com/2009/12/29/us/29screening.html>.

**228** Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks* (New York: Basic Books, 2016), 98–100.

**229** See e.g., David Welna, "Senators Fed Up with Secret Blocks on Nominees," *NPR*, June 3, 2010, <https://www.npr.org/templates/story/story.php?storyId=127368817>. Though note that the Senate passed a measure in 2011 to eliminate secret holds and require holds to be made public within two days. S. Res. 28, 112th Cong. (2011).

**230** A "pro forma" session is one where the Senate is technically in session but not conducting business; it typically interrupts a longer recess. See David Welna, "Congress Won't Recess to Block Obama Appointments," *NPR*, Dec. 9, 2011, <https://www.npr.org/2011/12/09/143458518/congress-wont-recess-to-block-obama-appointments>; Jordain Carney, "Senate Blocks Trump from Making Recess Appointments over Break," *The Hill*, Aug. 3, 2017, <https://thehill.com/homenews/senate/345261-senate-blocks-trump-from-making-recess-appointments-over-break>; *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (President Obama exceeding his authority by making recess appointments to the National Labor Relations Board while Congress was in pro forma session).

**231** From 2009 to 2013, during the Obama administration, the Congressional Research Service reported there were 82 cloture motions on nominations. Prior to 2009, there had only been 86 cloture motions ever filed on nominations. The number of cloture motions filed by senators is one way to approximate the number of times the Senate needed to vote to break a filibuster on a nominee. Richard S. Beth and Elizabeth Rybicki, "Nominations with Cloture Motions, 2009 to the Present," Congressional Distribution Memorandum, Nov. 21, 2013 (Washington, D.C.: Congressional Research Service), <https://www.documentcloud.org/documents/838702-crs-filibuster-report.html>. In total, nearly one-third of President Obama's nominations were returned or withdrawn. For those nominations that were confirmed, the process took four months under President Obama compared to two months under President Reagan. Anne Joseph O'Connell, "Acting Leaders: Recent Practices, Consequences, and Reforms," Brookings Institution, July 22, 2019, <https://www.brookings.edu/research/acting-leaders/>.

**232** See Proposal 8.

**233** See Proposal 7.

**234** Liz Stark and Devan Cole, "Trump Says He's in 'No Hurry' to Name Permanent Cabinet Replacements," *CNN*, Jan. 6, 2019, <https://www.cnn.com/2019/01/06/politics/trump-acting-officials-cabinet/index.html>.

**235** See S. Rep. No. 112-24, at 2.

**236** David J. Barron, "From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization," *George Washington University Law Review* 76 (2008): 1126–28.

**237** S. Rep. No. 112-24, at 2.

**238** Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (first iteration of the “travel ban”). There was not a confirmed commissioner of Customs and Border Protection until March 19, 2018. Trump’s first two nominees to serve as director of Immigration and Customs Enforcement withdrew prior to a confirmation vote. Partnership for Public Service and *Washington Post*, “How Many Key Positions.”

**239** Ryan Sit, “Trump Still Hasn’t Appointed a U.S. Ambassador to South Korea or Filled 56 Other Such Vacancies,” *Newsweek*, Mar. 8, 2018, <https://www.newsweek.com/donald-trump-north-korea-south-korea-no-united-states-ambassador-56-countries-837029>.

**240** Steven Dillingham was not confirmed to lead the Census Bureau until January 2, 2019, only one year before the start of the national head count and after significant decisions pertaining to it were made. Tara Bahrapour, “Senate Confirms New Census Bureau Director as 2020 Survey Approaches,” *Washington Post*, Jan. 3, 2019, [https://www.washingtonpost.com/local/social-issues/senate-confirms-new-census-bureau-director-as-2020-survey-approaches/2019/01/03/5599b2d2-0fa0-11e9-831f-3aa2c2be4cbd\\_story.html](https://www.washingtonpost.com/local/social-issues/senate-confirms-new-census-bureau-director-as-2020-survey-approaches/2019/01/03/5599b2d2-0fa0-11e9-831f-3aa2c2be4cbd_story.html).

**241** Following the death of then FWS director Sam Hamilton in February 2010, Rowan Gould served as FWS’s acting director. April Reese, “Wildlife Toll Mounts as BP Oil Inundates Coastal Marshes,” *E&E News*, June 3, 2010, <https://www.eenews.net/stories/91691>.

**242** See Elaine Kamarck, “Federal Vacancies Have Left Trump’s Government Home Alone,” Brookings Institution, Dec. 14, 2017, <https://www.brookings.edu/blog/fixgov/2017/12/14/trumps-government-home-alone/>.

**243** O’Connell, “Vacant Offices,” 938–41.

**244** Kamarck, “Federal Vacancies.”

**245** O’Connell, “Vacant Offices,” 941.

**246** Though the Senate is constitutionally required to provide advice and consent for some officers, Congress may delegate appointment authority for “inferior officers” to the president or agency heads. The majority of current PAS positions are comprised of “inferior officers.” It is generally recognized that the distinction between “principal” and “inferior” officers rests on whether the officer has a superior other than the president. See U.S. Const., art. II, § 2, cl. 2; *Morrison v. Olson*, 487 U.S. 654, 669–77 (1988); *Edmond v. U.S.*, 520 U.S. 651, 663 (1997) (“[W]e think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”).

**247** 5 U.S.C. §§ 3345–3346.

**248** 5 U.S.C. § 3345 et seq. The FVRA was intended to resolve differences between Congress and certain executive departments in the interpretation of the 1868 Vacancies Act. Committee on Governmental Affairs, U.S. Senate, *Report to Accompany S. 2176 to Amend Sections 3345 Through 3349 of Title 5, United States Code (Commonly Referred to as the “Vacancies Act”) to Clarify Statutory Requirements Relating to Vacancies in Certain Federal Offices, and for Other Purposes*, S. Rep. 105-250, at 4 (1998) (“The selection of officers is not a presidential power. The President may choose whom he wishes to nominate, but the Senate has the power to advise and consent before those nominees may assume office.”). See Patrick Hein, “In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights,” *California Law Review* 96 (2008): 272 (“The Reform Act sought to ‘bring[] to an end a quarter-century of obfuscation, bureaucratic intransigence, and outright circumvention’ through three primary amendments. First, the Reform Act was intended to prevent another seemingly illegal appointment like [Bill Lann] Lee’s by stating explicitly that the Vacancies Act is the exclusive statutory means for temporarily filling vacant advice and consent positions in the executive branch, unless Congress explicitly legislates otherwise. Second, the Reform Act broadened the Vacancies Act’s applicability by creating a third category of individuals who may serve in an acting capacity. Finally, the Reform Act provided the President with more

time to nominate a permanent replacement by increasing the length of an acting appointment to 210 days.”).

**249** The default rule under the FVRA is that the first assistant, typically the deputy to the vacant office, serves as the acting official. “First assistant” is a term of art but not defined in the FVRA. Some statutes specifically identify a position as a first assistant, but some do not. *Ibid.*, 9–10.

**250** The text of the FVRA limits the president to one of three classes of individuals to fill vacant PAS positions, when not superseded by another statute: (1) the first assistant to the vacant office, (2) another Senate-confirmed official in the executive branch, or (3) a senior official who has been serving in the same agency as the vacant office for at least 90 of the previous 365 days. 5 U.S.C. § 3345(a).

**251** See, Melissa Attias, “Unconfirmed, but Slavitt Likely to Remain in Charge,” *CQ Roll Call*, July 30, 2015.; David Dayen, “Trump’s Acting Directors Are Quietly Dropping ‘Acting’ from Their Titles,” *Intercept*, Nov. 29, 2017, <https://theintercept.com/2017/11/29/trump-administration-acting-director-cfpb-mick-mulvaney/>.

**252** Todd Ruger, “Acting Civil Rights Head Still Awaits Nomination,” *Roll Call*, May 11, 2015, <https://www.rollcall.com/news/acting-civil-rights-head-still-awaits-nomination-241734-1.html>. See also Thomas Berry, *The Illegal Tenure of Civil Rights Head Vanita Gupta*, Cato Institute, Legal Policy Bulletin No. 1, Jan. 19, 2017, [https://object.cato.org/sites/cato.org/files/pubs/pdf/legal\\_policy\\_bulletin\\_1.pdf](https://object.cato.org/sites/cato.org/files/pubs/pdf/legal_policy_bulletin_1.pdf) (arguing the attorney general’s delegation of the duties of the assistant attorney general for civil rights to the principal deputy assistant attorney general violated the FVRA).

**253** To cite a few examples of President Trump’s acting officials continuing to perform the duties of vacant offices beyond the 210-day time limit imposed by the FVRA: the former acting assistant secretary for energy efficiency and renewable energy at the Department of Energy continued leading the office as the principal deputy assistant secretary after reaching the statutory time limit — his title modified, but his role unchanged; the former acting director of the Office of Nuclear Energy led the office as the principal deputy assistant secretary; and at the Advanced Research Projects Agency-Energy, the former acting director led the office as its deputy director. Dayen, “Trump’s Acting Directors.”

**254** Eric Katz, “Trump Skirts Vacancies Law with Selection of Acting Agency Director,” *Government Executive*, June 10, 2019, <https://www.govexec.com/management/2019/06/trump-skirts-vacancies-law-selection-acting-agency-director/157598/>.

**255** Jordain Carney, “Republicans Warn Cuccinelli Won’t Get Confirmed by GOP Senate,” *The Hill*, June 10, 2019, <https://thehill.com/homenews/senate/447804-republicans-warn-cuccinelli-wont-get-confirmed-by-gop-senate>.

**256** Though several organizations and civil rights groups have argued that Cuccinelli’s appointment is unlawful, the Department of Homeland Security and the White House have said the appointment is consistent with the FVRA. Letter from Democracy Fund Foundation, et al. to Attorney General William Barr, July 22, 2019, available at <https://democracyforward.org/wp-content/uploads/2019/07/Cuccinelli-Letter-final-to-send.pdf>.

**257** See also Steve Vladeck, “Ken Cuccinelli and Federal Vacancies Reform Act of 1998,” *Lawfare*, June 10, 2019, <https://www.lawfareblog.com/ken-cuccinelli-and-federal-vacancies-reform-act-1998> (“By this logic, nothing would prevent naming anyone, at any time, to run almost any senior agency for as long as the FVRA allows — a minimum of 210 days and perhaps more . . .”).

**258** The statute is triggered when an official “dies, resigns, or is otherwise unable to perform the functions and duties of the office,” and there is debate about whether the last category includes termination. 5 U.S.C. § 3345(a). See Ben Miller-Gootnick, “Boundaries of the Federal Vacancies Reform Act,” *Harvard Journal on Legislation* 56 (May 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3372389](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372389); Steve Vladeck, “The Federal Vacancies Reform Act and the VA: A Study in Uncertainty and Incompetence,”

*Lawfare*, May 23, 2018, <https://www.lawfareblog.com/federal-vacancies-reform-act-and-a-study-uncertainty-and-incompetence>.

**259** Sessions submitted his resignation at the president's request, and Trump designated Whitaker acting attorney general. Laura Jarrett and Eli Watkins, "Jeff Sessions out as Attorney General," *CNN*, Nov. 7, 2018, <https://www.cnn.com/2018/11/07/politics/sessions-resign/index.html>.

The earlier departure of former Secretary of Veterans Affairs (VA) David Shulkin serves as another example, where Trump designated Robert Wilkie, a PAS official from the Department of Defense, to serve as the acting secretary of the VA after ostensibly firing Shulkin. See Vladeck, "Federal Vacancies Reform Act and the VA."

**260** Sessions faced withering and repeated public criticism from Trump for recusing from the Russia investigation and refusing to shut down the probe. See Cristiano Lima, "Trump Revives Criticism of Sessions' Recusal in Russia Probe," *Politico*, Apr. 9, 2018, <https://www.politico.com/story/2018/04/09/trump-sessions-russia-probe-511115>; Eric Lach, "Trump Fires Jeff Sessions, and Throws His Administration Back into Chaos," *New Yorker*, Nov. 7, 2018, <https://www.newyorker.com/news/current/trump-fires-jeff-sessions-and-throws-his-administration-back-into-chaos>.

**261** See Jacob Pramuk, "Lindsey Graham: 'There Will Be Holy Hell to Pay' If Trump Fires Sessions," *CNBC*, July 27, 2017, <https://www.cnn.com/2017/07/27/lindsey-graham-holy-hell-to-pay-if-trump-fires-jeff-sessions.html>; Russell Berman, "The Democratic Efforts to Keep Jeff Sessions in Office," *Atlantic*, Aug. 24, 2018, <https://www.theatlantic.com/politics/archive/2018/08/democrats-sessions-trump-attorney-general/568510/>.

**262** Some posit that Sessions was constructively fired. See, e.g., David Voreacos and Andrew Martin, "Did Sessions Quit or Get Fired? Mueller's Fate May Hang on the Answer," *Bloomberg*, Nov. 7, 2018, <https://www.bloomberg.com/news/articles/2018-11-07/did-sessions-quit-or-get-fired-mueller-fate-may-hang-on-answer>.

Whitaker's designation was controversial for other reasons, as well. Some argued that the designation was unconstitutional under the Appointments Clause because the attorney general, as principal officer, must be confirmed by the Senate. Jeff Barker, "In Federal Hearing, Maryland AG Seeks to Preserve Affordable Care Act, Opposes Acting U.S. Attorney General," *Baltimore Sun*, Dec. 19, 2018, <https://www.baltimoresun.com/news/maryland/politics/bs-md-maryland-whitaker-aca-20181218-story.html>; Neal K. Katyal and George T. Conway, III, "Trump's Appointment of the Acting Attorney General Is Unconstitutional," *New York Times*, Nov. 8, 2018, <https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html>. Others argued that the DOJ's own succession statute — specifying that the deputy attorney general "may exercise all the duties" of the attorney general upon a vacancy in that office — superseded the FVRA. 28 U.S.C. § 508. See John Bies, "Matthew Whitaker's Appointment as Acting Attorney General: Three Lingering Questions," *Lawfare*, Nov. 8, 2018, <https://www.lawfareblog.com/matthew-whitakers-appointment-acting-attorney-general-three-lingering-questions> (considering whether the FVRA supplants DOJ's specific succession statute).

**263** See, e.g., letter from Thomas H. Armstrong, general counsel, Government Accountability Office, to Donald Trump, President (May 9, 2018), available at <https://www.gao.gov/assets/700/692014.pdf> (informing the president that the acting general counsel of the air force had served beyond the statutory 300-day limit); Letter from Susan A. Poling, general counsel, Government Accountability Office, to Barack Obama, President (Mar. 30, 2015), available at <https://www.gao.gov/assets/670/669447.pdf> (informing the president that the acting inspector general of the Department of Veterans Affairs had served beyond the statutory 210-day limit).

**264** See, e.g., *Doolin*, 139 F.3d 203 (D.C. Cir. 1998); *Sw. Gen., Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015).

**265** 5 U.S.C. § 3349(b). However, the FVRA does not require the comptroller general to make this determination. See Valerie C. Brannon, *The Vacancies Act: A Legal Overview*, CRS Report No.

R44997 (Washington, D.C.: Congressional Research Service, 2017), 20, <https://fas.org/sgp/crs/misc/R44997.pdf>.

**266** Given the unique role of inspectors general, we think Congress should include separate provisions that dictate who may serve as an acting inspector general. See, e.g., Michael Stratford, "Trump Backtracks on Replacement of Education Department Watchdog," *Politico*, Feb. 1, 2019, <https://www.politico.com/story/2019/02/01/elizabeth-warren-education-betsy-devos-1138082> (White House reversing appointment of Education Department's deputy general counsel as acting inspector general amidst protests that appointment threatened office's independence from department leadership); Miranda Green, "Trump Appoints Social Security Administration Watchdog to Also Oversee Interior," *The Hill*, June 1, 2019, <https://thehill.com/policy/energy-environment/447713-trump-appoints-social-security-administration-watchdog-to-also-oversee-interior> (appointment of Social Security Administration inspector general as acting inspector general of Department of the Interior, pending confirmation of permanent inspector general at department).

**267** Though we do not advocate for a specific length of prior federal service, one option is the FVRA's current tenure requirement for senior officials who may serve as acting officers: prior service within the agency for at least 90 of the previous 365 days. 5 U.S.C. § 3345(a).

