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NATIONAL TASK FORCE ON
RULE OF LAW &
DEMOCRACY

Proposals for Reform

The National Task Force on the Rule of Law & Democracy (www.democracytaskforce.org) is a nonpartisan group of former government officials and policy experts housed at the Brennan Center for Justice at NYU School of Law.

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Proposals for Reform

FROM THE NATIONAL TASK FORCE ON RULE OF LAW & DEMOCRACY

Table of Contents

The values that undergird American democracy are being tested. As has become increasingly clear, our republic has long relied not just on formal laws and the Constitution, but also on unwritten rules and norms that constrain the behavior of public officials. These guardrails, often invisible, curb abuses of power. They ensure that officials act for the public good, not for personal financial gain. They protect nonpartisan public servants in law enforcement and elsewhere from improper political influence. They protect businesspeople from corrupting favoritism and graft. And they protect citizens from arbitrary and unfair government action. These practices have long held the allegiance of public officials from all political parties. Without them, government becomes a chaotic grab for power and self-interest.

Lately, the nation has learned again just how important those protections are — and how flimsy they can prove to be. For years, many assumed that presidents had to release their tax returns. It turns out they don't. We assumed presidents would refrain from interfering in criminal investigations. In fact, little prevents them from doing so. Respect for expertise, for the role of the free press, for the proper independent role of the judiciary, seemed firmly embedded practices. Until they weren't.

Presidents have overreached before. When they did so, the system reacted. George Washington's decision to limit himself to two terms was as solid a precedent as ever existed in American political life. Then Franklin D. Roosevelt ran for and won a third and then a fourth term. So, we amended the Constitution to formally enshrine the two-term norm. After John F. Kennedy appointed his brother to lead the Justice Department and other elected officials sought patronage positions for their family members, Congress passed an anti-nepotism law. Richard Nixon's many abuses prompted a wide array of new laws, ranging from the special prosecutor law (now expired) to the Budget and Impoundment Control Act and the War Powers Act. Some of these were enacted after he left office. Others, such as the federal campaign finance law, were passed while he was still serving, with broad bipartisan support, over his veto. In the wake of Watergate, a full-fledged accountability system — often unspoken — constrained the executive branch from lawless activity. This held for nearly half a century.

In short, time and again abuse produced a response. Reform follows abuse — but not automatically, and not always. Today the country is living through another such moment. Once again, it is time to act. It is time to turn soft norms into hard law. A new wave of reform solutions is essential to restore public trust. And as in other eras, the task of advancing reform cannot be for one or another party alone.

Hence the National Task Force on Rule of Law and Democracy. The Task Force is a nonpartisan group of former public servants 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 have come together to develop solutions to repair and revitalize our democracy. Our focus is not on the current political moment but on the future. Our system of government has long depended on leaders following basic norms and ground rules designed to prevent abuse of power. Unless those guardrails are restored, they risk being destroyed permanently — or being replaced with new antidemocratic norms that future leaders can exploit.

We have examined norms and practices surrounding financial conflicts, political interference with law enforcement, the use of government data and science, the appointment of public officials, and many other related issues. We have consulted other experts and former officials from both parties. Despite our differences, we have identified concrete ways to fix what has been broken.

We begin with those norms. What are they? And why do they matter?

Checks and balances. The phrase appears nowhere in the Constitution, but it is central to blunt arbitrary power and the potential for tyranny.[1] It's more than the clockwork mechanism of three separate but coequal branches. Checks have evolved within each branch as well. Congressional ethics committees police improper conduct.[2] Courts operate under a self-imposed code of conduct. Chief judges, circuit judicial councils, or the Judicial Conference investigate allegations of wrongdoing.[3] The executive branch has standards of ethical conduct, as well as inspectors general, internal auditors, and the Justice Department's special counsel regulations. These overlapping safeguards check the conduct of the powerful.

An evenhanded and unbiased administration of the law. The awesome power of prosecution must be wielded without consideration of individuals' political or financial status, or their personal relationships. This precept has deep roots. It draws from British law. Its violation formed a chief complaint in the Declaration of Independence. And it was woven into America's Constitution in the Fifth and Fourteenth Amendments, with their promise of "equal protection" and "due process of law."

Public ethics. Officials are obliged to seek the public good, not private gain. The Constitution includes key anti-corruption provisions, such as the Emoluments Clauses that prevent a president from receiving funds from foreign governments or states. The Framers had a broad view of corruption. To them, it meant a public official serving some other master — whether pecuniary or political — rather than the public.

Respect for science and the free flow of information. In a modern economy, data — whether environmental, demographic, or financial — must be trustworthy. Beginning especially in the 1970s, an expectation of government transparency — and transparency of government data — became standard. And throughout the nation's history, the accountability provided by a sometimes ferocious free press has been regarded as crucial.

We believe these values are more than fussy political etiquette. They are, in fact, vital to our democratic institutions and necessary to restore public trust. We hope that the reflexive partisanship of our age does not pose an insurmountable obstacle. At other times of reform, Americans from across the ideological spectrum, including members of both parties, have come together to restore and repair public institutions. Despite today's intense partisan polarization, we believe that our great nation can and should similarly achieve consensus for reform. In fact, we believe these values still command deep allegiance from Americans across the political spectrum. Our nonpartisan work has reinforced this view. It is up to patriots from all parties to work together on behalf of what we believe to be core precepts of our democracy.