**268** Professor Stephen I. Vladeck has argued for a similar approach. Instead of allowing for a president to choose between the first assistant, any PAS official in the executive branch, or another senior non-PAS official in the same agency, he argues: "Congress should require the president first choose the 'first assistant'; then, if that office is also vacant, any Senate-confirmed officer *in the same agency*; then . . . a non-Senate-confirmed senior official only if no Senate-confirmed officers from that agency remain; and finally . . . a Senate-confirmed officer from a different agency only if no qualifying senior officials from the same agency remain. Steve Vladeck, "Trump Is Abusing His Authority to Name 'Acting Secretaries.' Here's How Congress Can Stop Him," *Slate*, Apr. 9, 2019, <https://slate.com/news-and-politics/2019/04/trump-acting-secretaries-dhs-fvra-senate-reform.html>.

**269** The default rule under the FVRA is that the first assistant, typically the deputy to the vacant office, serves as the acting official. Some statutes specifically identify a position as a first assistant, but some do not. Committee on Governmental Affairs, *Report to Accompany S. 2176*, 12. To avoid debate, Congress could specifically identify the first assistant to any PAS position where it is not already identified in the relevant statute or regulation.

**270** Again, we do not advocate for a specific length of prior federal service, but one option is the FVRA's current tenure requirement for senior officials who may serve as acting officers: prior service within the agency for at least 90 of the previous 365 days. 5 U.S.C. § 3345(a).

**271** The senior career official should satisfy the same tenure and pay requirements required by the FVRA. 5 U.S.C. § 3345(a)(3) (The president may designate a senior official to perform the duties of a vacant office within their agency if the senior official (1) has served in the agency for at least 90 of the last 365 days, and (2) receives a rate of pay at GS-15 of the General Schedule or above.).

**272** See Rebecca Jones, *The Dangers of Chronic Federal Vacancies, Project on Government Oversight*, Aug. 6, 2019, available at <https://www.pogo.org/analysis/2019/08/the-dangers-of-chronic-federal-vacancies/>; Liz Hempowicz, Sean Moulton, Rebecca Jones, and Peter Tyler, *Baker's Dozen: 13 Policy Areas That Require Congressional Action*, Project on Government Oversight, 2019, 43–44, available at [https://docs.pogo.org/report/2019/Bakers-Dozen-2019\\_190212\\_151225.pdf](https://docs.pogo.org/report/2019/Bakers-Dozen-2019_190212_151225.pdf); Miller-Gootnick, "Federal Vacancies Reform Act."

**273** S. Rep. No. 112-24, at 4–5.

**274** Henry B. Hogue, Michael Greene, and Elizabeth Rybicki, *Filling Advice and Consent Positions at the Outset of Recent Administrations*, CRS Report No. R40119 (Washington, D.C.: Congressional Research

Service, 2017), 21, <https://fas.org/sgp/crs/misc/R40119.pdf>.

**275** The forms required by the executive branch include: the Standard Form 86 Questionnaire for National Security Positions (SF 86), the Supplement to the SF 86, the Office of Government Ethics Form 278 Executive Branch Personnel Public Financial Disclosure Report (OGE 278), and consent forms submitted to the White House. Nominees must also complete the appropriate Senate committee questionnaire(s). For additional information on the vetting process, see *Appointment and Confirmation of Executive Branch Leadership: An Overview*, CRS Report No. R44083 (Washington, D.C.: Congressional Research Service, 2015), [https://www.everycrsreport.com/files/20150622\\_R44083\\_a0dcf1a87bcf8965479aedc61bb-776c7b4f16686.pdf](https://www.everycrsreport.com/files/20150622_R44083_a0dcf1a87bcf8965479aedc61bb-776c7b4f16686.pdf), and Robert Kelner, Robert Lenhard, and Derek Lawlor, "A Primer on the Presidential Appointee Vetting Process," *Law360*, Nov. 16, 2016, [https://www.cov.com/-/media/files/corporate/publications/2016/11/a\\_primer\\_on\\_the\\_presidential\\_appointee\\_vetting\\_process.pdf](https://www.cov.com/-/media/files/corporate/publications/2016/11/a_primer_on_the_presidential_appointee_vetting_process.pdf).

**276** For instance, the SF 86 and the Senate questionnaires ask differently worded questions about the nominee's criminal conviction history. Some questionnaires require the nominee to provide information about any criminal conviction, whereas the SF 86 asks particular questions about different types of offenses and covers a different time period. Working Group on Streamlining Paperwork for Executive Nominations, *Report to the President and the Chairs and Ranking Members of the Senate Committee on Homeland Security & Government Affairs and the Senate Committee on Rules & Administration* (Washington, D.C.: Executive Office of the President, 2012), 18–22, 29–33, available at [https://www2.oge.gov/Web/OGEnsf/O/2CE9B19C0F0ED82A85257EA600655818/\\$FILE/243ff-5ca6d384f6fb89728a57e65552f3.pdf](https://www2.oge.gov/Web/OGEnsf/O/2CE9B19C0F0ED82A85257EA600655818/$FILE/243ff-5ca6d384f6fb89728a57e65552f3.pdf).

**277** Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining the Background Investigation Process for Executive Nominations* (Washington, D.C.: Executive Office of the President, 2013), 1.

**278** However, there are reports of President Trump nominating individuals prior to the completion of their background investigation. See Ed O'Keefe and Sean Sullivan, "Ethics Officials Warns Against Confirmations Before Reviews Are Complete," *Washington Post*, Jan. 7, 2017, [https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8\\_story.html](https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8_story.html).

**279** Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining the Process*, 1.

**280** *Ibid.*, 14.

**281** President Bush's proposal would have required the Senate Judiciary Committee to hold hearings within 90 days of receiving a nomination, and for a full Senate vote within 180 days. *President Announces Plan for Timely Consideration of Judicial Nominees*, Oct. 30, 2002, <https://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021030-4.html>. President Obama made a similar proposal at the 2012 State of the Union, calling for a Senate rule that would require a vote on judicial and executive branch nominees within 90 days. *Remarks by the President in State of the Union Address*, Jan. 24, 2012, <https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address>. The *New York Times* editorial board endorsed President Obama's plan. "Filibustering Nominees Must End," *New York Times*, Jan. 28, 2012, <https://www.nytimes.com/2012/01/29/opinion/sunday/filibustering-nominees-must-end.html>.

**282** See S. Rep. No. 112-24, at 2. See also Zach Graves and Daniel Schuman, "The Decline of Congressional Expertise Explained in 10 Charts," *Tech Dirt*, Oct. 18, 2018, <https://www.techdirt.com/articles/20181018/10204640869/decline-congressional-expertise-explained-10-charts.shtml> (arguing that Congress struggles to fulfill its constitutional responsibilities due to lack of staff).

**283** See Working Group on Streamlining Paperwork for Executive

Nominations, *Report to Senate Committee on Homeland Security*; Alvin S. Felzenberg, "Fixing the Appointment Process: What the Reform Commissions Saw," Brookings Institution, Mar. 1, 2001, <https://www.brookings.edu/articles/fixing-the-appointment-process-what-the-reform-commissions-saw/>; Paul A. Volcker et al., *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, National Commission on the Public Service, 2003, available at <https://www.brookings.edu/wp-content/uploads/2016/06/01governance.pdf>; Paul A. Volcker et al., *Leadership for America: Rebuilding the Public Service*, National Commission on the Public Service, 1989, available at [http://www.washingtonpost.com/wp-srv/opinions/documents/Leadership\\_for\\_America\\_Rebuilding\\_the\\_Public\\_Service.pdf](http://www.washingtonpost.com/wp-srv/opinions/documents/Leadership_for_America_Rebuilding_the_Public_Service.pdf); Robert Rizzi and Dianna Muth, "Delays in Presidential Appointments Damage the Vetting System," *The Hill*, Dec. 10, 2014, <https://thehill.com/blogs/congress-blog/the-administration/226512-delays-in-presidential-appointments-damage-vetting>.

**284** The Constitution's Appointments Clause provides Congress with the power to vest the appointment of "inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." U.S. Const. art. II, § 2, cl. 2.

**285** The confirmation process would have revealed the preclusive conflicts of interest that eventually led to the resignation of the former director of the CDC. Jennifer Haberkorn and Brianna Ehler, "CDC Director's Conflicts Keep Her from Testifying," *Politico*, Jan. 18, 2018, <https://www.politico.com/story/2018/01/18/cdc-director-avoids-congressional-testimony-297284>; Corky Siemaszko, "CDC Director Brenda Fitzgerald Quits Following Reports She Bought Tobacco Shares," NBC News, Jan. 31, 2018, <https://www.nbcnews.com/news/us-news/cdc-director-brenda-fitzgerald-quits-after-revelations-she-bought-tobacco-n843261>.

**286** In November 2012, the Working Group on Streamlining Paperwork for Executive Nominations reported that a standard questionnaire had already been adopted by several Senate committees, including the Homeland Security and Government Affairs Committee; the Rules Committee; the Health, Education, Labor, and Pensions Committee; and the Committee on Veterans' Affairs. Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining the Process*, 2. See also Working Group on Streamlining Paperwork for Executive Nominations, *Report to Senate Committee on Homeland Security*, 2.

**287** A select group of senior positions, including members of the cabinet, are typically subject to an investigation more intensive than the "full field" investigation. Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining the Process*, 5–6.

**288** The requirement was removed from positions that generally fell into four categories: (1) legislative and public affairs positions; (2) internal management positions (e.g., chief financial officers and chief information officers); (3) officials who reported to another PAS official; and (4) members of part-time boards and commissions that play advisory roles. S. Rep. No. 112-24, at 6–7. For the full list of positions no longer requiring Senate confirmation, see Carey, *Presidential Appointments*, 19.

**289** Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012). The bill garnered bipartisan support in the Senate and was cosponsored by senators of both parties: Senators Lamar Alexander (R-TN), Harry Reid (D-NV), Mitch McConnell (R-KY), Joe Lieberman (D-CT), Susan Collins (R-ME), Scott Brown (R-MA), Jeff Bingaman (D-NM), Richard Blumenthal (D-CT), Dick Durbin (D-IL), Mike Johanns (R-NE), Dick Lugar (R-IN), Jack Reed (D-RI), Sheldon Whitehouse (D-RI), Tom Carper (D-DE), Jon Kyl (R-AZ), Michael Bennet (D-CO), and Patty Murray (D-WA).

**290** Committee on Homeland Security and Governmental Affairs, 114th Cong., United States Government Policy and Supporting Positions (S. Print 114-26), available at <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf>.

**291** See, e.g., Fulbright Foreign Scholarship Board, 22 U.S.C. §



2456(a)(1). See also S. Rep. No. 112-24, at 7 (arguing that reducing the number of positions requiring Senate confirmation should speed up the confirmation process).

**292** As the Senate Homeland Security and Government Affairs Committee reported in 2011, reducing the number of positions subject to Senate confirmation would allow the Senate to more responsibly and effectively exercise its advice and consent powers. S. Rep. No. 112-24, at 7–8.

**293** S. Rep. No. 112-24, 8 (2011).

**294** Working Group on Streamlining Paperwork for Executive Nominations, *Report to Senate Committee on Homeland Security*, 14.

**295** *Ibid.*, 16.

**296** *Ibid.*, 5.

**297** *Ibid.*, 33.

**298** Working Group, *Streamlining the Process*. Nonpartisan organizations have also recommended establishing a tiered system. See, e.g., Felzenberg, “Fixing the Appointment Process.”

**299** William A. Galston and E. J. Dionne Jr., *A Half-Empty Government Can’t Govern: Why Everyone Wants to Fix the Appointments Process, Why It Never Happens, and How We Can Get It Done*, Brookings Institution, 2010, 5, available at [https://www.brookings.edu/wp-content/uploads/2016/06/1214\\_appointments\\_galston\\_dionne.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/1214_appointments_galston_dionne.pdf) (“We . . . suggest a tiered-system of background checks, with the most stringent reserved only for top-level positions.”); *Eliminating the Bottlenecks: Streamlining the Nominations Process: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. 101 (2011) (statement of Norman J. Ornstein, resident scholar, American Enterprise Institute) (“There is simply no need for . . . full background checks for many non-security and non-major posts; a sliding scale from full investigations for key posts down to simple computer background checks for more minor posts would suffice.”); Partnership for Public Service and Boston Consulting Group, *Presidential Transition Guide*, Third Edition, 2018, 230, available at <https://ourpublicservice.org/wp-content/uploads/2018/01/Presidential-Transition-Guide-2018.pdf> (“[A] new executive order could be issued to adopt a tiered clearance process based on the type of position to which an individual has been nominated and whether an individual has previously been cleared. Those appointed to non-sensitive positions and those with previous clearances, or who are moving between government posts, could qualify for more streamlined background checks. This change would reduce the time required to fill vacancies and save time and resources for the FBI!”).

**300** S. Rep. No. 112-24, at 9.

**301** There is at least one precedent for conducting more limited background investigations for certain types of positions. In the final year of the Obama administration, the Presidential Personnel Office began requesting more limited investigations for nominees to part-time positions that did not require a security clearance and did not have national-security-related responsibilities. We do not have evidence of this practice continuing during the Trump administration.

**302** See, e.g., Ken Dilanian, Geoff Bennett, and Kristen Walker, “Limits to FBI’s Kavanaugh Investigation Have Not Changed, Despite Trump’s Comments,” *NBC*, Sept. 30, 2018, <https://www.nbcnews.com/politics/politics-news/white-house-limits-scope-fbi-s-investigation-allegations-against-brett-n915061>; Rudy Mehrbani, “Take Stock of the FBI’s Role in Senate Confirmations after Kavanaugh,” *Just Security*, Oct. 9, 2018, <https://www.justsecurity.org/60985/stock-fbis-role-senate-confirmations-kavanaugh/>. Background investigation reports are shared, upon request, with the chair and ranking member of the Senate committee considering the nominee. See Council for Excellence in Government, *A Survivor’s Guide for Presidential Nominees*, Brookings Institution, 2000, 35, available at <https://www.brookings.edu/wp-content/uploads/2016/06/1115gov-ernance.pdf>; Carey, *Presidential Appointments*, 5.

**303** S. Rep. No. 112-24, at 7.

**304** David Lewis, “Presidential Appointments in the Obama Administration: An Early Evaluation,” in *The Obama Presidency: Change and Continuity*, eds. Andrew J. Dowdle, Dirk C. van Raemdonck, Robert Maranto (New York: Routledge, 2011) (arguing that policy “czars” and other advisers have less direct authority over agency personnel and create recruiting challenges because would-be agency personnel feel disempowered by the president’s designation of such a point person).

**305** *The Federal Anti-Nepotism Statute: Limits on Appointing, Hiring, and Promoting Relatives*, CRS Legal Sidebar (Washington, D.C.: Congressional Research Service, 2016), <https://fas.org/ggp/crs/misc/nepotism.pdf> (“Congress passed the prohibition in 1967 to address long-standing criticisms of the practice of some federal officials, particularly some Members of Congress as well as certain postal officials, placing relatives on the federal payroll.”).

**306** Lydia Saad, “Americans’ Faith in Government Shaken but Not Shattered by Watergate,” *Gallup*, June 13, 1997, <https://news.gallup.com/poll/4378/americans-faith-government-shaken-shattered-watergate.aspx> (“In 1972, before Watergate became the scandal of the decade, more than half of American adults gave the government very high marks, saying they could trust it all or most of the time, while 45% opted for the ‘only some of the time’ alternative. By 1974, high trust had dropped to 36% and has remained below 50% ever since.”); Ethics in Government Act of 1978, 5 U.S.C. app. 4 §§ 101–505; Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101–7703.

**307** Mark Stencel, “Watergate Reforms,” *Washington Post*, June 13, 1997, <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm>; Robert Vaughn, “Civil Service Reform and the Rule of Law,” *Federal Circuit Bar Journal* 8 (1999): 2 (“The [Civil Service] Reform Act sought to protect federal employees and by so doing to restrain the ability of government officials to abuse governmental power.”).

**308** Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law & Democracy, 2018, 4, available at [https://www.brennancenter.org/sites/default/files/publications/TaskForceReport\\_2018\\_09\\_.pdf](https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf).

**309** See, e.g., Marc Lacey and Raymond Bonner, “A Mad Scramble by Donors for Plum Ambassadorships,” *New York Times*, Mar. 17, 2001, <https://www.nytimes.com/2001/03/17/world/a-mad-scramble-by-donors-for-plum-ambassadorships.html>; Lori McCue, “Trump Appoints Mike Huckabee, Jon Voight to the Kennedy Center Board,” *DCist*, Mar. 27, 2019, <https://dcist.com/story/19/03/27/trump-appoints-mike-huckabee-jon-voight-to-the-kennedy-center-board/>.

**310** See Peter Overby, “Trump’s Choice for Ethics Chief Wins Praise as ‘Somebody Who Plays It by the Book,’” *NPR*, Feb. 9, 2018, <https://www.npr.org/2018/02/09/584394977/trumps-choice-for-new-ethics-chief-wins-praise-somebody-who-plays-it-by-the-book>; Rick Weiss, “NIH’s Varmus to Resign at End of Year,” *Washington Post*, Oct. 8, 1999, <http://www.washingtonpost.com/wp-srv/WPcap/1999-10/08/047r-100899-idx.html> (directorship of NIH considered nonpartisan position); “Trump Retains Collins as NIH Director,” *Science*, June 6, 2017, <https://www.sciencemag.org/news/2017/06/trump-retains-collins-nih-director>; Danny Vinik and Andrew Restuccia, “Leading Trump Census Pick Causes Alarm,” *Politico*, Nov. 21, 2017, <https://www.politico.com/story/2017/11/21/trump-census-pick-causes-alarm-252571> (noting long-standing precedent of choosing a nonpolitical government official as deputy director of the U.S. Census Bureau). Certainly, friends and political allies of the president who are highly qualified for the positions they hold are an asset to an administration, as are all highly qualified personnel.

**311** Spencer S. Hsu and Susan B. Glasser, “FEMA Director Singled Out by Response Critics,” *Washington Post*, Sept. 6, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501590.html>.

**312** At the time, FEMA’s top three leaders had ties to President Bush’s 2000 campaign or to the White House advance operation but little actual emergency management experience. Spencer S. Hsu, “Leaders Lacking Disaster Experience,” *Washington Post*, Sept.

9, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/08/AR2005090802165.html>.

**313** Juliet Eilperin, "Obama Ambassador Nominees Prompt an Uproar with Bungled Answers, Lack of Ties," *Washington Post*, Feb. 14, 2014, [https://www.washingtonpost.com/politics/obama-ambassador-nominees-prompt-an-uproar-with-bungled-answers-lack-of-ties/2014/02/14/20fb0fe4-94b2-11e3-83b9-1f024193bb84\\_story.html](https://www.washingtonpost.com/politics/obama-ambassador-nominees-prompt-an-uproar-with-bungled-answers-lack-of-ties/2014/02/14/20fb0fe4-94b2-11e3-83b9-1f024193bb84_story.html).

**314** Aaron Blake, "No, Obama's Ambassador Picks Aren't Qualified. But That's Nothing New," *Washington Post*, Feb. 14, 2014, <https://www.washingtonpost.com/news/the-fix/wp/2014/02/14/no-obamas-ambassador-picks-arent-qualified-but-thats-nothing-new/> (noting that many past presidents have appointed their political allies to ambassadorships in stable, developed nations).

**315** Ryan Scoville, "Unqualified Ambassadors," *Duke Law Journal* (forthcoming, Feb. 2019): 15, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3333988](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333988).

**316** Andrew Buncombe, "Rick Perry: Energy Secretary Nominee Didn't Know His Job Would Involve Managing Nuclear Weapon Stockpile," *Independent*, Jan. 19, 2017, <https://www.independent.co.uk/news/world/americas/rick-perry-enerhy-secretary-don-ald-trump-nominee-senate-hearing-not-know-nuclear-weapon-stockpile-a7535876.html>; Brad Plumer, "Rick Perry Once Wanted to Abolish the Energy Department. Trump Picked Him to Run It," *Vox*, Dec. 13, 2016, <https://www.vox.com/energy-and-environment/2016/12/13/13936210/rick-perry-energy-department-trump>.

**317** Trip Gabriel, "Trump Chooses Ben Carson to Lead HUD," *New York Times*, Dec. 5, 2016, <https://www.nytimes.com/2016/12/05/us/politics/ben-carson-housing-urban-development-trump.html>.

**318** See Lorraine Woellert, "Trump Party Planner Promoted at HUD after Carson's Troubled Tour," *Politico*, June 26, 2017, <https://www.politico.com/story/2017/06/26/lynne-patton-trump-party-planner-new-york-federal-housing-239963>; Andrew Restuccia, "Husband of Former Trump Housing Aide Scores Government Job," *Politico*, Feb. 2, 2018, <https://www.politico.com/story/2018/02/02/trump-household-aide-government-job-386727>.

**319** "DOE and EPA Team Announced by Obama," *Thorium Energy World*, Aug. 4, 2013, <http://www.thoriumenergyworld.com/news/doe-and-epa-team-announced-by-obama>; Paul Guinnessy, "Nobel Prize Winner to Head Department of Energy," *Physics Today*, Dec. 11, 2008, <https://physicstoday.scitation.org/doi/10.1063/PT.4.1190/full>.

**320** Blake, "Obama's Ambassador Picks."

**321** The legislative history of the anti-nepotism statute clarifies that it would extend to "all persons, including the President, Vice President, and Members of Congress, having authority to make appointments of civilian officers or employees in the Federal service." *The Federal Anti-Nepotism Statute*. Upholding the statute against a constitutional challenge, a federal court explained that the breadth of the law — explicitly applying to the president, members of Congress, and the judiciary — was not a vulnerability because it applies to only "specified kinship relationships." *Lee v. Blount*, 345 F. Supp. 585, 588 (N.D. Cal. 1972).

**322** John M. Harmon, acting assistant attorney general, Office of Legal Counsel, "Possible Appointment of Mrs. Carter as Chairman of the Commission on Mental Health" (official memorandum, Washington, D.C.: Department of Justice, 1977), available at <https://www.justice.gov/olc/page/file/1009451/download>; John M. Harmon, acting assistant attorney general, Office of Legal Counsel, "Appointment of President's Son to Position in the White House Office" (official memorandum, Washington, D.C.: Department of Justice, 1977), available at <https://static.politico.com/22/c2/624cf595485191d6abc9b0810665/olcopinon.pdf>.

**323** Robert B. Shanks, deputy assistant attorney general, Office of Legal Counsel, "Appointment of Member of President's Family to Presidential Advisory Committee on Private Sector Initiatives" (official memorandum, Washington, D.C.: Department of Justice, 1983).

**324** David J. Barron, acting assistant attorney general, Office of Legal Counsel, "Application of 5 U.S.C. § 3110 to Two Proposed Appointments by the President to the Advisory Committees" (official memorandum, Washington, D.C.: Department of Justice, 2009).

**325** Harmon, "Possible Appointment of Mrs. Carter"; Harmon, "Appointment of President's Son"; Shanks, "Appointment of President's Family"; Barron, "Application of 5 U.S.C. § 3110."

**326** *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 904–05 (D.C. Cir. 1993) ("We see no reason why a President could not use his or her spouse to carry out a task that the President might delegate to one of his White House aides. It is reasonable, therefore, to construe [the statute in question] as treating the presidential spouse as a *de facto* officer or employee."). See also *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (assuming for the sake of decision that the first lady enjoyed official status as a representative of the White House).

**327** *Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office*, 41 Op. O.L.C. 1 (2017). See also Norman Eisen and Richard W. Painter, "Can Donald Trump Hire Ivanka Trump?" *New York Times*, Dec. 29, 2016, <https://www.nytimes.com/2016/12/29/opinion/can-donald-trump-hire-ivanka-trump.html>; Aaron Blake, "Donald Trump's 'First Attempt to Ignore the Law,'" *Washington Post*, Jan. 10, 2017, <https://www.washingtonpost.com/news/the-fix/wp/2017/01/10/donald-trumps-first-attempt-to-ignore-the-law/>; "Nepotism and Conflicts of Interest – Jared Kushner and Ivanka Trump," *Citizens for Responsibility and Ethics in Washington*, accessed Mar. 27, 2019, <https://www.citizensforethics.org/nepotism-conflicts-interest-jared-kushner-ivanka-trump/>.

**328** Reports indicate that President Trump's son-in-law, Jared Kushner, has been assigned or taken on responsibility for solving the opioid crisis, bringing peace to the Middle East, reforming the criminal justice system, managing diplomatic relations with key countries (including Saudi Arabia, Mexico, and China), improving the government's use of data and technology, and reforming veterans' care. He previously ran his family's real estate company, cofounded an online investment platform, and purchased a media publishing company. "Jared Kushner: The Son-in-Law with Donald Trump's Ear," *BBC*, Oct. 10, 2018, <https://www.bbc.com/news/world-us-canada-37986429>.

**329** See David Smith, "Ivanka Trump Under Fire After Taking Seat Among World Leaders at G20," *The Guardian*, July 8, 2017, <https://www.theguardian.com/us-news/2017/jul/08/ivanka-trump-g20-world-leaders-meeting>; Choe Sang-Hun, "Ivanka Trump, in South Korea, Calls for Pressure on the North," *New York Times*, Feb. 23, 2018, <https://www.nytimes.com/2018/02/23/world/asia/ivanka-trump-south-korea.html>.

**330** See "What Is the PDB?" Office of the Director of National Intelligence, accessed Apr. 22, 2019, <https://www.intelligence.gov/publics-daily-brief/presidents-daily-brief>; Mark Hosenball and Warren Strobel, "Kushner Loses Access to Top Intelligence Briefing: Sources," *Reuters*, Feb. 27, 2018, <https://www.reuters.com/article/us-usa-trump-kushner/kushner-loses-access-to-top-intelligence-briefing-sources-idUSKCN1GB2VE>.

**331** Blake, "Donald Trump's 'First Attempt.'"

**332** The OLC's conclusion was largely based on a separate statute — 3 U.S.C. § 105 — that it interpreted as superseding the anti-nepotism statute. *Application of the Anti-Nepotism Statute*.

**333** See 5 U.S.C. § 3110; Alan Dershowitz, "Does Anti-Nepotism Law Bar Kushner Appointment?" *Newsmax*, Jan. 11, 2017, <https://www.newsmax.com/alandershowitz/jfk-rfk/2017/01/11/id/767981/>.

**334** Laura Jarrett and David Shortell, "DOJ Releases Slew of Memos Lobbying Against Presidential Appointments for Family," *CNN*, Oct. 3, 2017, <https://www.cnn.com/2017/10/03/politics/doj-old-anti-nepotism-olc-memos/index.html>.

**335** So as not to disturb current staffing of executive branch projects and programs, the legislation could apply prospectively.

**336** See 5 U.S.C. § 7321 et seq.; 18 U.S.C. § 208; 5 C.F.R. § 2634;

45 C.F.R. § 73.735–904. See *Ex parte Curtis*, 106 U.S. 371, 373 (1882) (“The evident purpose of Congress in all this class of enactments [regarding conduct of executive branch employees] has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end.”); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 99 (1947) (“Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection. . . . To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system.”).

**337** A useful frame put forth by the White House Transition Project (based on the National Commission to Reform the Federal Appointments Process) is that of the “critical position” — one which is required to maintain national security and important government functions. Critical positions include “all the leadership in government agencies,” to include national security, economic management, critical management positions, and positions that are key to the management agenda. “Appointments,” White House Transition Project.

**338** Congress generally has authority to impose statutory qualifications on executive branch positions, but the boundaries of the authority have not been conclusively drawn. See Henry B. Hogue, *Statutory Qualifications for Executive Branch Positions*, CRS Report No. RL33886 (Washington, D.C.: Congressional Research Service, 2015), <https://fas.org/sgp/crs/misc/RL33886.pdf>. See recommendations below.

**339** Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

**340** See, e.g., Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Division E, §704, 128 Stat. 2380 (2014). See also Henry B. Hogue, *Statutory Qualifications*.

**341** See, e.g., Inspector General Act of 1978, 5 U.S.C. app. § 3(a) (1978) (“There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability . . . .”); 42 U.S.C. § 2000e-4(a) (2012) (mandating that the EEOC “be composed of five members, not more than three of whom shall be members of the same political party”); Brian D. Feinstein and Daniel J. Hemel, “Partisan Balance with Bite,” *Columbia Law Review* 118 (2018): 31 n. 83 (listing agencies with partisan balance requirements).

**342** 19 U.S.C. § 2171.

**343** 10 U.S.C. § 113(a).

**344** See “James N. Mattis,” Department of Defense, accessed May 7, 2018, <https://www.defense.gov/About/Biographies/Biography-View/Article/1055835/james-mattis/>.

**345** A security clearance represents “a determination that an individual — whether a federal employee or a private contractor performing work for the government — is eligible for access to classified national security information.” Except for constitutional officers (president, vice president, members of Congress, and federal judges), no one can access classified information without a security clearance and a “need to know.” Michelle D. Christensen, *Security Clearance Process: Answers to Frequently Asked Questions*, CRS Report No. R43216 (Washington, D.C.: Congressional Research Service, 2016), 1, 4, <https://fas.org/sgp/crs/secrecy/R43216.pdf>.

Reports and testimony indicate that at least 25 clearance decisions were overruled in the first two years of the Trump administration. Rachael Bade and Tom Hamburger, “White House Whistleblower Says 25 Security Clearance Denials Were Reversed During Trump Administration,” *Washington Post*, Apr. 1, 2019, <https://wapo.st/2U7eW4c>.

In the previous three years, there was only one incident of similar overruling of security clearance determinations. Zack Ford and Ryan Koronowski, “Ex-White House Staffers Say Trump’s Decision to Overrule Security Clearance Denials Is Unprecedented,” *ThinkProgress*, Apr. 4, 2019, <https://thinkprogress.org/white-house-decision-overrule-so-many-security-clearances-unprecedented-8a45f4b0598c/>.

**346** Jim Sciutto, Gloria Berger, and Zachary Cohen, “Dozens of Trump Officials Still Lack Full Security Clearance,” *CNN*, Feb. 9, 2018, <https://www.cnn.com/2018/02/09/politics/trump-officials-pending-security-clearances/index.html>.

**347** Eliana Johnson, “Kelly Knew Before Abuse Reports That Porter Would Be Denied Security Clearance,” *Politico*, Feb. 8, 2018, <https://www.politico.com/story/2018/02/08/john-kelly-rob-porter-security-clearance-400987>; Brian Naylor and Domenico Montanaro, “White House Security Clearance Trouble Shines Light on ‘High Risk’ Backlog Problem,” *NPR*, Feb. 10, 2018, <https://www.npr.org/2018/02/10/584375510/white-house-security-clearance-trouble-shines-light-on-high-risk-backlog-problem>; Kara Scannell, “Background Check Chief Has ‘Never Seen’ Mistakes and Omissions at Level of Jared Kushner Forms,” *CNN*, Feb. 13, 2018, <https://www.cnn.com/2017/10/12/politics/jared-kushner-background-check-form/index.html>.

**348** Jennifer Steinhauer and Eric Lichtblau, “Senate Confirmation Hearings to Begin Without All Background Checks,” *New York Times*, Jan. 7, 2017, <https://www.nytimes.com/2017/01/07/us/politics/senate-confirmation-hearings-background-checks.html>; O’Keefe and Sullivan, “Ethics Official Warns”; *The FBI and the Senate Confirmation Process*, Center for Economic and Policy Research, available at <http://cepr.net/images/documents/fbi-and-senate-confirmation-process.pdf>.

**349** Alana Abramson, “Rob Porter’s Resignation Raises Questions About White House Vetting,” *Time*, Feb. 9, 2018, <http://time.com/5139427/rob-porter-domestic-violence-security-clearance/>.

**350** *Ibid.*

**351** Sciutto et al., “Dozens of Trump Officials.”

**352** See Laura Strickler, Ken Dilanian, and Peter Alexander, “Officials Rejected Jared Kushner for Top Secret Security Clearance, but Were Overruled,” *NBC News*, Jan. 24, 2019, <https://www.nbcnews.com/politics/donald-trump/officials-rejected-jared-kushner-top-secret-security-clearance-were-overruled-n962221>; Matt Apuzzo, “Jared Kushner Gets Security Clearance, Ending Swirl of Questions over Delay,” *New York Times*, May 23, 2018, <https://www.nytimes.com/2018/05/23/us/politics/jared-kushner-security-clearance.html>.