"We the People" gave our government its power. That notion made American democracy, imperfect as it was, truly revolutionary from the start. Restoring these principles is central to the task of revitalizing democracy itself.

With these values in mind, the Task Force examined some of the most significant current areas of concern where our democratic system is most under pressure from official overreach.

In this report, we put forward specific proposals in support of two basic principles — the rule of law and ethical conduct in government.

In future reports, we will turn to other areas, including issues related to money in politics, congressional reform, government-sponsored research and data, and the process for appointing qualified professionals to critical government positions. Most of our proposals reflect a decision to make previously longstanding practices legally required. They reflect, we believe, an existing consensus across both parties.

Ethical Conduct and Government Accountability

To ensure transparency in government officials' financial dealings:

- Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for government officials, including closing the loophole for family businesses and privately held companies, and reducing the burdens of disclosure.
- Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.

- Congress should require a confidential national security financial review for incoming presidents, vice presidents, and other senior officials.

To better ensure that government officials put the interests of the American people first:

- Congress should pass a law to enforce the safeguards in the Constitution's Foreign and Domestic Emoluments Clauses, clearly articulating what payments and benefits are and are not prohibited and providing an enforcement scheme for violations.

- Congress should extend federal safeguards against conflicts of interest to the president and vice president, with specific exemptions that recognize the president's unique role.

To ensure that public officials are held accountable for violations of ethics rules where appropriate:

- Congress should reform the Office of Government Ethics (OGE) so that it can better enforce federal ethics laws, including by:

  – granting OGE the power, under certain circumstances, to conduct confidential investigations of ethics violations in the executive branch,
  – creating a separate enforcement division within OGE,
  – allowing OGE to bring civil enforcement actions in federal court,
  – specifying that the OGE director may not be removed during his or her term except for good cause,
  – providing OGE an opportunity to review and object to conflict of interest waivers, and
  – confirming that White House staff must follow federal ethics rules.

The Rule of Law and Evenhanded Administration of Justice

To safeguard against inappropriate interference in law enforcement for political or personal aims:

- Congress should pass legislation requiring the executive branch to articulate clear standards for, and report on how, the White House interacts with law enforcement, including by:

  – requiring the White House and enforcement agencies to publish policies specifying who should and should not participate in discussions about specific law enforcement matters,
  – requiring law enforcement agencies to maintain a log of covered White House contacts and to provide summary reports to Congress and inspectors general.

- Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

To ensure that no one is above the law:

- Congress should require written justifications from the president for pardons involving close associates.

- Congress should pass a resolution expressly and categorically condemning self-pardons.

- Congress should pass legislation providing that special counsels may only be removed "for cause" and establishing judicial review for removals.

Ethical Conduct and Government Accountability

Our republic is rooted in the principle that government officials serve the people, not themselves — that government power derives *from* the people and is intended to be used *for* the people.[4]

The Framers recognized that political leaders, being human, will be tempted from time to time to put their own interests ahead of the public's. To restrain abuses of power, they created a system of checks and balances. They also included several provisions in the Constitution to ensure that top public officials are not economically beholden to others. For example, Foreign Emoluments Clause prohibits federal officials from receiving payments or gifts from foreign governments.[5] Its Domestic Emoluments Clause applies a similar rule to the president with respect to U.S. states, and also specifies that Congress may not award the president salary increases during his or her term.[6] And the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit federal and state judges from presiding over cases in which they have a personal interest.[7]

These constitutional provisions provide the foundation and support for a broad range of other rules — written and unwritten — adopted over time to constrain top leaders. Most notably, a set of robust conflict of interest laws, put in place more than a century ago, prohibit many public officials from taking part in government matters involving their own personal financial interests or those of their immediate families. Nearly half a century ago, in the wake of Watergate, Congress strengthened these protections by passing the Ethics in Government Act of 1978. This law created a federal agency, the Office of Government Ethics, dedicated to monitoring government officials' compliance with conflict of interest and other ethics rules. It also requires high-ranking government officials to disclose their financial interests and dealings to the public. (For a summary of ethics and disclosure requirements for elected and appointed officials, please see Appendix on page 28.)

These laws reflect the shared understanding that public officials should not be able to use their power to advance their own personal or financial interests, that transparency is needed to enable the public to identify improper influences, and that some measure of accountability is needed to deter misconduct.

Unfortunately, formal ethics laws exempt most senior government officials — specifically the president and vice president, and, with respect to some laws, members of Congress and federal judges. That the law does not bind these top officials does not mean, however, that they should not follow its principles.

Elected officeholders have long voluntarily adopted ethics practices to reinforce the public's faith in the integrity of our government. For example, while conflict of interest laws do not apply to the president, vice president, or members of Congress, in recent decades many of these officials — including, until recently, every president and vice president in the last four decades — have voluntarily divested from assets that could potentially pose a conflict with their official duties or kept such investments in a blind trust whose contents were hidden from them.[8] Similarly, although not required by law, all presidents since Richard Nixon, and all major party presidential nominees since Jimmy Carter, had, until recently, voluntarily disclosed their personal tax returns to the public to provide more information about their personal finances and to confirm that they were paying their fair share in taxes.[9]

These longstanding practices, or norms, have come to be understood as a critical component of accountable government for the people. Because our leaders have been committed to the tradition of ethics in public service, including financial transparency and independent oversight, the fact that they have been formally exempted from many ethics laws has not posed a major problem.