**353** Strickler et al., “Officials Rejected Jared Kushner.”

**354** *Ibid.*

**355** In *Department of the Navy v. Egan*, the Supreme Court stated in dicta that “[the president’s] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant.” 484 U.S. 518, 527 (1988) (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961)). The Court further explained that the government has a compelling interest in withholding national security information from unauthorized persons and that “[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.” *Ibid.*

**356** See John T. Bennett, “Kelly Admits Missteps with White House Aides’ Clearances,” *Roll Call*, Feb. 16, 2018, <https://www.rollcall.com/news/politics/kelly-admits-missteps-white-house-aides-clearances>; “Rob Porter’s Lack of Full Security Clearance Raises Concerns About Backlog,” *CBS*, Feb. 13, 2018, <https://www.cbsnews.com/news/backlog-white-house-security-clearance-problems-rob-porter/>.

**357** Brian Naylor, “Agency Conducting Government Background Checks Has Backlog of 700,000,” *NPR*, Feb. 9, 2018, <https://www>.

[npr.org/2018/02/09/584640379/agency-conducting-government-background-checks-has-backlog-of-700-000](http://npr.org/2018/02/09/584640379/agency-conducting-government-background-checks-has-backlog-of-700-000).

**358** The Obama administration created the National Bureau of Background Investigations (NBIB) in 2016. See Exec. Order No. 13,764, 3 C.F.R. 243 (2017). NBIB created a division to oversee and monitor the contractor workforce performing background investigations, added a new financial office to oversee the agency's budget, pricing, and funding models, and looked for ways to streamline and modernize the background investigation process, for instance by exploring the use of artificial intelligence. See Nicole Ogrysko, "NBIB Has Planned Improvements to Security Clearance Process, but DOD Transfer May Complicate Them," *Federal News Network*, Dec. 28, 2017, <https://federalnewsnetwork.com/workforce/2017/12/nbib-has-planned-improvements-to-security-clearance-process-but-dod-transfer-may-complicate-them/>; Nicole Ogrysko, "As NBIB Shrinks the Security Clearance Backlog, Other Personnel Vetting Agencies Feel the Pressure," *Federal News Network*, Mar. 13, 2019, <https://federalnewsnetwork.com/other-dod-agencies/2019/03/as-nbib-shrinks-the-security-clearance-backlog-other-personnel-vetting-agencies-feel-the-pressure/>.

The Government Accountability Office made additional recommendations to improve the personnel security clearance process. United States Government Accountability Office, *Personnel Security Clearances: Additional Actions Needed to Ensure Quality, Address Timeliness, and Reduce Investigation Backlog*, GAO-18-29 (Washington, D.C.: Government Accountability Office, 2017), <https://www.gao.gov/assets/690/688918.pdf> (proposing that Congress reinstate a requirement for clearance timeliness reporting and six additional recommendations, including that a milestone be set for establishing measures for investigation quality, and that NBIB develop a plan to reduce the backlog and establish goals for increasing total investigator capacity).

Plans are underway to transfer the government-wide security clearance program from NBIB to the Department of Defense (DOD), which served as the government-wide security clearance provider until 2005. Nicole Ogrysko, "Trump Administration Takes Another Baby Step to Advance OPM-GSA Merger," *Federal News Network*, July 30, 2019, <https://federalnewsnetwork.com/reorganization/2019/07/trump-administration-takes-another-baby-step-to-advance-opm-gsa-merger/>; Nicole Ogrysko, "Trump Administration Considering Major Changes to Security Clearance Program," *Federal News Network*, Apr. 9, 2018, <https://federalnewsnetwork.com/workforce/2018/04/trump-administration-considering-major-changes-to-security-clearance-program/>. Congress passed legislation directing the DOD to transfer responsibility for conducting background investigations on DOD personnel from NBIB to DOD. See 2017 National Defense Authorization Act, Pub. L. No. 114-328, § 951, 130 Stat. 2371-74 (2016); 2018 National Defense Authorization Act, Pub. L. No. 115-91, § 925, 131 Stat. 1526-32 (2017).

**359** The security clearance process is currently governed primarily by the Counterintelligence and Security Enhancements Act of 1994, 50 U.S.C. § 3161. The procedures established by the president are binding on all departments, agencies, and offices of the executive branch. 50 U.S.C. § 3161(a). An executive order in 1995 set out most of the security clearance framework in use today. Exec. Order No. 12,968, 3 C.F.R. 391 (1995). See also Elizabeth Goitein and David M. Shapiro, *Reducing Overclassification Through Accountability*, Brennan Center for Justice, 2011, 1, available at [http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan\\_Overclassification\\_Final.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf); Greg Cullison, "Are Security Clearances Useless?" *Big Sky*, <https://www.bigskyassociates.com/blog/how-did-we-get-here>.

**360** 50 U.S.C. § 3161(a). Except as permitted by the president, no employee can be given access to classified information unless a background investigation determines that access is consistent with national security. The procedures must establish uniform requirements regarding the scope and frequency of background investigations. Employees must allow an authorized investigative agency access to their relevant financial records, consumer reports, travel records, and

computers used in government duties as a condition of access to classified information. Employees who require access to "particularly sensitive classified information," as determined by the president, must permit access to information about their financial condition and foreign travel. And there must be uniform standards that provide reasons for denying or terminating a clearance and that give the employee an opportunity to respond before final action occurs. *Ibid.* The statute permits agencies to act through procedures that are inconsistent with the statutory standards "pursuant to other law or [e]xecutive order to deny or terminate access to classified information," but only if the agency head determines that the statutory standards cannot be followed "in a manner that is consistent with the national security." *Ibid.*, § 3161(b).

**361** John F. Kelly, chief of staff, "Improvements to the Clearance Process" (official memorandum: Washington, D.C., White House, 2018), available at <https://apps.washingtonpost.com/g/documents/politics/read-kellys-memo-of-proposed-changes-to-white-house-security-clearance-process/2777/>.

**362** *Ibid.*, 2.

**363** Kelly's memorandum directed other senior staff to "carefully consider[] and implement[] as appropriate" the discontinuation of long-term interim clearances that had been pending for approximately eight months or more. *Ibid.*, 4.

**364** *Ibid.*

**365** *Egan*, 484 U.S. at 527.

**366** In *Egan*, the Court noted in dicta that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." 484 U.S. at 530 (emphasis added). And in *Environmental Protection Agency v. Mink*, the Court stated that, for the purpose of determining what national security information is exempt from the Freedom of Information Act, "Congress could certainly [provide] that the Executive Branch adopt new [classification] procedures or [establish] its own procedures — subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." 410 U.S. 73, 84 (1973).

**367** See 1964 Amendments to the Internal Security Act of 1950, 50 U.S.C. § 832 (prohibiting employment at the National Security Agency (NSA) without being cleared for access to classified information and permitting the secretary of defense to grant access to classified information on a temporary basis, pending completion of an investigation, in certain circumstances: during a period of war, national disaster, or "in exceptional cases in which the Secretary . . . makes a determination in writing that his action is necessary or advisable in the national interest").

**368** See, e.g., Counterintelligence and Security Enhancement Act of 1994, 50 U.S.C. § 3161; Bond Amendment, 50 U.S.C. § 3343.

**369** See, e.g., Counterintelligence and Security Enhancement Act of 1994, 50 U.S.C. § 3161(a) (directing the president to establish procedures governing access to classified material and requiring certain minimum due process standards); 1964 Amendments to the Internal Security Act of 1950, 50 U.S.C. § 831-835 (directing the secretary of defense to prescribe regulations regarding access to classification for NSA employees); Bond Amendment, 50 U.S.C. § 3343(c)(1) (prohibiting heads of agencies from granting security clearances for access to certain categories of information if the employee meets certain disqualifying criteria); Intelligence and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 3001, 118 Stat. 3638 (directing the president to select a single entity to oversee security clearance investigations and develop uniform policies); Securely Expediting Clearances Through Reporting Transparency (SECRET) Act of 2018, Pub. L. No. 115-173 (requiring submission of reports to Congress about backlog of security clearance investigations and process for security clearance investigations for personnel in the Executive Office of the President and the White House Office and recommendations to improve government-wide continuous evaluation programs, classified information requests, and process for investigating security clearances).

- 370** Commonsense Legislation Ensuring Accountability by Reporting Access of Non-Cleared Employees to Secrets (CLEARANCES) Act, H.R. 5019, 115 Cong. (2018).
- 371** See Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009): 1–21.
- 372** The Federalist No. 51 (James Madison) (envisioning the three branches of government as “keeping each other in their proper places,” which is “essential to the preservation of liberty”).
- 373** The Federalist No. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”).
- 374** See Norman Ornstein and Thomas E. Mann, “The Broken Branch: How Congress Is Failing America and How to Get It Back on Track,” Brookings Institution, June 27, 2006, <https://www.brookings.edu/articles/the-broken-branch-how-congress-is-failing-america-and-how-to-get-it-back-on-track/>.
- 375** See Johanna Kalb and Alicia Bannon, “Courts Under Pressure: Judicial Independence and Rule of Law in the Trump Era,” *New York University Law Review* 93 (2018).
- 376** See, e.g., Bradley Jones, “Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence,” *Pew Research Center*, May 8, 2018, <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>; Wendy Weiser and Alicia Bannon, eds., *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice (2018), 19–26, available at [https://www.brennancenter.org/sites/default/files/publications/2018\\_05\\_Agendas\\_DEmocracy\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEmocracy_FINAL.pdf).
- 377** 1 Annals of Cong. 1515 (1790) (Joseph Gales ed., 1834) (quoting Representative James Madison of Virginia on the House’s first referral to a select committee).
- 378** Ornstein and Mann, “The Broken Branch.”
- 379** See, e.g., Jonathan Chait, “House Republicans Have a Secret List of Trump Scandals They’re Covering Up,” *New York*, Aug. 27, 2018, <http://nymag.com/intelligencer/2018/08/republicans-congress-list-of-trump-scandals-covering-up.html> (detailing, among other things, House Republicans’ refusal to investigate the federal government’s response to Hurricane Maria in Puerto Rico); Jason Zengerle, “How Devin Nunes Turned the House Intelligence Committee Inside Out,” *New York Times Magazine*, Apr. 24, 2018, <https://www.nytimes.com/2018/04/24/magazine/how-devin-nunes-turned-the-house-intelligence-committee-inside-out.html> (citing the House Intelligence Committee under Devin Nunes investigating “the F.B.I. and the Justice Department for supposedly abusing their powers in an effort to hurt Trump”); James M. Goldgeier and Elizabeth N. Saunders, “The Unconstrained Presidency: Checks and Balances Eroded Long before Trump,” Council on Foreign Relations, Aug. 14, 2018, <https://www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump> (“Today, members of Congress reflexively support their own party. In periods of unified government, this means extreme deference to the president. In periods of divided government, it means congressional gridlock. Neither scenario yields much in terms of congressional oversight.”).
- 380** See, e.g., Zachary Laub, “Debating the Legality of the Post-9/11 ‘Forever War,’” Council on Foreign Relations, Sept. 1, 2016, <https://www.cfr.org/expert-roundup/debating-legality-post-911-forever-war>; Elizabeth Goitein, “Congress Is About to Decide Whether to Give Trump More or Less Power to Expand Wars,” *Fortune*, June 4, 2018, <http://fortune.com/2018/06/04/bob-corker-tim-kaine-jeff-merkle-trump-wars/>. See also Richard F. Grimmert, *War Powers Resolution: Presidential Compliance*, CRS Report No. RL33532 (Washington, D.C.: Congressional Research Service, 2012), 23–26, <https://fas.org/sgp/crs/natsec/RL33532.pdf> (discussing whether the War Powers Resolution is working or should be amended).
- 381** National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976), 50 U.S.C. §§ 1601–1651. See Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (declaring a national emergency concerning the southern border of the United States).
- 382** Li Zhou, “Congress’s Latest Move to Stop Trump’s National Emergency Just Failed,” *Vox*, Mar. 26, 2019, <https://www.vox.com/2019/3/26/18282410/national-emergency-trump-house-ve-to-override>.
- 383** Emily Guskin, “A Clear Majority of Americans Oppose Trump’s Emergency Declaration,” *Washington Post*, Mar. 15, 2019, [https://www.washingtonpost.com/politics/2019/03/15/clear-majority-americans-oppose-trumps-emergency-declaration/?utm\\_term=.55daec087094](https://www.washingtonpost.com/politics/2019/03/15/clear-majority-americans-oppose-trumps-emergency-declaration/?utm_term=.55daec087094) (“By roughly a 2-to-1 margin, Americans oppose Trump’s decision to use emergency powers to build a border wall.”). Recently, however, the Article One Act, a bill to reform the National Emergencies Act, passed out of the Senate Homeland Security and Governmental Affairs Committee with a strong bipartisan vote of 12 to 2. Tim Lau, “Progress Toward Reforming the National Emergencies Act,” Brennan Center for Justice, July 29, 2019, <https://www.brennancenter.org/blog/progress-toward-reforming-national-emergencies-act>.
- 384** United States Constitutional Convention, *The Records of the Federal Convention of 1787, Issue 2* (New Haven: Yale University Press, 1911), 206, available at <https://books.google.com/books?id=atiffAAAMAAJ&pg=PA206> (referencing George Mason’s statement at the Constitutional Convention that members of Congress “are not only Legislators” but also “possess inquisitorial powers” and “must meet frequently to inspect the Conduct of the public offices”).
- 385** *Hurricane Katrina: Voices from Inside the Storm, Before the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (2005); Michael D. Minta, *Oversight: Representing the Interests of Blacks and Latinos in Congress* (Princeton: Princeton University Press, 2011); *The Final Report of the Select Committee on Presidential Campaign Activities*, S. Rep. No. 93-981 (1973) (“Watergate Committee Report”); *The State of VA Healthcare, Before the Senate Committee on Veterans Affairs*, 113th Cong. (2014).
- 386** See, e.g., Ornstein and Mann, “The Broken Branch”; Tressa Guenov and Tommy Ross, “At a Crossroads, Part I: How Congress Can Find Its Way Back to Effective Defense Oversight,” *War on the Rocks*, Mar. 9, 2018, <https://warontherocks.com/2018/03/at-a-crossroads-part-i-how-congress-can-find-its-way-back-to-effective-defense-oversight/>; Cristian R. C. Kelly, “Full of Sound and Fury: Curbing the Cost of Partisan Opportunism in Congressional Oversight Hearings,” *New York University Law Review* 90 (2015): 256 (“[I]n today’s polarized political environment, congressional committees have strong incentives to initiate and misuse public oversight hearings for their own electoral benefit, rather than for purposes of good policy or good governance.”); Susan Milligan, “Drowning in Bitter Partisanship,” *U.S. News and World Report*, June 23, 2017, <https://www.usnews.com/news/the-report/articles/2017-06-23/partisanship-drowns-out-bipartisan-oversight>.
- 387** See Ornstein and Mann, “The Broken Branch.”
- 388** See, e.g., Douglas Kriner and Liam Schwartz, “Divided Government and Congressional Investigations,” *Legislative Studies Quarterly* 33, no. 2 (May 2008): 295–321.
- 389** See, e.g., 18 U.S.C. § 208 (criminal conflict of interest statute, prohibiting officers and employees of the executive branch, except for the president and vice president — but not members of Congress — from taking official governmental action on any matter in which they have any personal financial interest); Office of Compliance, *Recommendations for Improvements to the Congressional Accountability Act: An Analysis of Federal Workplace Rights, Safety, Health, and Accessibility Laws That Should Be Made Applicable to Congress and Its Agencies* (Washington, D.C.: Office of Compliance, 2012), [https://www.compliance.gov/sites/default/files/wp-content/uploads/2012/12/102B-Report\\_web.pdf](https://www.compliance.gov/sites/default/files/wp-content/uploads/2012/12/102B-Report_web.pdf) (documenting the numerous

employment, workplace safety, and whistleblower laws from which Congress has exempted itself); Freedom of Information Act, 5 U.S.C. § 551(1) (exempting Congress from scope of statute's applicability).