Unfortunately, that commitment is eroding. This phenomenon is not entirely new. President Bill Clinton, for instance, notoriously issued pardons during his last day in office to a fugitive investor whose ex-wife had made substantial donations to the Clinton Presidential Library and to Hillary Clinton's Senate campaign,[10] and to a businessman who had retained Mrs. Clinton's brother to advocate for a clemency application.[11] Mrs. Clinton herself was later faulted for her many dealings with individuals and entities who donated to the Clinton Foundation, which was still run by her husband and daughter, while she served as President Obama's secretary of state.[12] Recent decades have seen a number of scandals over congressional conflicts of interest and other alleged misconduct.[13]

What is different today is the pervasiveness of breaches in ethical norms, especially at the highest levels of government. These breaches threaten to undermine public trust not only in particular officials but also in the integrity of bedrock governmental institutions.

The starkest example is President Trump's decision to keep ownership and control of his far-flung business

interests — a major departure from the expectations set by his predecessors.[14] It has produced an ever-expanding list of situations where his decisions as president could directly or indirectly affect his personal financial affairs.[15] That circumstance in turn can make it hard to discern where the public interest ends and the president's self-interest begins.[16]

Take, for example, the administration's recent controversial decision to rescue the Chinese tech giant ZTE, which had been sanctioned for violating U.S. law.[17] Critics have suggested that the decision was motivated by the president's personal gratitude for a loan China made to a Trump project in Indonesia.[18] But the move was also consistent with furthering a legitimate policy objective: building goodwill with the Chinese government ahead of the president's summit with North Korean leader Kim Jong-un.[19] If that was the case, the president's personal dealings with China only served to obscure what his administration was trying to accomplish.

Doubts about presidents' interests can sap their legitimacy and the legitimacy of their actions, even when they are not actually motivated by self-interest. That should concern any president's political supporters as much as his or her opponents.[20]

If the ethics precedents set by President Trump are not addressed now, they could also balloon in future administrations. For example, potential contenders for the Democratic nomination in 2020 include: the founder and chief executive of Facebook, a global social media company with more than 2 billion users around the world;[21] the former CEO of Starbucks, which has locations in dozens of countries;[22] and a former Massachusetts governor who now serves as a managing director at Bain Capital, a global hedge fund with offices in 10 countries.[23]

Disregard for longstanding ethical guuidelines is not limited to the presidency. The disregard has also affected other public officials in both the executive branch and Congress. Former Environmental Protection Agency Administrator Scott Pruitt, for instance, attracted bipartisan criticism for his many ethical lapses, like renting a luxury apartment at below-market rates from the wife of an energy lobbyist with business before his agency.[24]

Most Americans would agree that this is not acceptable. Indeed, according to recent polling, more than three-quarters of voters rank corruption in government as a top issue for the 2018 election, with almost a third calling it the most important issue.[25] The principle that government service should not be used to advance one's personal financial interests is one of our political system's bedrock values.[26] To protect it, we must translate some of the traditions and ground rules to which many of our leaders have voluntarily adhered into legal requirements, while updating and revitalizing existing ethics and anticorruption laws.

Ensure Transparency in Government Officials' Financial Dealings

Transparency rules are among the most fundamental ethical safeguards to help ensure that ultimate power remains with the people. Without meaningful disclosure of public officials' financial and personal dealings, it is difficult for the public to detect potential sources of bias and to hold its representatives accountable. Disclosure also empowers journalists, legislators, and law enforcement officials to expose official self-dealing and deter corrupt acts. Of course, government officials do not forfeit their privacy completely, and they have legitimate reasons for maintaining privacy in some areas. But sunlight remains the best disinfectant.[27]

PROPOSAL 1

Congress should pass legislation to create an ethics task force to modernize financial disclosure requirements for public officials.

The Ethics in Government Act of 1978, enacted in response to the Watergate scandal, requires high-ranking federal officials — including the president, vice president, members of Congress, and candidates for those offices — to publicly file a report detailing their financial holdings and personal dealings.[28] These reports help ethics regulators and the voting public identify potential biases that could influence how they will govern.

While the Act's disclosure rules are tremendously valuable, they are also sorely in need of an overhaul. In some cases, the Act allows critical information to remain undisclosed. For example, while the law requires candidates and officials to identify family businesses and other private companies in which they have substantial ownership interests, these provisions have not kept pace with changing financial structures. Unlike in the 1970s, today many wealthy individuals hold most of their assets indirectly through networks of limited liability companies (LLCs) and similar entities that were not common when the Ethics in Government Act was passed.[29] Current law does not generally require candidates and officials to disclose critical information about those entities, including their sources of income, debts, or co-owners.[30] Too often, that deprives the public of the information they need to determine potential conflicts of interest.

Take, for example, a family business that derives substantial income from contracts with foreign governments, owes money to a foreign country's state-run bank, or is even co-owned by a foreign official. Under current ethics law, candidates and government officials would have no legal obligation to disclose any such ties.[31]

In other ways, the ethics disclosure rules enacted four decades ago have become unduly burdensome for public officials. Most notably, they require disclosure of very minor sources of income and small assets unlikely to raise significant ethical questions. That is because the requirements are keyed to dollar values that have not changed since the 1970s. These and other outdated rules can make the filing experience onerous even for candidates and officials with relatively simple finances. This creates the opportunity for inadvertent errors and may even deter qualified people from pursuing public service.[32]

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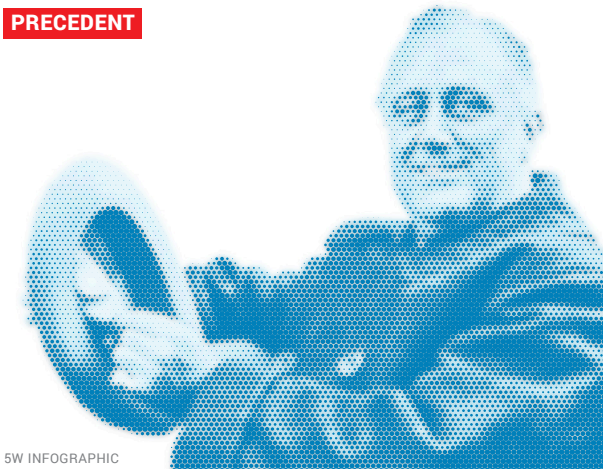

5W INFOGRAPHIC

Limiting Presidential Terms

PRINCIPLE

Following the example of George Washington, presidents should limit themselves to two terms, in order to ensure that the executive branch doesn't become too powerful.

PROBLEM

In 1940, President Franklin Roosevelt ran for and won his third term as president. Four years later, he was elected to a fourth term.

RESPONSE

In 1947, Congress passed an amendment to the Constitution limiting the president to two terms. The amendment was ratified four years later.

The federal ethics disclosure requirements should be updated to address such concerns. To achieve the best outcome, Congress should pass legislation directing the Office of Government Ethics to convene a task force of ethics experts to prepare a detailed proposal for a legislative overhaul of the relevant sections of the Ethics in Government Act. At a minimum, the legislation should require the task force to:

- **Address the disclosure loophole related to family businesses and other privately-held companies.** Specifically, the task force should propose a way to require filers with significant direct or indirect interests in such entities to provide relevant information, including disclosure of the entity's assets, ultimate sources of income, liabilities (including creditors by name), and the identities of other owners.

- **Propose measures to streamline the filer experience and make it less burdensome** by, among other things, substantially raising the monetary thresholds at which particular income and assets need to be disclosed.

Fixing outdated disclosure rules is something on which policymakers on both sides of the aisle should be able to agree. Americans of all ideological stripes overwhelmingly support transparency in politics and governance.[33] Reforming financial disclosure requirements to give the public more information will give the American people greater confidence that our leaders' decisions are guided by the nation's best interests rather than self-dealing or hidden interests. Congress can and should ensure that Americans have the information they need to hold public officials accountable, while reducing unnecessary requirements that burden public service.

PROPOSAL 2

Congress should require the president and vice president, and candidates for those offices, to publicly disclose their personal and business tax returns.

A second important reform is to standardize and codify the longstanding practice of sitting presidents, vice presidents, and candidates for those offices disclosing their tax returns.

In 1973, in the wake of scandal and seeking vindication, President Nixon publicly released his personal tax returns because, as he put it, "People have got to know whether or not their president is a crook."[34] Since then, until 2016, every president, vice president, and major party nominee for those offices has publicly disclosed their personal tax information. Most other serious contenders

for the presidency have also done so.[35] With few exceptions, the practice had until recently become routine and noncontroversial.[36]

Presidential or vice presidential candidates' tax returns provide a snapshot of their income and help to confirm that they are following the same rules that apply to everyone by paying their fair share of taxes. This a real concern. Nixon's returns, which showed that he had paid very little in certain years thanks to dubious deductions, helped to undermine his credibility with the public near the height of the Watergate scandal.[37] His first vice president, Spiro Agnew, resigned in the wake of an investigation into tax evasion, to which he pleaded no contest.[38] Tax returns may also shed additional light on specific conflicts of interest and self-dealing, especially those related to tax policy.

For all of these reasons, codifying the longstanding practice of tax return disclosure would complement other public disclosure requirements in the Ethics in Government Act that assist voters and deter corruption.[39] Congress should therefore pass legislation that:

- **Requires the president, vice president, and candidates for those offices to disclose their personal tax returns** and the tax returns of any privately held businesses in which they have a controlling interest at the same time as they make other mandatory ethics disclosures pursuant to the Ethics in Government Act.[40]

- **Requires disclosure of returns for the three years preceding a candidate's declaration** that they are running for president or vice president and returns for every year a sitting president or vice president is in office for any portion of the year.[41]

Similar proposals have been advanced by public officials and advocates of all political stripes. A number of bills are currently pending before Congress, most notably the Presidential Tax Transparency Act,[42] which has bipartisan support. A growing number of states are also considering legislation that would require candidates to disclose their tax returns prior to appearing on a ballot, although a uniform federal rule would be preferable.[43]

Legislation along these lines is plainly within Congress's constitutional powers. Presidents and vice presidents, like other public officials, have long been required to disclose significant financial information, with no suggestion that such requirements interfere with any constitutional rights or responsibilities. Requiring disclosure of tax returns would be no different.