**390** See, e.g., Deirdre Walsh, "House Ethics Committee Investigating Rep. Chris Collins for Insider Trading Allegations," *CNN*, Oct. 12, 2017, <https://www.cnn.com/2017/10/12/politics/chris-collins-investigation-house-ethics-committee/index.html>; Donna M. Nagy, "Tom Price's Stock Controversy Shows an Urgent Need for a New Law," *Washington Post*, Jan. 24, 2017, [https://www.washingtonpost.com/opinions/tom-prices-stock-controversy-shows-an-urgent-need-for-a-new-law/2017/01/24/37d26974-e1bc-11e6-a547-5fb9411d332c\\_story.html](https://www.washingtonpost.com/opinions/tom-prices-stock-controversy-shows-an-urgent-need-for-a-new-law/2017/01/24/37d26974-e1bc-11e6-a547-5fb9411d332c_story.html); MJ Lee, Sunlen Serfaty, and Juana Summers, "Congress Paid Out \$17 Million in Settlements. Here's Why We Know So Little About That Money," *CNN*, Nov. 16, 2017, <https://www.cnn.com/2017/11/16/politics/settlements-congress-sexual-harassment/index.html>.

**391** See *More Than 60 National Security Experts Urge Reform in Congressional Oversight of Homeland Security*, 2014, <https://assets.aspeninstitute.org/content/uploads/files/content/upload/WSJ%20ad%20news%20release%205-21-14.pdf> (urging simpler oversight to address particular national security vulnerabilities); *Necessary and Proper: Best Practices for Congressional Investigations*, Project on Government Oversight, 2017, 8–19, available at [http://www.pogoarchives.org/m/co/2017\\_pogo\\_necessary\\_and\\_proper\\_report.pdf](http://www.pogoarchives.org/m/co/2017_pogo_necessary_and_proper_report.pdf) (suggesting that congressional investigative committees display true bipartisanship, have adequate tools and resources, maintain a clear focus, and enjoy support of congressional leadership); *Strengthening Congressional Oversight of the Intelligence Community*, R Street, Demand Progress, Freedom Works, Electronic Frontier Foundation, 2016, available at [https://www.openthegovernment.org/wp-content/uploads/other-files/Strengthening\\_Congressional\\_Oversight\\_of\\_the\\_IC\\_White\\_Paper\\_Sept\\_2016.pdf](https://www.openthegovernment.org/wp-content/uploads/other-files/Strengthening_Congressional_Oversight_of_the_IC_White_Paper_Sept_2016.pdf) (suggesting improvements to operation and transparency of House Permanent Select Committee on Intelligence).

**392** See Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *Atlantic*, Dec. 5, 2018, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> (calling for "repeal of laws that are obsolete or unnecessary, revision of other laws to include stronger protections against abuse, issuance of new criteria for emergency declarations, requiring a connection between the nature of the emergency and the powers invoked, a prohibition on indefinite emergencies, and limitation of powers set forth in Presidential Emergency Action Documents"); *Hearing on the National Emergencies Act of 1976, Before the H. Comm. on the Judiciary, Subcomm. on the Constitution*, 116th Cong. (2019) (testimony of Elizabeth Goitein, codirector, Liberty & National Security Program, Brennan Center for Justice at New York University School of Law) (proposing that Congress specify that: the president may declare a national emergency only if there exists a significant change in factual circumstances that poses an imminent threat to public health, public safety, or other similarly pressing national interests; an emergency declared by the president should end after 30 days unless Congress votes to continue it; no state of emergency should be allowed to continue for more than five years; the statutory authorities invoked under a declared emergency must relate to the nature of, and may be used only to address, that emergency; emergency powers cannot be used to circumvent Congress; and presidents should be required to publicly detail expenses incurred, as well as activities and programs implemented).

**393** Under the Article One Act, if a president declared a national emergency, Congress would be required to vote to approve it within 30 days, or it would automatically expire. Renewing an emergency declaration would also require congressional approval for every subsequent year. Lau, "Progress Toward Reforming."

**394** There are numerous proposals for modernizing science and technology expertise in Congress. See, e.g., Grant Tudor and Justin Warner, *The Congressional Futures Office*, Belfer Center, 2019, [https://www.belfercenter.org/sites/default/files/2019-06/PAE/CFQ%20Policy%20Brief\\_vF.pdf](https://www.belfercenter.org/sites/default/files/2019-06/PAE/CFQ%20Policy%20Brief_vF.pdf); Bianca Majumder, "Congress Should Revive

the Office of Technology Assessment," Center for American Progress, May 13, 2019, <https://www.americanprogress.org/issues/green/news/2019/05/13/469793/congress-revive-office-technology-assessment/>; Zach Graves, *R Street Policy Study No. 152: Rebuilding a Technology Assessment Office in Congress: Frequently Asked Questions*, R Street, 2018, <https://2o9ub0417chl2lg6m43em6p-si2i-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/No.-152.pdf>; Daniel D'Arcy et al., *Congress Needs the Office of Technology Assessment to Keep Up with Science and Technology*, Bipartisan Policy Center, 2019, available at <https://bipartisanpolicy.org/wp-content/uploads/2019/08/Congress-Needs-the-Office-of-Technology-Assessment-to-Keep-up-with-Science-and-Technology-002.pdf>. A forthcoming National Academy of Public Administration report, expected to be published in October 2019, may discuss the optimal structure for a congressional agency engaged in technology assessment. "Science and Technology Policy Assessment for the U.S. Congress," National Academy of Public Administration, accessed July 22, 2019, <https://www.napawash.org/studies/academy-studies/science-and-technology-policy-assessment-for-the-us-congress>.

**395** See, e.g., *Make Congress Work*, No Labels, 2011, available at <http://2o16qp9prbv3jfk0qb3yon1a-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/Make-Congress-Work.pdf>; Commission on Political Reform, *Governing in a Polarized America: A Bipartisan Blueprint to Strengthen Our Democracy*, Bipartisan Policy Center, 2011, 51–69, available at <https://bipartisanpolicy.org/wp-content/uploads/sites/default/files/files/BPC%20CPR%20Governing%20in%20a%20Polarized%20America.pdf>; Kathy Goldschmidt, *State of the Congress: Staff Perspectives on Institutional Capacity in the House and Senate*, Congressional Management Foundation, 2017, available at [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/cmf-state-of-the-congress.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-state-of-the-congress.pdf); "Select Committee on the Modernization of Congress," accessed May 3, 2019, <https://modernizecongress.house.gov/>; Meredith McGehee et al., *The Ethics Blind Spot: How the House and Senate Ethics Committees Fail to Uphold High Ethical Standards — And Solutions to Fix the Problem*, Issue One, 2018, available at <https://www.issueone.org/wp-content/uploads/2018/02/Ethics-Blind-Spot-Final.pdf>; Victoria Bassetti, "Of Ceiling Tiles and Senate Committee Reform," in *Democracy and Justice: Collected Writings* (New York: Brennan Center for Justice, 2014), 151–52; Marian Currinder et al., *Why We Left Congress: How the Legislative Branch Is Broken and What We Can Do About It*, R Street and Issue One, 2018, 13–15, available at <https://www.issueone.org/wp-content/uploads/2018/12/Why-We-Left-Congress-Report.pdf>.

**396** Susan Cornwell, "Congress Passes Bill to Make Members Pay Sexual Misconduct Claims," *Reuters*, Dec. 13, 2018, <https://www.reuters.com/article/us-usa-congress-harassment/congress-passes-bill-to-make-members-pay-sexual-misconduct-claims-idUSKBN1OC2V0>.

**397** Business leaders have suggested extending blind trust requirements to members of Congress, requiring recusal for particular matters, and improvements to transparency to reduce the impact of conflicts of interest on the actions of Congress. See Aaron D. Hill, Jason W. Ridge, Amy Ingram, "The Growing Conflict-of-Interest Problem in the U.S. Congress," *Harvard Business Review*, Feb. 24, 2017, <https://hbr.org/2017/02/the-growing-conflict-of-interest-problem-in-the-us-congress>. Good government advocates have likewise pointed out that Congress's self-exemption from FOIA is largely unfounded and that greater transparency is needed for the legislative branch. See JPat Brown, "Reminder That Congress Is (Increasingly) Exempt from FOIA," *Muckrock*, Oct. 4, 2018, <https://www.muckrock.com/news/archives/2018/oct/04/congress-foia-exemption/>.

**398** In 1946, Congress passed the Legislative Reorganization Act with large bipartisan majorities in both chambers. Ch. 753, 60 Stat. 812. This law reduced the number of standing committees and clarified their jurisdictions, upgraded staff support, strengthened congressional oversight of executive agencies, and required lobbyists to register with Congress and to file periodic reports of their activities. *Ibid.* In the 1960s and 1970s, members of Congress worked to change committee assignments and leadership, as well as for procedural reforms to allow legislation to pass more easily. Daniel

Stid, *Two Pathways for Congressional Reform*, William and Flora Hewlett Foundation, 2015, 10–12, available at <https://hewlett.org/wp-content/uploads/2018/01/Two-Pathways-for-Congressional-Reform-March-2015.pdf>. In the 1970s, Congress increased transparency in committee hearings and meetings, as well as votes, and expanded professional staff. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970). Congress also created expert bodies — the Office of Technology Assessment and the Congressional Budget Office — to advise legislators. Technology Assessment Act of 1972, Pub. L. No. 92-484, 86 Stat. 797 (1972); Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 601 (creating the Congressional Budget Office).

**399** See, e.g., successful challenges to President Trump’s first “travel ban,” Exec. Order No. 13,769, *State of Washington v. Trump*, 847 F. Supp. 3d 1151 (9th Cir. 2017), and *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017), and a successful challenge to the president’s decision to terminate the Deferred Action for Childhood Arrivals (DACA) program, *Regents of the Univ of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1036–37 (N.D. Cal. 2018).

**400** See, e.g., Kevin Judd and Keith Watters, “Trump’s Attacks on Courts Undermine Judicial Independence,” *American Bar Association Journal*, June 28, 2018, available at [http://www.abajournal.com/news/article/trumps\\_attacks\\_on\\_courts\\_undermines\\_judicial\\_independence](http://www.abajournal.com/news/article/trumps_attacks_on_courts_undermines_judicial_independence) (“A judiciary without the faith of the executive is a danger to a free and open society. . . . When citizens lose confidence with the branch of government responsible for interpreting the laws, all of our institutions are diminished.”); “In His Own Words: The President’s Attacks on the Courts,” Brennan Center for Justice, June 5, 2017, <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>.

**401** *Ibid.* For example, President Trump suggested that rulings halting the administration’s first “travel ban” executive order were politically motivated. Immediately after an October 2017 terrorist attack in New York City, the president described the judiciary as a “joke” and a “laughingstock.” In January 2018, after a district court judge had temporarily blocked the administration from ending the Deferred Action for Childhood Arrivals (DACA) program, the president tweeted a complaint about “how broken and unfair our Court system is.” See *ibid.*

**402** Michael J. Nelson and Alicia Uribe-McGuire, “Confidence in the US Supreme Court Is Declining, and That Puts Its Decisions at Risk from Congress,” *LSE US Centre*, July 24, 2018, available at <https://blogs.lse.ac.uk/usappblog/2018/07/24/confidence-in-the-us-supreme-court-is-declining-and-that-puts-its-decisions-at-risk-from-congress>.

**403** In the first report issued by the National Task Force on the Rule of Law & Democracy, we recommend that Congress “require written justifications for pardons involving close associates and should pass a resolution expressly disapproving of self-pardons.” Bharara, Whitman et al., *Proposals for Reform*, 19.

**404** Burgess Everett, “Republicans Trigger ‘Nuclear Option’ to Speed Trump Nominees,” *Politico*, Apr. 3, 2019, <https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118>; Russell Wheeler, “Senate GOP Used ‘Blue Slips’ to Block Obama Judicial Nominees, But Now Wants to Trash the Practice,” Brookings Institution, May 25, 2017, <https://www.brookings.edu/blog/fixgov/2017/05/25/blue-slips-and-judicial-nominees-in-senate/>; Jay Michaelson, “While You Weren’t Looking, the Senate Has Been Rubber-Stamping Trump’s Extreme Judicial Picks,” *Daily Beast*, Sept. 21, 2017, <https://www.thedailybeast.com/while-you-weren-trying-to-look-the-senate-has-been-rubber-stamping-trumps-extreme-judicial-picks>; Russell Wheeler, “Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump — What Has He Done with Them?” Brookings Institution, June 4, 2018, <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/> (cataloging lower court vacancies that went unfilled during Obama administration due to Senate obstruction).

**405** Nelson and Uribe-McGuire, “Confidence in the US Supreme Court.”

**406** See *The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption*, International Bar Association and Basel Institute on Governance, 2016, 10, available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=F856E657-A4FC-4783-806E-6AAC6895D37F>.

**407** The public increasingly sees that legislators’ votes and presidents’ policy decisions align with the interests of their biggest donors. See, e.g., Jonathan Chait, “Mick Mulvaney Tells Bankers to Pay Up If They Want Favors from Trump,” *New York*, Apr. 24, 2018, <http://nymag.com/intelligencer/2018/04/mulvaney-tells-bankers-pay-up-if-you-want-favors-from-trump.html> (reporting that White House Office of Management and Budget Director Mick Mulvaney told executives and lobbyists that the more they donated, the more influence they would have in the Trump administration, and that Mulvaney admitted that when he was a congressman, he only met with lobbyists who donated to his campaigns); Aaron Kessler, “Why the NRA Is So Powerful on Capitol Hill, by the Numbers,” *CNN*, Feb. 23, 2018, <https://www.cnn.com/2018/02/23/politics/nra-political-money-clout/index.html> (reporting the number of members of Congress receiving donations from the National Rifle Association, and size of donations); Isaac Arnsdorf, “Trump Rewards Big Donors with Jobs and Access,” *Politico*, Dec. 27, 2016, <https://www.politico.com/story/2016/12/donald-trump-donors-rewards-232974> (reporting that donors to President Trump’s 2016 campaign represent 38 percent of the people he selected for high-level government posts).

**408** U.S. Const. art. I, § 9, cl. 8 (“No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”); U.S. Const. art. II, § 1, cl. 7 (“The President shall, at stated times, receive for his service, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.”).

**409** U.S. Const. amends. V, XIV; *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (finding that a West Virginia state court judge should have recused, as a matter of due process, where defendant contributed \$3 million to judge’s election campaign).

**410** Indeed, as the Task Force has documented in its reports, presidents have typically divested their assets as a gesture that they mean to serve the people, not themselves, despite no legal obligation to do so, and presidents and other White House officials have refrained from directing enforcement actions in a manner that would enrich them or their close associates, although no legally enforceable barriers between the White House and enforcement agencies exist. Bharara, Whitman, et al., *Proposals for Reform*, 4, 18. They have selected highly qualified personnel who are dedicated to public service, even though the opportunity to use the power of administrative agencies to benefit special interests has always been there. See Section 2. Both Democratic and Republican administrations have promoted research initiatives in the interest of public health and welfare, despite the financial enticements of the tobacco, oil, and pharmaceutical industries, among others. See, e.g., Julia Belluz, “Scott Gottlieb Was the Most Aggressive Anti-Tobacco FDA Leader in Years. Now He’s Leaving,” *Vox*, Mar. 6, 2019, <https://www.vox.com/2019/3/6/18252176/scott-gottlieb-fda-vaping-tobacco>; Marshall Shepard, “The Surprising Climate and Environmental Legacy of President George H. W. Bush,” *Forbes*, Dec. 1, 2018, <https://www.forbes.com/sites/marshallshepard/2018/12/01/the-surprising-climate-and-environmental-legacy-of-president-george-h-w-bush/#3aece80c589c>; Katie Thomas and Michael S. Schmidt, “Glaxo Agrees to Pay \$3 Billion in Fraud Settlement,” *New York Times*, July 2, 2012, <https://www.nytimes.com/2012/07/03/business/glaxosmithkline-agrees-to-pay-3-billion-in-fraud-settlement.html>.

**411** From presidents doling out plum appointments to campaign

donors to the heads of several federal agencies in this administration implementing the regulatory agendas of former donors to their campaigns, public trust is damaged as the principle of government service in the public interest collapses, giving way to what increasingly appears to be a pay-to-play system. Eilperin, "Obama Ambassador Nominees"; Chris Arnold, "Under Trump Appointee, Consumer Protection Agency Seen Helping Payday Lenders," *NPR*, Jan. 24, 2018, <https://www.npr.org/2018/01/24/579961808/under-trump-appointee-consumer-protection-agency-seen-helping-payday-lenders>; Sam Ross-Brown, "Scott Pruitt's Dirty War on Clean Water," *American Prospect*, Oct. 10, 2017, <https://prospect.org/article/scott-pruit-t%E2%80%99s-dirty-war-clean-water>.

**412** See Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Act), Pub. L. No. 107-155, 116 Stat. 81 (2002). The earliest campaign finance regulation, the Tillman Act of 1907, was originally suggested by Theodore Roosevelt, a Republican, and was named after its Democratic Senate sponsor. An Act to Prohibit Corporations from Making Money Contributions in Connection with Political Elections (Tillman Act), Pub. L. No. 59-36, 34 Stat. 864 (1907).

**413** See Adam Skaggs and Fred Wertheimer, *Empowering Small Donors in Federal Elections*, Brennan Center for Justice, 2012, available at [http://www.brennancenter.org/sites/default/files/legacy/publications/Small\\_donor\\_report\\_FINAL.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/Small_donor_report_FINAL.pdf). See also Lawrence Norden, *The Case for Small Donor Public Financing in New York State*, Brennan Center for Justice, 2019, available at <https://www.brennancenter.org/sites/default/files/publications/CaseforPublicFinancing-NY.pdf>; Lawrence Norden and Douglas Keith, *Small Donor Tax Credits: A New Model*, Brennan Center for Justice, 2017, available at <https://www.brennancenter.org/sites/default/files/publications/Small%20Donor%20Tax%20Credit.pdf>; *First Look: Seattle's Democracy Voucher Program*, Win-Win Network and Every Voice Counts, 2017, available at <https://everyvoice.org/wp-content/uploads/2018/08/2017-11-15-Seattle-Post-Election-Report-FINAL.pdf>.

**414** The DISCLOSE Act, a version of which has been introduced in every Congress since 2010, would require dark money groups to disclose their donors. S. 1585, 115th Cong. (2017); H.R. 6239, 115th Cong. (2018). The bipartisan Honest Ads Act, first introduced in 2017, would bring greater transparency to internet ads on social media. H.R. 4077, 115th Cong. (2017); S. 1989, 115th Cong. (2017). Both have been incorporated into the 2019 democracy reform package, H.R. 1. H.R. 1, 116th Cong. (2019). See also "Dark Money Basics," Center for Responsive Politics, accessed Feb. 28, 2019, <https://www.opensecrets.org/dark-money/basics>; Alex Tausanovitch, "The NRA Can Be So Secretive About Its Russian Donors Because It Blocked Campaign Finance Reform," *NBC News*, May 4, 2018, <https://www.nbcnews.com/think/opinion/nra-can-be-so-secretive-about-its-russian-donors-because-ncna871216>.

Russian meddling in the 2016 election revealed further problems with campaign finance disclosure rules, most notably the lack of meaningful disclosure for most campaign ads on the internet. See Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, Brennan Center for Justice, 2018, available at [https://www.brennancenter.org/sites/default/files/publications/Getting Foreign Funds Out of America%27s Elections.Final\\_April9\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Getting Foreign Funds Out of America%27s Elections.Final_April9_0.pdf).

**415** The DISCLOSE Act would bar foreign governments, officials, and corporations owned or controlled by a foreign government or government official from ownership or control of more than 5 percent of the voting shares of a corporation wishing to spend in U.S. elections. H.R. 1, 116th Cong. §§ 4100–4122 (2019). See also Ellen L. Weintraub, "Taking on Citizens United," *New York Times*, Mar. 30, 2016, <https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html>.

**416** *Ibid.* In particular, Congress should curb candidate fundraising for outside groups, impose a "cooling off" period before candidates' staff members and consultants can work for allied super PACs, and block candidates and outside groups from sharing strategists or vendors. "Strengthen Rules Preventing Candidate Coordination with Super PACs," Brennan Center for Justice, Feb. 4, 2016, <https://>

[www.brennancenter.org/analysis/strengthen-rules-preventing-candidate-coordination-super-pacs](http://www.brennancenter.org/analysis/strengthen-rules-preventing-candidate-coordination-super-pacs). The treatment of coordinated expenditures as a type of contribution is a well-established principle of campaign finance law that *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and other recent cases have not changed. *Ibid.*

**417** In the last decade, a narrow majority on the Supreme Court swept aside several long-standing safeguards. See, e.g., *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Citizens United*, 558 U.S. 310; *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014). Most famously, in *Citizens United*, the Court invalidated limits on corporate and union campaign spending, enabling billions of dollars to flood into federal elections from super PACs funded by super wealthy mega-donors and dark money groups who keep their donors secret. See Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 2015, 3–4, available at [https://www.brennancenter.org/sites/default/files/analysis/Citizens\\_United\\_%20Five\\_Years\\_Later.pdf](https://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%20Five_Years_Later.pdf). The Court's decisions have done considerable damage to our campaign finance system and have undermined the public's trust in government. See Ann M. Ravel, "Disclosure and Public Confidence," *Yale Law and Policy Review* 34 (2016): 495. But many worthwhile policies remain constitutional. Indeed, some of the worst effects of the Court's decisions result as much from legislative and regulatory inaction in response to those rulings as they do from the rulings themselves.

**418** Efforts to curb the undue influence of money in politics have drawn broad public support. One recent poll found that 80 percent of voters in 2018 supported bipartisan political reform. William Gray, "New Poll: Voters Want to Reduce the Influence of Big Money in Politics," *Issue One*, Nov. 9, 2018, <https://www.issueone.org/new-poll-voters-want-to-reduce-the-influence-of-big-money-in-politics-should-be-a-top-priority-in-next-congress/>; Dale Eisman, "Poll: Most Americans Believe Our Political System Is Broken," *Common Cause*, Nov. 13, 2017, <https://www.commoncause.org/democracy-wire/most-americans-believe-system-broken/> (96 percent of Americans identifying money in politics as a major driver of government dysfunction); Jones, "Most Americans Want to Limit Campaign Spending."

## Appendix Endnotes

**419** Michael Grunwald, "Departmental Differences Show over ANWR Drilling," *Washington Post*, Oct. 19, 2001, <https://www.washingtonpost.com/archive/politics/2001/10/19/departamental-differences-show-over-anwr-drilling/cf80543c-3ad9-4a5d-99b8-bab2afc9c468/>.

**420** Phil Cooney, a former lobbyist at the American Petroleum Institute who was chief of staff for the White House Council on Environmental Quality under President George W. Bush, rewrote sections of important climate change reports, despite his lack of scientific training, exaggerating uncertainty about global warming in a manner that was not consistent with the overwhelming scientific consensus. Andrew C. Revkin, "Bush Aide Softened Greenhouse Gas Links to Global Warming," *New York Times*, June 8, 2005, <http://www.nytimes.com/2005/06/08/politics/bush-aide-softened-greenhouse-gas-links-to-global-warming.html>. The *New York Times* obtained the draft reports, with Cooney's handwritten edits, from the Government Accountability Project, a whistleblower protection organization. See also Andrew C. Revkin, "Former Bush Aide Who Edited Reports Is Hired by Exxon," June 15, 2005, <https://www.nytimes.com/2005/06/15/politics/former-bush-aide-who-edited-reports-is-hired-by-exxon.html>. After the story of his misconduct broke, Cooney resigned.

**421** Janet Wilson, "EPA Panel Advises Agency Chief to Think Again," *Los Angeles Times*, Feb. 4, 2006.

**422** The inspector general's office found that the public affairs office added uncertainty to scientific findings, changed report titles to obscure findings, eliminated controversial terms such as "global



warming,” and altered quotations from scientists. For example, the first sentence of a news release drafted by a scientist was, “The ‘ozone hole’ that develops over Antarctica was *larger* this year than in 2004 and was the fifth largest on record.” The public affairs office changed that sentence to read, “NASA researchers[] . . . determined the seasonal ozone hole that developed over Antarctica this year is *smaller* than in previous years.” NASA Office of the Inspector General, *Investigative Summary* (italics added). See also Andrew C. Revkin, “Climate Expert Says NASA Tried to Silence Him,” *New York Times*, Jan. 29, 2006, <https://www.nytimes.com/2006/01/29/science/earth/climate-expert-says-nasa-tried-to-silence-him.html>. George Deutsch, a politically appointed public affairs officer at NASA, rejected a request from a producer at NPR to interview James E. Hansen, then director of NASA’s Goddard Institute for Space Studies, reportedly calling NPR “the most liberal” media outlet in the country and that his job was “to make the president look good.”

**423** Tom DiChristopher, “Major EPA Fracking Study Downplayed Risks to US Water Supply, Investigation Finds,” *CNBC*, Dec. 1, 2016, <https://www.cnbc.com/2016/12/01/major-epa-fracking-study-downplayed-risks-to-us-water-supply-investigation-finds.html>. Records of communications obtained through Freedom of Information Act requests indicate that the changes were made after EPA officials and media consultants met with advisers to President Obama to discuss marketing the study. Scott Tong and Tom Scheck, “EPA’s Late Changes to Fracking Study Downplay Risk of Drinking Water Pollution,” *Marketplace*, Nov. 30, 2016, <https://www.marketplace.org/2016/11/29/world/epa-s-late-changes-fracking-study-portray-lower-pollution-risk>. An EPA panel of independent scientists contested the report’s conclusions on the grounds that they either lacked quantitative evidence or were inconsistent with underlying data and recommended that the EPA revise the report’s findings to clearly link to evidence provided in the report. Letter from Peter S. Thorne, chair, Science Advisory Board, and David A. Dzombak, chair, SAB Hydraulic Fracturing Research Advisory Panel, to Gina McCarthy, administrator, Environmental Protection Agency (Aug. 11, 2016), available at <https://www.documentcloud.org/documents/3011057-EPA-SAB-16-005-Unsigned.html>. The controversial conclusion that there “no evidence that fracking systemically contaminates water” supplies was deleted from the final study because EPA scientists determined it could not be quantitatively supported. Coral Davenport, “Reversing Course, E.P.A. Says Fracking Can Contaminate Drinking Water,” *New York Times*, Dec. 13, 2016, <https://www.nytimes.com/2016/12/13/us/reversing-course-epa-says-fracking-can-contaminate-drinking-water.html>.

**424** In 2013 and 2014, officials and scientists from the National Institutes of Health (NIH) met with alcohol industry representatives to solicit funding for a study of the benefits of moderate drinking. They also allowed industry representatives to give input on study design. After their actions were publicly reported, the NIH ended the trial. Rony Caryn Rabin, “Major Study of Drinking Will Be Shut Down,” *New York Times*, June 15, 2018, <https://www.nytimes.com/2018/06/15/health/alcohol-nih-drinking.html>.

**425** Gardiner Harris, “Plan to Widen Availability of Morning-After Pill Is Rejected,” *New York Times*, Dec. 7, 2011, <https://www.nytimes.com/2011/12/08/health/policy/sebelius-overrules-fda-on-freer-sale-of-emergency-contraceptives.html>.

**426** Pam Belluck, “Judge Strikes Down Age Limits on Morning-After Pill,” *New York Times*, Apr. 5, 2013, <https://www.nytimes.com/2013/04/06/health/judge-orders-fda-to-make-morning-after-pill-available-over-the-counter-for-all-ages.html> (quoting Tummino v. Hamburg, 936 F. Supp. 2d 162, 192 (E.D.N.Y. 2013)).

**427** Lisa Friedman, “E.P.A. Cancels Talk on Climate Change by Agency Scientists,” *New York Times*, Oct. 22, 2017, <https://www.nytimes.com/2017/10/22/climate/epa-scientists.html>; Arianna Skibell, “Agency Keeps Scientists from Speaking at Watershed Conference,” *Greenwire*, Oct. 23, 2017.

**428** Elliot Negin, “Energy Department Scientists Barred from Attending Nuclear Power Conference,” *Huffington Post*, Aug. 1,

2017, [https://www.huffpost.com/entry/energy-department-scientists-barred-from-attending\\_b\\_597f7e2ee4b0cb4fc1c73b8e](https://www.huffpost.com/entry/energy-department-scientists-barred-from-attending_b_597f7e2ee4b0cb4fc1c73b8e); Brittany Patterson, “Govt. Scientist Blocked from Talking About Climate and Fire,” *E&E News*, Oct. 31, 2017, <https://www.eenews.net/stories/1060065143>; Sarah Kaplan, “Government Scientists Blocked from the Biggest Meeting in Their Field,” *Washington Post*, Dec. 22, 2017, <https://www.washingtonpost.com/news/speaking-of-science/wp/2017/12/22/government-scientists-blocked-from-the-biggest-meeting-in-their-field/>; Dino Grandoni, “The Energy 202: Interior Agency Blocks Group of Archaeologists from Attending Scientific Conference,” *Washington Post*, May 3, 2018, <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/05/03/the-energy-202-interior-agency-blocks-group-of-archaeologists-from-attending-scientific-conference/>.

**429** Lance Leggett, Chief of Staff, Office of the Secretary, “Congressional Relations” (official memorandum, Washington, D.C.: Department of Health and Human Services, May 3, 2017), available at <https://www.washingtonpost.com/news/post-nation/wp-content/uploads/sites/23/2017/05/HHSMemo.pdf>; Sam Baker, “CDC Cracks Down on Communications with Reporters,” *Axios*, Sept. 12, 2017, <https://www.axios.com/cdc-cracks-down-on-communications-with-reporters-1513305443-0a94d025-172c-44f1-b26c-e02885bdf40.html>; Rong-Gong Lin II, “Trump Administration Tightens Rules for Federal Scientists Talking to Reporters,” *Los Angeles Times*, June 22, 2018, <https://www.latimes.com/local/lanow/la-me-ln-trump-policy-usgs-scientists-20180621-story.html>.

**430** Center for Science and Democracy, *Science Under President Trump: Voices of Scientists Across 16 Federal Agencies*, Union of Concerned Scientists, 2018, 7, available at <https://www.ucsusa.org/sites/default/files/attach/2018/08/science-under-trump-report.pdf>.

**431** Lena H. Sun and Juliet Eilperin, “CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity,” *Washington Post*, Dec. 15, 2017, [https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010\\_story.html](https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html).

**432** Julia Belluz, “CDC Banned from Using 7 Words, Including ‘Science-Based,’” in Budget Documents,” *Vox*, Dec. 16, 2017, <https://www.vox.com/2017/12/16/16784498/cdc-seven-words-science-transgender-fetus>.

**433** Scott Waldman, “Officials Removed Climate References from Press Releases,” *E&E News*, July 8, 2019, <https://www.eenews.net/climatewire/2019/07/08/stories/1060709857>.

**434** Patrick Malone, “The Trump Administration Reins In a Nuclear Weapons Safety Watchdog,” Center for Public Integrity, Oct. 29, 2018, <https://publicintegrity.org/national-security/the-trump-administration-reins-in-a-nuclear-weapons-safety-watchdog/>; Rebecca Moss, “Trump Administration Neuters Nuclear Safety Board,” *ProPublica*, July 22, 2018, <https://www.propublica.org/article/nuclear-safety-board-information-access-trump-administration>.

**435** The EPA’s proposed “transparent science” rule would require that scientific studies that support “pivotal regulatory science” publish their underlying data, models, and assumptions, which would often entail disclosure of personal health and other private information of study participants, in contravention of privacy laws. Robinson Meyer, “Even Geologists Hate the EPA’s New Science Rule,” *Atlantic*, July 17, 2018, <https://www.theatlantic.com/science/archive/2018/07/scott-pruitts-secret-science-rule-could-still-become-law/565325/>.

**436** Audra J. Wolfe, “Yes, Radiation Is Bad for You. The EPA’s ‘Transparency Rule’ Would Be Even Worse,” *Washington Post*, Oct. 8, 2018, <https://www.washingtonpost.com/outlook/2018/10/08/yes-radiation-is-bad-you-epas-transparency-rule-would-be-even-worse>. See also Scott Waldman, “How Pruitt’s Science Plans Might Help Industry Fight Rules,” *E&E News*, May 1, 2018, <https://www.eenews.net/stories/1060080501> (“Offering more raw data[] . . . could allow industry to take data out of context and to rework it with predetermined findings that it will claim invalidates the work of established and independent researchers[.]”); Bernard Goldstein, “Why the EPA’s ‘Secret

Science' Proposal Alarms Public Health Experts." *The Conversation*, May 18, 2018, <https://theconversation.com/why-the-epas-secret-science-proposal-alarms-public-health-experts-96000> (providing historical context for "transparent science rule").