PROPOSAL 3
Congress should require a national security financial review for incoming presidents, vice presidents, and other senior officials.

Disclosure of financial information is especially vital in the national security arena, where it can help identify potential sources of leverage foreign adversaries or entities might have over our political leaders. In his nuclear treaty negotiations with the Soviet Union, President Reagan famously advised that Americans should "trust, but verify."[44] The same can be said here.

These concerns are particularly resonant in an era when foreign powers are openly seeking to meddle in U.S. elections. As the commander-in-chief of the U.S. military and the face of U.S. foreign policy, the president is a unique target for foreign adversaries. And those efforts are more likely to bear some fruit when a large number of high-ranking officials, including the president and other senior administration officials, have globe-spanning business interests.[45] Indeed, there are already reports that foreign powers sought to use his family's business arrangements around the world as a source of leverage over the president's son-in-law and senior adviser, Jared Kushner.[46] This issue is not unique to the current administration. Several potential future presidential contenders also have wide-ranging international business dealings.[47]

When foreign companies seek to purchase American businesses, the Treasury Department coordinates a government-wide national security review process to examine what effect, if any, the proposed transaction has on U.S. national security.[48] Our political system should have a similar process to evaluate national security vulnerabilities in the portfolios of senior officials, including incoming presidents, vice presidents, and other senior members of the administration who have responsibilities affecting national security.

To that end, Congress should pass legislation to require the following:

- **For incoming presidents, vice presidents, and senior White House staff** who work on national security-related matters, Congress should require the administration of a national security financial risk assessment led by the director of the Office of Government Ethics and the director of National Intelligence. The purpose of the review would be to identify whether an official's financial holdings present potential national security vulnerabilities and

to issue divestment recommendations beyond what may be already required by other laws.

- **Officials subject to the review should be required to provide reviewers with their tax returns and ethics filings**, as well as other information the reviewers request about their holdings (such as business transaction history and records of material holdings or transactions with foreign entities), with a requirement to update filings whenever there is material transaction but at least on a yearly basis. The reviewers should be required to keep any nonpublic information they receive strictly confidential.

- **The reviewers should be empowered to obtain access to all relevant government information** sources and follow-up information from the filers.

- **The review should be undertaken on a confidential basis,** with findings presented to the "Gang of Eight," the bipartisan group of congressional leaders customarily briefed on classified intelligence matters as part of their oversight role.

- **The official in question should be informed of vulnerabilities the review uncovers,** unless doing so would imperil counterintelligence gathering.

There is broad bipartisan consensus on the need to combat foreign interference in our elections and in the workings of our government.[49] A national security review for incoming leaders, building on an effective interagency program, would provide a way to help ensure that those leaders remain accountable to the American people rather than any foreign power. The process would also benefit the officials themselves, who may often be unaware of potential vulnerabilities.

Bolster Safeguards to Ensure Officials Put the Interests of the American People First

Transparency is important, but it is not enough to ensure that all public officials put the interests of the American people ahead of their own. We also need meaningful guardrails to prevent officials from crossing long-established lines meant to prevent abuse of power for personal gain. This is especially important at the highest levels of government because top officials set the tone for the people working under them. Our laws should embody the expectation that public service be treated as a public trust and not as an opportunity for personal enrichment. This means changing the law to ensure that those at the very top are subject to the same broad legal standards as those under them.

PROPOSAL 4

Congress should pass a law to enforce the safeguards in the Foreign and Domestic Emoluments Clauses of the U.S. Constitution.

Two provisions in the Constitution are specifically meant to prevent public officials at all levels from being corrupted by conflicting financial incentives: the Foreign and Domestic Emoluments Clauses. Both of these provisions have been generally respected by every administration since the nation's founding.

The Foreign Emoluments Clause seeks to curb foreign influence by prohibiting federal officials from accepting "any present, emolument, office, or title, of any kind whatsoever, from any king, prince, or foreign state" without the consent of Congress.[50] The Department of Justice has frequently applied this provision, issuing legal opinions on everything from the president's receipt of the Nobel Peace Prize to government workers performing research stints at foreign universities.[51]

The Domestic Emoluments Clause seeks to prevent undue influence over the president by guaranteeing the payment of a salary "which shall neither be increased nor diminished during the Period for which he shall have been elected" and by prohibiting the president from receiving any other "emolument from the United States or any of them."[52] There does not appear to be any historical evidence of any president ever seeking compensation that would violate this prohibition.

As it does in many other contexts,[53] Congress has passed laws over the years to codify and implement both clauses in certain circumstances. These range from the Foreign Gifts and Decorations Act (FGDA), governing when officials may or may not keep ceremonial gifts and honors from foreign governments under the Foreign Emoluments Clause[54] to periodic legislation raising the president's salary as provided by the Domestic Emoluments Clause.[55]

To further reduce the possibility of conflicts and emoluments violations, from the 1970s until 2017, successive presidents and vice presidents voluntarily divested from problematic investments. They generally limited their direct financial holdings to "plain vanilla" assets, like cash and widely distributed mutual funds, and turned any remaining assets over to a blind trust to be sold and replaced by new investments unknown to the beneficiary.[56]

Because public officials have generally adhered to these constitutional safeguards, little attention has been paid to the fact that the law does not specify how they should be

applied in many circumstances. For example, the Constitution says nothing about how either clause should be enforced in the event of a violation. Congress has also not addressed this question except in limited contexts like the FGDA's rules on foreign gifts and decorations. Nor does the Constitution or any federal law specify just how broadly the word "emolument" should be interpreted. For example, does it cover regulatory benefits, as when a foreign government grants a patent to a federal official or a state government awards a tax subsidy to a business owned by the president? Does it cover profits from a business transaction between a federal official and a foreign state?[57]

Some of these questions have come up over the years (though not conclusively resolved) in various House and Senate Ethics Committee investigations of members of Congress for everything from renting property to a foreign diplomat to accepting travel and other gifts from foreign governments beyond what Congress itself has authorized by law.[58] The global reach of President Trump's business holdings (including U.S. hotels that cater to a global client base[59]) — and the prospect that future presidential contenders may have complex business arrangements of their own — has added extra urgency. President Trump has already been sued in three separate lawsuits for alleged violations of both the Foreign and Domestic Emoluments Clauses.[60]

While these lawsuits may set new legal precedent relating to the particulars of the president's business dealings, they will leave many other questions unanswered. But Congress has the authority to implement constitutional safeguards through rules that are more detailed and comprehensive than the bare bones text that the Constitution provides.[61]

To ensure that future public officials adhere to the letter and spirit of the two Emoluments Clauses, Congress should enact legislation that specifies in detail what is and is not prohibited under each clause. The measure should also create a fair and comprehensive scheme for enforcing those expectations. At a minimum, the legislation should:

- **Define which benefits constitute prohibited "emoluments."**
- **Establish categories of foreign emoluments** to which Congress expressly withholds consent (e.g., those worth over $10,000) beyond those covered by existing laws like the FGDA.
- **Create a regulatory scheme for enforcement** of both Emoluments Clauses, which should ideally rely on enforcement agencies like the Department of Justice and possibly the Office of Government Ethics (for civil violations of the law).
- **Establish statutory remedies for violations,** including disgorgement of illegal emoluments and criminal and civil penalties.

The Emoluments Clauses provide clear constitutional authority for these measures. These constitutional provisions reflect the Framers' fundamental concern that public officials, especially the president, should put the interests of the American people first, which resonates just as strongly today. Codifying them more fully would also benefit current and future public officials, who need clear guidance to help them avoid running afoul of these key

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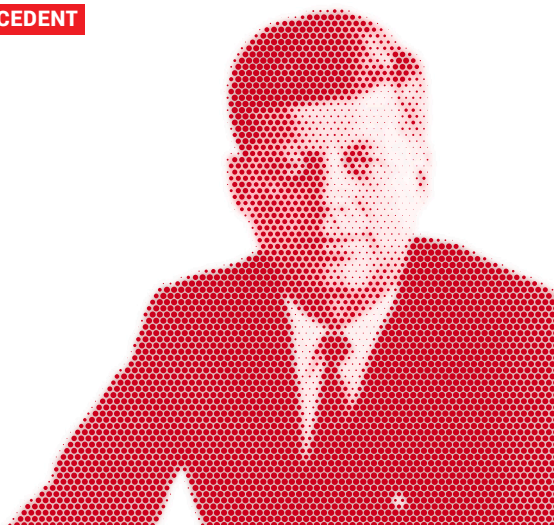


Preventing Nepotism in Government

PRINCIPLE

Presidents should avoid appointing close family members to top posts to help ensure that government officials are loyal to the country rather than to the president personally.

PROBLEM

In 1961, President John F. Kennedy nominated his brother, Robert F. Kennedy, to be attorney general. The period also saw members of Congress give jobs to family members.

RESPONSE

In 1967, Congress passed, and President Lyndon B. Johnson signed, the "anti-nepotism" statute, prohibiting employment of certain relatives, including brothers, in certain government positions.

constitutional constraints. Congress should ensure that the protections both clauses afford are enforced in a clear, concrete and effective manner.

PROPOSAL 5
Congress should extend federal safeguards against conflicts of interest to the president and vice president.

Conflict of interest law bars officers and employees of the federal government from "participating personally and substantially" in specific government matters in which they or their immediate family members have a personal financial interest has existed for more than a century.[62] But those laws do not apply to the president and vice president.[63] They should.

Federal conflict of interest law establishes a *minimum* standard of conduct. The law applies only when government officials are involved in a decision relating to a specific set of persons or entities and only when the decision will have a "direct and predictable" effect on officials' financial interests (or those of their close family members, business partners, or entities with which they are affiliated).[64] The law does not apply to matters that involve broad policymaking.[65] For instance, regulations issued by the Office of Government Ethics specify that government officials typically cannot award a contract to a company in which they have stock (other than through certain types of mutual funds). On the other hand, the officials usually would be able to work on major legislation, like a tax overhaul that would favorably impact their own bottom line, provided it would affect other Americans in the same way.[66]

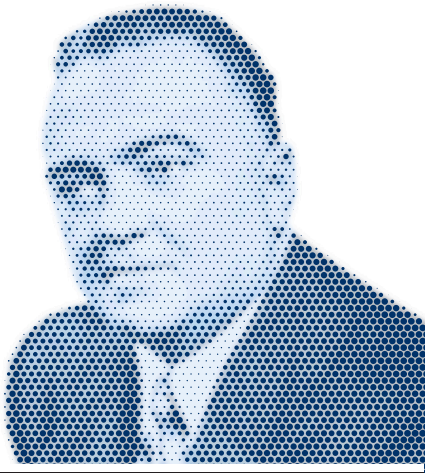
Few would say that the president and vice president should not follow the same basic rules.[67] Congress exempted them from the formal conflict of interest law based on potential practical and legal concerns related to the presidency's unique role in our system of separation of powers (which, as noted below, we do not ultimately find persuasive).[68] Until recently, most also assumed that the public limelight and accountability of the presidency would be sufficient to ensure that its occupants adhere to the same ethics standards that govern other federal employees and officers. It turns out they are not.