**437** Robinson Meyer, "Trump's Interference with Science Is Unprecedented," *The Atlantic*, Nov. 9, 2018, <https://www.theatlantic.com/science/archive/2018/11/experts-warn-trump-epa-meddling-scientific-method/575377/>.

**438** Juliet Eilperin, Josh Dawsey, and Brady Dennis, "White House Blocked Intelligence Agency's Written Testimony Calling Climate Change 'Possibly Catastrophic,'" *Washington Post*, June 8, 2019, <https://www.washingtonpost.com/climate-environment/2019/06/08/white-house-blocked-intelligence-aides-written-testimony-saying-human-caused-climate-change-could-be-possibly-catastrophic/>.

**439** Scott Waldman, "Climate Analyst Whose Testimony Was Blocked Resigns," *E&E News*, July 11, 2019, <https://www.eenews.net/climatewire/2019/07/11/stories/1060722687>.

**440** Ben Guarino, "USDA Orders Scientists to Say Published Research Is 'Preliminary,'" *Washington Post*, Apr. 19, 2019, <https://www.washingtonpost.com/science/2019/04/19/usda-orders-scientists-say-published-research-is-preliminary/>. The USDA abandoned the practice in the face of criticism. Ben Guarino, "After Outcry, USDA Will No Longer Require Scientists to Label Research 'Preliminary,'" *Washington Post*, May 10, 2019, [https://www.washingtonpost.com/science/2019/05/10/after-outcry-usda-will-no-longer-require-scientists-label-research-preliminary/?utm\\_term=.5c543b9f4937](https://www.washingtonpost.com/science/2019/05/10/after-outcry-usda-will-no-longer-require-scientists-label-research-preliminary/?utm_term=.5c543b9f4937).

**441** Adam Federman, "How Science Got Trampled in the Rush to Drill in the Arctic," *Politico*, July 26, 2019, <https://www.politico.com/interactives/2019/trump-science-alaska-drilling-rush/>.

**442** Ariel Wittenberg and Dylan Brown, "EPA Deleted Scientists' Concerns About Pebble Analysis," *E&E News*, Aug. 16, 2019, <https://www.eenews.net/greenwire/2019/08/16/stories/1060971569>.

**443** Matthew Choi and Rishika Dugyala, "Trump Secures a NOAA Walkback, Bending Another Agency to His Words," *Politico*, Sept. 6, 2019, <https://www.politico.com/story/2019/09/06/noaa-defends-trump-alabama-hurricane-claims-1484326>; Christopher Flavelle, Lisa Friedman and Peter Baker, "Commerce Chief Threatened Firings at NOAA After Trump's Hurricane Tweets, Sources Say," *New York Times*, Sept. 9, 2019, <https://www.nytimes.com/2019/09/09/climate/hurricane-dorian-trump-tweet.html>; Peter Baker, Lisa Friedman, and Christopher Flavelle, "White House Pressed Agency to Repudiate Weather Forecasters Who Contradicted Trump," *New York Times*, Sept. 11, 2019, <https://www.nytimes.com/2019/09/11/us/politics/trump-alabama-noaa.html>.

**444** Charlie Savage, "Report Finds Meddling in Interior Dept. Actions," *New York Times*, Dec. 15, 2008, <https://www.nytimes.com/2008/12/16/washington/16interior.html>; Department of the Interior Office of the Inspector General, *Investigative Report on Allegations Against Julie MacDonald*; Scientific Integrity Program, *Political Interference in Endangered Species Science: A Systemic Problem at the U.S. Fish and Wildlife Service*, Union of Concerned Scientists, 2006, available at [https://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific\\_integrity/white-tailed-prairie-dog.pdf](https://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/white-tailed-prairie-dog.pdf); U.S. Department of the Interior Office of Inspector General, *The Endangered Species Act and the Conflict Between Science and Policy* (Washington, D.C.: Department of the Interior, 2008), available at <https://www.doi.gov/sites/doi.gov/files/EndangeredSpecies-FINAL.pdf>.

**445** Dino Grandoni and Juliet Eilperin, "Interior Dept. Officials Downplayed Federal Wildlife Experts' Concerns About Trump's Border Wall, Documents Show," *Washington Post*, Dec. 10, 2018, <https://www.washingtonpost.com/energy-environment/2018/12/11/interior-officials-downplayed-federal-wildlife-experts-concerns-about-trumps-border-wall-documents-show/>.

**446** Lydia Wheeler, "Report: Labor Department Hiding Unfavorable Report on Impacts of Tip-Pooling Rule," *The Hill*, Feb. 1, 2018, <http://thehill.com/regulation/labor/371798-report-labor-department-hiding-unfavorable-report-on-impacts-of-tip-pooling>;

<http://thehill.com/regulation/labor/371798-report-labor-department-hiding-unfavorable-report-on-impacts-of-tip-pooling>; Eric Levitz, "Trump DOL Hid Report Showing Its Tips Rule Would Likely Cost Workers Billions," *New York Magazine*, Feb. 1, 2018, <http://nymag.com/daily/intelligencer/2018/02/dol-hid-study-showing-tips-rule-could-cost-workers-billions.html>.

**447** Ben Penn, "Mulaney, Acosta Override Regulatory Office to Hide Tips Rule Data," *Bloomberg*, Mar. 1, 2018, <https://news.bloomberglaw.com/daily-labor-report/mulaney-acosta-override-regulatory-office-to-hide-tips-rule-data-1>.

**448** See Coral Davenport and Eric Lipton, "Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say," *New York Times*, Aug. 11, 2017, <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html>.

**449** Scott Bronstein, Drew Griffin, and Audrey Ash, "Whistleblower Says He Was Pressured by Trump Administration to Reverse Environmental Decision," *CNN*, July 9, 2019, <https://www.cnn.com/2019/07/08/politics/interior-department-arizona-development-bernhardt/index.html>.

**450** "Distorting Scientific Knowledge on Florida Panthers," Union of Concerned Scientists, accessed June 15, 2019, [https://www.ucsusa.org/center-for-science-and-democracy/scientific\\_integrity/abuses\\_of\\_science/a-to-z/florida-panther.html](https://www.ucsusa.org/center-for-science-and-democracy/scientific_integrity/abuses_of_science/a-to-z/florida-panther.html).

**451** Emily Heil, "Medicare Actuary Details Threats over Estimates," *Government Executive*, Mar. 25, 2004, <https://www.govexec.com/federal-news/2004/03/medicare-actuary-details-threats-over-estimates/16317/>. The agency's chief actuary's role is to provide Congress with "prompt, impartial . . . information," 143 Cong. Rec. H6243 (daily ed. July 29, 1997).

**452** Jory Heckman, "Scientist Claims 'Unrelenting Intimidation' from Energy Management," *Federal News Network*, Sept. 21, 2016, <https://federalnewsnetwork.com/agency-oversight/2016/09/scientist-claims-unrelenting-intimidation-energy-management/>; Christa Marshall, "Lawmakers Slam 'Disturbing' Firing of Agency Scientist," *E&E News*, Sept. 22, 2016, <https://www.eenews.net/stories/1060043226>.

**453** Joel Clement, "I'm a Scientist. I'm Blowing the Whistle on the Trump Administration," *Washington Post*, July 19, 2017, [https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-17740635e83\\_story.html](https://www.washingtonpost.com/opinions/im-a-scientist-the-trump-administration-reassigned-me-for-speaking-up-about-climate-change/2017/07/19/389b8dce-6b12-11e7-9c15-17740635e83_story.html); Juliet Eilperin, "Senate Democrats Call for an Investigation of Climate Scientist Whistleblower Complaint," *Washington Post*, July 24, 2017, <https://www.washingtonpost.com/news/energy-environment/wp/2017/07/24/senate-democrats-demand-ig-probe-of-interiors-reassigning-top-career-officials/>. The department's OIG determined that DOI officials did not follow Office of Personnel Management (OPM) guidance for organizing and operating the Employee Resources Board (ERB), the entity tasked with effectuating the reassignments. The OIG was unable to determine whether the reassignments violated federal law due to the ERB's failure to maintain records of its operation and decision-making. U.S. Department of the Interior Office of Inspector General, *Reassignment of Senior Executives at the U.S. Department of the Interior* (Washington, D.C.: Department of the Interior, 2018), 1, available at [https://www.doi.gov/sites/doi.gov/files/FinalEvaluation\\_SESReassignments\\_Public.pdf](https://www.doi.gov/sites/doi.gov/files/FinalEvaluation_SESReassignments_Public.pdf).

**454** Statement of Ryan Zinke, Secretary of the Interior, Before the Senate Energy and Natural Resources Committee on the 2018 President's Budget Request, June 20, 2017, 5, available at [https://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=E4146E42-E6AD-4519-AE88-3EE0402ABED2](https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=E4146E42-E6AD-4519-AE88-3EE0402ABED2).

**455** Darryl Fears, "Interior Department Whistleblower Resigns; Bipartisan Former Appointees Object to Zinke's Statements," *Washington Post*, Oct. 6, 2017, <https://www.washingtonpost.com/news/energy-environment/wp/2017/10/04/whistleblower-resigns-keeping-my-voice-more-important-than-keeping-my-job/>.

**456** Elizabeth Shogren, "Scientist Who Resisted Censorship of

Climate Report Lost Her Job.” *Reveal*, Feb. 14, 2019, <https://www.revealnews.org/blog/scientist-who-resisted-censorship-of-climate-report-lost-her-job/>.

**457** Ryan McCrimmon, “Economists Flee Agriculture Dept. After Feeling Punished Under Trump,” *Politico*, May 7, 2019, <https://www.politico.com/story/2019/05/07/agriculture-economists-leave-trump-1307146?cid=apn>.

**458** Rick Weiss, “HHS Seeks Science Advice to Match Bush Views,” *Washington Post*, Sept. 17, 2002, <https://www.washingtonpost.com/archive/politics/2002/09/17/hhs-seeks-science-advice-to-match-bush-views/cbe5071b-4426-403d-949b-e27769026780/>.

**459** Gerald Markowitz and David Rosner, “Politicizing Science: The Case of the Bush Administration’s Influence on the Lead Advisory Panel at the Centers for Disease Control,” *Journal of Public Health Policy* 24, no. 2 (2003): 112–19.

**460** “Lead Astray in Ohio: Bush Admin. Stymies Added Protections,” Environmental Working Group, May 3, 2004, <https://www.ewg.org/research/lead-astray/bush-admin-stymies-added-protections>.

**461** *Ibid.*

**462** Andrew C. Revkin, “Bush vs. the Laureates: How Science Became a Partisan Issue,” *New York Times*, Oct. 19, 2004, <https://www.nytimes.com/2004/10/19/science/19poli.html>.

**463** Andrew Rosenberg, “Is EPA Excessively Restricting Access to Its Science Advisory Board Members?” Union of Concerned Scientists, Aug. 12, 2014, <https://blog.ucsusa.org/andrew-rosenberg/is-epa-excessively-restricting-access-to-its-science-advisory-board-members-626>.

**464** Michelle Diament, “Critics Question Obama Choice for Disability Committee,” *Disability Scoop*, Jan. 13, 2012, <https://www.disability-scoop.com/2012/01/13/critics-question-obama-choice/14766/>.

**465** Matthew Mosk, Brian Ross, and Cho Park, “How Clinton Donor Got on Sensitive Intelligence Board,” *ABC News*, June 10, 2016, <https://abcnews.go.com/Politics/clinton-donor-sensitive-intelligence-board/story?id=39710624>.

**466** Michael Doyle and Brittany Patterson, “Climate Advisory Group Died Quietly,” *Climate Wire*, Aug. 17, 2017, <https://www.eenews.net/stories/1060058869>. See also Scott Waldman, “EPA’s Science Advisory Board Has Not Met in 6 Months,” *E&E News*, Mar. 6, 2018, <https://www.scientificamerican.com/article/epas-science-advisory-board-has-not-met-in-6-months/>.

**467** Juliet Eilperin, “Nearly All Members of National Park Service Advisory Panel Resign in Frustration,” *Washington Post*, Jan. 17, 2018, [https://www.washingtonpost.com/national/health-science/nearly-all-members-of-national-park-service-advisory-panel-resign-in-frustration/2018/01/16/b322ef5e-fae3-11e7-ad8c-ecbb62019393\\_story.html](https://www.washingtonpost.com/national/health-science/nearly-all-members-of-national-park-service-advisory-panel-resign-in-frustration/2018/01/16/b322ef5e-fae3-11e7-ad8c-ecbb62019393_story.html).

**468** Dino Grandoni and Juliet Eilperin, “Trump Administration Swaps Academics for Business Executives on National Park Service Advisory Panel,” *Washington Post*, Dec. 6, 2018, <https://www.washingtonpost.com/energy-environment/2018/12/06/trump-administration-swaps-academics-businessmen-national-park-service-advisory-panel/>.

**469** Genna Reed et al., *Abandoning Science Advice*, Union of Concerned Scientists, 2018, 6, <https://www.ucsusa.org/sites/default/files/attach/2018/01/abandoning-science-advice-full-report.pdf>.

**470** *Ibid.*

**471** *Secretary Perry Announces Members of the Secretary of Energy Advisory Board*, Department of Energy, Feb. 20, 2019, <https://www.energy.gov/seab/articles/secretary-perry-announces-members-secretary-energy-advisory-board>.

**472** *Ibid.*

**473** “Secretary of Energy Advisory Board (SEAB),” Council of State Governments, last accessed Apr. 23, 2019, <http://www.csg.org/aap-ca/SEAB.aspx>.

**474** Mark Hand, “Government Watchdog to Investigate Scott Pruitt’s Shakeup of EPA Advisory Boards,” *ThinkProgress*, Mar. 7, 2018, <https://thinkprogress.org/gao-investigating-epa-advisory-boards-b615407c3644/> (“Normally, when candidates are nominated to serve on advisory committees, EPA’s career scientists and lawyers provide input to the administrator regarding which nominees have the right scientific expertise and which have conflicts [sic] of interests. And normally, the administrator follows the career staff’s recommendations. But under Pruitt, political appointees are playing key roles in selecting committee members.”).

**475** Reed et al., *Abandoning Science Advice*.

**476** Suzy Khimm and Andrew Rafferty, “Pruitt Makes EPA Science Board More Industry Friendly,” *NBC News*, Nov. 3, 2017, <https://www.nbcnews.com/politics/white-house/pruitt-makes-epa-science-board-more-industry-friendly-n817276>.

**477** See Sean Reilly, “38 Science Advisers Get Pink Slips — Internal Email,” *Greenwire*, June 20, 2017, <https://www.eenews.net/stories/1060056308>.

**478** John McQuade, “Trump Officials Act to Tilt Federal Science Boards Toward Industry,” *Scientific American*, May 16, 2017, <https://www.scientificamerican.com/article/trump-officials-act-to-tilt-federal-science-boards-toward-industry/>.

**479** 42 U.S.C. § 7409(d)(2A).

**480** Sean Reilly, “Key EPA Science Advisers Call on Agency to Revive an Expert Soot Panel It Just Killed,” *E&E News*, Dec. 11, 2018, <https://www.sciencemag.org/news/2018/12/two-epa-science-advisers-call-agency-revive-expert-panel-it-killed>.

**481** See *Acting Administrator Wheeler Announces Science Advisors for Key Clean Air Act Committee*, Environmental Protection Agency, Oct. 10, 2018, <https://www.epa.gov/newsreleases/acting-administrator-wheeler-announces-science-advisors-key-clean-air-act-committee>; E. A. Crunden, “Like Pruitt, Wheeler’s New EPA Clean Air Advisors Ignore Established Science,” *Think Progress*, Oct. 11, 2018, <https://thinkprogress.org/wheeler-science-pruitt-epa-panel-be0a783aa55b/>; Kate Peikes, “Air Quality Impacts Health, Professor Says,” *Herald Journal*, Jan. 25, 2016, [https://www.hjnews.com/all-access/air-quality-impacts-health-professor-says/article\\_406e0713-fb38-554c-a2f5-4efaf3c86092.html](https://www.hjnews.com/all-access/air-quality-impacts-health-professor-says/article_406e0713-fb38-554c-a2f5-4efaf3c86092.html).