The reason these exemptions from ethics law for the president and vice president have received scant attention is that presidents over the last four decades have voluntarily complied with most of their requirements.[69] Especially in the wake of Watergate, it became common wisdom, as President Reagan's transition team put it, that "even the possibility of an appearance of any conflict of interest in the performance of his duties" could undermine the president's legitimacy.[70]

And not just the president's. When an official as powerful as the president has a personal financial interest in government decisions, there is a risk that officials who report up the chain will be tempted to govern with an eye toward the chief executive's bottom line. Taken to extremes, it can be virtually impossible to discern which decisions have been infected by consideration of a leader's self-interest. Such doubts undermine the basic integrity of democratic governance.[71]

Now, of course, we have a president who has chosen to keep control of his far-flung businesses, raising the

PRECEDENT



Reining in the FBI

PRINCIPLE

Law enforcement agencies should operate with effective oversight in order to guard against investigative abuses. And those agencies should not be used to advance solely partisan or personal agendas.

PROBLEM

The late 1960s and early 1970s saw a string of revelations about abuses, culminating in 1976 with the Senate's Church Committee report. Among the report's findings was that the FBI wiretapped Martin Luther King, Jr., as part of an effort to portray him as a communist.

RESPONSE

In 1976, Congress set a single 10-year term for the FBI director. The reform built off of a 1968 law that had established the post as a presidentially appointed position requiring Senate confirmation under the general authority of the attorney general.

possibility of numerous conflicts of interest.[72] While voters find this distasteful,[73] his decision may embolden his successors to do the same. As a result, the time has come to extend basic safeguards to the president and vice president by eliminating their exemption from federal conflict of interest law.

This does not mean that we must subject the president and vice president, who occupy a unique constitutional role, to the same legal requirements as other officials. For example, conflict of interest rules can bar an official from working on comparatively narrow legislation, like a bill to regulate a particular industry or to give benefits to a small class of people. But the duties of the chief executive are unique. The Constitution gives the president sole authority to sign or veto legislation passed by Congress,[74] and thousands of measures make their way each year to the president's desk. Rather than impose the unwieldy requirement of an exhaustive conflicts check in each instance, it makes better sense to exempt the president and vice president's participation in the legislative process from conflict of interest regulation. The law should also explicitly exempt any president or vice president who follows the longstanding practice of limiting his or her direct personal holdings to nonconflicting assets and placing remaining investments in a qualified blind trust.[75]

Finally, the law should specify that the only remedy where the president or vice president has a conflict of interest is to sell off his interest in the asset that created the conflict. Typically, an official with a conflict of interest can address the conflict either through such divestiture or through recusal (meaning formally refraining from participation in the matter).[76] But presidential recusal could be disruptive to executive branch operations.[77] A divestiture requirement avoids that risk and is the best approach for addressing the relatively narrow circumstances where the president or vice president have conflicts of interest[78]

The need for reasonable exemptions does not negate the need for the president and vice president to be subject, broadly speaking, to the same laws as the millions of federal employees who work under them.

To that end, Congress should pass legislation that, at a minimum:

- **Eliminates the blanket exemption to existing federal conflict of interest law** for the president and vice president.
- **Sets forth reasonable and appropriate exemptions,** including for conflicts arising from the president's role in proposing, signing, or vetoing legislation, and the vice president's role in presiding over and casting tie-breaking votes in the Senate.
- **Exempts any president or vice president whose holdings are limited** to nonconflicting assets or are placed in a qualified blind trust.
- **Specifies that divestment from the relevant asset is the only remedy** in cases where the president or vice president has a conflict of interest.

Several proposals to subject the president and vice president to conflict of interest law are currently pending before Congress.[79] They follow a long tradition of bipartisanship on ethics law[80] as well as a shared understanding that the president and vice president, despite their unique roles in our system of government, are not above the law.

While Congress in the past has taken the view that there are practical and constitutional hurdles to taking such a step, we do not find this view persuasive. The most common objection raised is that the president cannot be subject to conflict of interest law because it is impossible for him to recuse from any matter under his authority as the head of the executive branch.[81] But even if that is true,[82] the proposal here does not require recusal. Sale of assets is also a common means of managing conflicts of interest in the public sector.[83] Already for decades, presidents have voluntarily divested from most of their assets that could give rise to even the appearance of conflicts. And they aren't the only ones: Many other high-ranking federal officials are also required to divest from assets that would create insurmountable conflicts of interest relating to their core responsibilities.[84] Similarly, it is not unreasonable to require the president to divest in situations where there is a clear risk that the unique powers of his office could be used for personal gain.