**482** Scott Waldman, “EPA Science Adviser Allowed Industry Group to Edit Journal Article,” *E&E News*, Dec. 10, 2018, <https://www.sciencemag.org/news/2018/12/epa-science-adviser-allowed-industry-group-edit-journal-article>.

**483** Lisa Friedman, “E.P.A. to Disband a Key Scientific Review Panel on Air Pollution,” *New York Times*, Oct. 11, 2018, <https://www.nytimes.com/2018/10/11/climate/epa-disbands-pollution-science-panel.html>.

**484** Bernard D. Goldstein, “If I Were Still Working at the EPA, I Would Resign,” *Washington Post*, Apr. 2, 2019, [https://www.washingtonpost.com/opinions/if-i-were-still-working-at-the-epa-i-would-resign/2019/04/02/88e6e2b8-519a-11e9-88a1-ed346f0ec94f\\_story.html](https://www.washingtonpost.com/opinions/if-i-were-still-working-at-the-epa-i-would-resign/2019/04/02/88e6e2b8-519a-11e9-88a1-ed346f0ec94f_story.html).

**485** Gretchen Goldman, “We Can’t Take the Science Out of Our Clean Air Standards,” *Scientific American*, Mar. 21, 2019, <https://blogs.scientificamerican.com/observations/we-cant-take-the-science-out-of-our-clean-air-standards/>.

**486** *Ibid.*

**487** Benjamin J. Hulac, “Creation of a Panel Disputing Climate Change Causes White House Infighting,” *Roll Call*, Mar. 14, 2019, <https://www.rollcall.com/news/congress/panel-dispute-climate-science-facing-debate-white-house/>; Juliet Eilperin, Josh Dawsey, and Brady Dennis, “White House to Set up Panel to Counter Climate Change Consensus, Officials Say,” *Washington Post*, Feb. 24, 2019, <https://www.washingtonpost.com/national/health-science/white-house-to-select-federal-scientists-to-reassess-government-climate-findings-sources-say/2019/02/24/49cd0a84-37dd-11e9->

- [af5b-b51b7ff322e9\\_story.html](#). The panel will not operate under the Federal Advisory Committee Act. David Armiak, "Trump Taps Climate Denier to Lead a Secret White House Climate Panel," *PR Watch*, Mar. 12, 2019, <https://www.prwatch.org/news/2019/03/13454/trump-taps-climate-denier-lead-secret-white-house-climate-panel>. The effort to convene the panel has stalled. Scott Waldman, "White House Won't Review Climate Science Before Election," *E&E News*, July 9, 2019, <https://www.eenews.net/climatewire/2019/07/09/stories/1060713373>.
- 488** Friedman, "E.P.A. to Disband"; Warren Cornwall, "Trump's EPA Has Blocked Agency Grantees from Serving on Science Advisory Panels. Here Is What It Means," *Science*, Oct. 31, 2017, <https://www.sciencemag.org/news/2017/10/trump-s-epa-has-blocked-agency-grantees-serving-science-advisory-panels-here-what-it>.
- 489** *Protecting Science at Federal Agencies: How Congress Can Help*, Climate Science Legal Defense Fund et al., 2018, 11–12, available at <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2018/11/Protecting-Science-at-Federal-Agencies-Report.pdf>.
- 490** Lila Thulin, "Here's the Expertise Scott Pruitt Is Removing from the EPA's Advisory Boards," *Slate*, Nov. 2, 2017, <https://slate.com/technology/2017/11/a-list-of-expertise-scott-pruitt-is-removing-from-the-epa.html>.
- 491** Cornwall, "Trump's EPA."
- 492** Ted Gest, "Criminologists Ask DOJ to Fill Gaps in FBI Data," *Crime Report*, Dec. 4, 2017, <https://thecrimereport.org/2017/12/04/criminologists-ask-doj-to-fill-gaps-in-fbi-data/>; Clare Malone and Jeff Asher, "The First FBI Crime Report Issued Under Trump Is Missing a Ton of Info," *FiveThirtyEight*, Oct. 27, 2017, <https://fivethirtyeight.com/features/the-first-fbi-crime-report-issued-under-trump-is-missing-a-ton-of-info/>.
- 493** Chris Mooney and Brady Dennis, "EPA Halts Inquiry into Oil and Gas Industry Emissions of Methane, a Powerful Greenhouse Gas," *Washington Post*, Mar. 2, 2017, <https://www.washingtonpost.com/news/energy-environment/wp/2017/03/02/epa-halts-inquiry-into-oil-and-gas-industry-emissions-of-methane-a-powerful-greenhouse-gas/>.
- 494** Alexandra Hutzler, "Trump's EPA May Have Shut Down Its Climate Change Website for Good," *Newsweek*, Nov. 2, 2018, <https://www.newsweek.com/epa-shuts-down-climate-change-websites-1198362>.
- 495** Meredith Wadman, "USDA Blacks Out Animal Welfare Information," *Science*, Feb. 3, 2017, <http://www.sciencemag.org/news/2017/02/usda-blacks-out-animal-welfare-information>; Karen Brulliard, "USDA Removed Animal Welfare Reports from Its Site. A Showhorse Lawsuit May Be Why," *Washington Post*, Feb. 9, 2017, [https://www.washingtonpost.com/news/animalia/wp/2017/02/09/usda-animal-welfare-records-purge-may-have-been-triggered-by-horse-industry-lawsuit/?utm\\_term=.24d6a8501a70](https://www.washingtonpost.com/news/animalia/wp/2017/02/09/usda-animal-welfare-records-purge-may-have-been-triggered-by-horse-industry-lawsuit/?utm_term=.24d6a8501a70).
- 496** Kendra Pierre-Louis, "What We Actually Lose When the USDA and EPA Can't Talk to the Public," *Popular Science*, Jan. 24, 2017, <https://www.popsoci.com/usda-epa-science-gag-order-government>.
- 497** *Ibid.*
- 498** Richard Rubin, "Treasury Removes Paper at Odds with Mnuchin's Take on Corporate-Tax Cut's Winners," *Wall Street Journal*, Sept. 28, 2017, <https://www.wsj.com/articles/treasury-removes-paper-at-odds-with-mnuchin-take-on-corporate-tax-cuts-winners-1506638463>; "Department of Treasury Deletes Economic Science Paper from Website," *Union of Concerned Scientists*, Sept. 28, 2017, <https://www.ucsusa.org/center-science-and-democracy/attacks-on-science/department-treasury-deletes-economic-science-paper#.WphdW2rwbcs>.
- 499** Jenna Johnson, "FEMA Removes — Then Restores — Statistics About Drinking Water Access and Electricity in Puerto Rico from Website," *Washington Post*, Oct. 6, 2017, <https://www.washingtonpost.com/news/post-politics/wp/2017/10/05/fema-removes-statistics-about-drinking-water-access-and-electricity-in-puerto-rico-from-website/>.
- 500** Sam Knight, "Mulaney Student Fee Whitewash Benefits Bank of America, U.S. Bank," *Truthout*, Sept. 2, 2018, <https://truthout.org/articles/mulaney-student-fee-whitewash-benefits-bank-of-america-us-bank/>; Nikhel Sus, "CREW Releases Shelved CFPB Report on Dubious Student Account Fees," *Citizens for Responsibility and Ethics in Washington*, Dec. 11, 2018, <https://www.citizensforethics.org/crew-releases-shelved-cfpb-report-on-dubious-student-account-fees/>. Compare Consumer Financial Protection Bureau, "Student Banking: Annual Report to Congress," Dec. 2016, [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016\\_cfpb\\_student\\_banking\\_report.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016_cfpb_student_banking_report.pdf), and Consumer Financial Protection Bureau, "College Credit Card Agreements: Annual Report to Congress," Jan. 2019, [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_college-credit-card-agreements-report\\_2017.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_college-credit-card-agreements-report_2017.pdf).
- 501** Annie Snider, "White House, EPA Headed Off Chemical Pollution Study," *Politico*, May 14, 2018, <https://www.politico.com/story/2018/05/14/emails-white-house-interfered-with-science-study-536950>.
- 502** Helene Bottemiller Evich, "Agriculture Department Buries Studies Showing Dangers of Climate Change," *Politico*, June 23, 2019, <https://www.politico.com/story/2019/06/23/agriculture-department-climate-change-1376413>.
- 503** Heather Rogers, "The Secretive White House Office Lobbyists Use to Block Government Regulation," *Pacific Standard*, May 3, 2017, <https://psmag.com/news/secretive-white-house-office-lobbyists-use-block-government-regulation-87408>.
- 504** *Ibid.*
- 505** "White House Sidelines Science in Regulating Ozone," Union of Concerned Scientists, [https://www.ucsusa.org/center-for-science-and-democracy/scientific\\_integrity/abuses\\_of\\_science/a-to-z/white-house-sidelines-science.html](https://www.ucsusa.org/center-for-science-and-democracy/scientific_integrity/abuses_of_science/a-to-z/white-house-sidelines-science.html).
- 506** Rogers, "The Secretive White House Office."
- 507** Ben Penn, "Labor Dept. Ditches Data Showing Bosses Could Skim Waiters' Tips," *Bloomberg BNA*, Feb. 1, 2018, <https://bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>; Wheeler, "Report: Labor Department Hiding Unfavorable Report"; Levitz, "Trump DOL Hid Report."
- 508** 40 C.F.R. § 230.3(o).
- 509** Davenport and Lipton, "Scott Pruitt."
- 510** Ariel Wittenberg and Kevin Bogardus, "EPA Falsely Claims 'No Data' on Waters in WOTUS Rule," *E&E News*, Dec. 11, 2018, <https://www.eenews.net/stories/1060109323>.
- 511** *Ibid.*
- 512** *Ibid.*
- 513** 83 Fed. Reg. 48,737.
- 514** Thomas R. Waters, Ph.D., James Collins, Ph.D., and Dawn Castillo, MPH, "NIOSH Assessment of Risks for 16- and 17-Year-Old Workers Using Power-Driven Patient Lift Devices," Centers for Disease Control and National Institute for Occupational Safety and Health, [https://www.dol.gov/whd/CL/NIOSH\\_PatientLifts.pdf](https://www.dol.gov/whd/CL/NIOSH_PatientLifts.pdf).
- 515** *Top House Democrats: Proposed Change to Child Labor Rules Could Endanger Young People and Patients*, Education and the Workforce Committee Democrats, Sept. 26, 2018, <https://edlabor.house.gov/media/press-releases/top-house-democrats-proposed-change-to-child-labor-rules-could-endanger-young-people-and-patients>. See also Jaclyn Diaz, "Teen Health-Worker Proposal Didn't Get Risk Assessment," *Bloomberg Law*, Sept. 26, 2018, <https://news.bloomberglaw.com/daily-labor-report/teen-health-worker-proposal-didnt-get-risk-assessment-1>.
- 516** 83 Fed. Reg. 48,742. See, e.g., Letter from Robert C. "Bobby" Scott, ranking member, Committee on Education and the Workforce, Mark Takano, ranking member, Subcommittee on Workforce Protections, Committee on Education and the Workforce, Rosa L. DeLauro, ranking member, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Committee on Appropriations, and Lucille Roybal-Allard, member of Congress, to R. Alexander

Acosta, secretary of labor (Oct. 30, 2018), available at <http://src.bna.com/DFa>; Diaz, "Teen Health-Worker Rule."

**517** Debbie Berkowitz, "Labor Department Refused to Release Survey It Claimed Justified Rolling Back Child Labor Protections. We Obtained a Copy." National Employment Law Project, Dec. 3, 2018, <https://www.nelp.org/news-releases/labor-department-refused-release-survey-claimed-justified-rolling-back-child-labor-protections-obtained-copy/>; Letter from Scott et al. to Acosta, secretary of labor.

**518** 83 Fed. Reg. 4780. See also Sarah Jones, "The USDA Goes Hog Wild," *New Republic*, Apr. 26, 2018, <https://newrepublic.com/article/148135/usda-goes-hog-wild>.

**519** See, e.g., Heidi Shierholz and Marni von Wilpert, "EPI Comment on the Modernization of Swine Slaughter Inspection Rule," Economic Policy Institute, May 2, 2018, <https://www.epi.org/publication/epi-comment-on-the-modernization-of-swine-slaughter-inspection-rule/>.

**520** 83 Fed. Reg. 4784.

**521** The OIG's report noted that one pilot program participant had nearly 50 percent more violations than the plant with the next highest number. U.S. Department of Agriculture Office of Inspector General, *Food Safety and Inspection Service — Inspection and Enforcement Activities at Swine Slaughter Plants*, Audit Report 24601-0001-41 (Washington, D.C.: Department of Agriculture, 2013), 17, available at <https://www.usda.gov/oig/webdocs/24601-0001-41.pdf>.

An independent analysis of data from the pilot program also determined that there were a disproportionately high number of serious violations of food safety standards at plants participating in the pilot program. *New Documents Show Privatized Hog Inspection Scheme Rife with Food Safety Violations*, Food and Water Watch, Feb.

21, 2018, <https://www.foodandwaterwatch.org/news/new-documents-show-privatized-hog-inspection-scheme-rife-food-safety-violations>; Food and Water Watch, "Translating the New Swine Inspection System," Feb. 15, 2018, <https://www.foodandwaterwatch.org/insight/translating-new-swine-inspection-system>.

**522** See Letter from Terry O'Neill, executive director, National Employment Lawyers Association, to Paul Kiecker, acting administrator, Food Safety and Inspection Service, USDA (May 2, 2018), available at <https://www.nela.org/index.cfm?pg=ModernizationSwineSlaughterInspection2018>.

**523** Celeste Monforton and Philip W. Vaughan, *Review of the Analysis Prepared by the Food Safety and Inspection Service (USDA/FSIS) of Plant Employee-Injury Rates at Swine Slaughtering Operations*, <https://s27147.pcdn.co/wp-content/uploads/Monforton-Vaughan-Review-USDA-FSIS-Injury-Data.pdf>.

**524** Kimberly Kindy, "Inspector General Wants to Know If USDA Concealed Worker Safety Data," *Washington Post*, June 25, 2019, [https://www.washingtonpost.com/national/inspector-general-wants-to-know-if-usda-concealed-worker-safety-data/2019/06/24/6e-6b17a2-969a-11e9-8d0a-5edd7e2025b1\\_story.html?utm\\_term=.3c01c8a02242](https://www.washingtonpost.com/national/inspector-general-wants-to-know-if-usda-concealed-worker-safety-data/2019/06/24/6e-6b17a2-969a-11e9-8d0a-5edd7e2025b1_story.html?utm_term=.3c01c8a02242).

---

#### Image Credits:

Page 8: da-vooda/Getty Images; Page 10: Wilson Joseph/Noun Project; Page 13: Laymik/Noun Project; Page 18: Vectors Market; Page 22: Symbolon/Noun Project; Page 25: Creative Stall/Noun Project

**ABOUT THE BRENNAN CENTER  
FOR JUSTICE**

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize — and when necessary defend — our country’s systems of democracy and justice. The Brennan Center is dedicated to protecting the rule of law and the values of constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, in the courts, and in the court of public opinion.

**ABOUT THE BRENNAN CENTER’S  
DEMOCRACY PROGRAM**

The Brennan Center’s Democracy Program encourages broad citizen participation by promoting voting and campaign finance reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

**ACKNOWLEDGMENTS**

The Brennan Center gratefully acknowledges the Carnegie Corporation of New York, Change Happens Foundation, Craig Newmark Philanthropies, Ford Foundation, the William and Flora Hewlett Foundation, the JPB Foundation, the Kohlberg Foundation, Open Society Foundations, Rockefeller Family Fund, and the Bernard and Anne Spitzer Charitable Trust for their generous support of this work. The Task Force members and its staff would like to thank Zachary Roth for his substantial writing assistance, as well as Daniel Weiner, Sidni Frederick, and Natalie Giotto for their critical research and deliberations in support of our report. We would also like to thank Michael Waldman, Alicia Bannon, Andrew Boyle, Victoria Bassetti, Gareth Fowler, Hazel Millard, Peter Dunphy, Derek Tisler, Lisa Benenson, Alden Wallace, Alexandra Ringe, Rebecca Autrey, Josh Bell, Zachary Laub, and Jeanne Park of the Brennan Center for their contributions. Finally, thank you to Joanna Loomis, Monica Finke, Jacob Apkon, and Catherine Larsen for their research assistance.



**BRENNAN  
CENTER**  

---

**FOR JUSTICE**