Such a requirement would not offend the Constitution, which permits Congress to place restrictions on the president where there is "an overriding need to promote objectives within the constitutional authority of Congress."[85] Guarding against official self-dealing, which the Supreme Court has called "an evil which endangers the very fabric of a democratic society,"[86] is surely one such objective. Congress should prevent the use of the presidency for personal gain, just as it prohibits the chief executive from engaging in other kinds of official misconduct.[87]

Related Issues: Presidential conflicts of interest are not the only area of ethics law in need of reform. Members of Congress are also exempt from federal conflict of interest

law,[88] and congressional conflicts are also an enduring problem. Members of Congress are bound by certain ethics rules, but those have far fewer teeth than the laws governing most federal officers and employees.[89] Many lawmakers take voluntary steps to limit their personal investments and avoid any appearance of bias, but others do not.[90] In recent years, for instance, there have been many reports of members of Congress engaging in inappropriate stock trading involving industries under the jurisdiction of committees on which those members sit.[91] Others have accepted questionable travel and other gifts from foreign governments.[92] Some members have even gone to prison for bribery and other official misconduct spanning many years.[93]

Such scandals suggest that stronger legal safeguards may be needed. That could include making members of Congress subject to conflict of interest law, requiring them to divest from certain assets, or simply providing for better enforcement of existing House and Senate rules.

Congress should also consider ways to lighten the regulatory burden on the many federal officers and employees who must comply with a much stricter regime of restrictions than elected officials. They must follow rules governing everything from who can take them to lunch to whether they can be paid for teaching a class at their local community center.[94] Moreover, absent a waiver, they are subject to the full force of conflict of interest law even if the actual financial interest in question is negligible, like a single share of stock in a regulated industry. Scholars have criticized such heavy regulation as too strict,[95] with real and substantial burdens on ordinary federal employees. A full ethics reform package should include measures to lighten these burdens for the millions of men and women in the rank-and-file federal workforce, where appropriate.

The Task Force expects to take up these and other related issues in its next report.

Ensure that Officials Are Held Accountable Where Appropriate

Along with changes to actual legal requirements, effective enforcement is necessary to prevent official self-dealing and abuse of power. No rule enacted by Congress will have any effect without meaningful action to ensure legal accountability. Any enforcement mechanism should be even-handed and effective. Enforcement actions must be proportional to the offense, and the rights of those alleged to have committed misconduct must be protected. Unfortunately, our current ethics regime is deficient on both counts: there is no independent body dedicated primarily to ethics enforcement, and those wrongfully accused of violations outside of the formal process have no way to clear their names. Congress should rectify this.

PROPOSAL 6
Congress should reform the Office of Government Ethics so that it can better enforce federal ethics laws.

The Office of Government Ethics (OGE) is the only federal agency primarily devoted to government ethics, and the logical choice for an independent body to handle day-to-day enforcement of ethics rules. Created in the wake of Watergate to improve the uniform application of federal ethics rules across the executive branch, OGE's primary function is to interpret and promote compliance with federal conflict of interest laws, gift restrictions, limits on outside employment, and related safeguards.[96] While its director is a presidential appointee, the role has usually been filled by a nonpartisan expert, including under the current administration.[97] No other federal agency similarly combines a tradition of nonpartisanship with comparable expertise in government ethics.

As currently configured, OGE is not equipped to serve as an effective, independent enforcement body. While it has developed an extensive body of regulations and other guidance, its role has been primarily advisery. The office has no authority to investigate alleged violations that come to its attention and very limited ability to compel a remedy for even the most obvious violations.[98]

OGE also is not truly independent. Although its director serves for a fixed five-year term and is usually a nonpartisan expert, there appears to be no statutory safeguard against a president, upset by OGE's pursuit of ethical issues in his or her administration, removing the director without cause.[99] This is less protection than that accorded other important watchdog agencies, including the Securities Exchange Commission and Federal Election Commission, whose leaders the president may generally remove only for good cause (e.g., neglect of duty or misconduct in office).[100] As a further guarantee of independence, such agencies also typically have the ability to communicate directly with Congress, including submitting their own budget requests, rather than going through the White House.[101]

Finally, OGE also lacks the necessary resources to perform an expanded oversight role. With approximately 75 employees and a $12 million budget, OGE would not have the capacity to hire the qualified attorneys, investigators, and other staff needed to effectively enforce ethics rules across the sprawling executive branch.

These shortcomings have not received the attention they deserve. Until recently, voluntary adherence to OGE's guidance has long been the expectation at the highest levels in both Democratic and Republican administrations. Every president since OGE was created has directed cabinet members and other close aides to follow the agency's instructions to recuse, sell property, or take other steps to avoid conflicts of interest, and to direct their subordinates to do the same.[102] Presidents and vice presidents have also sought OGE approval for their own voluntary asset plans, which set the tone for their administrations.[103]

To be sure, there have always been cracks in this façade. At times, OGE has been unable or unwilling to hold officials who were determined to bend or break the rules accountable.[104] But today, the administration does not even make a show of following OGE's guidance in high-profile cases[105] and has publicly questioned whether most federal ethics rules even apply to White House aides, citing an unpersuasive legal technicality.[106]

This is not sustainable. Like any other set of rules, ethics standards will never be truly effective, especially at the highest levels, unless they have real teeth. That means enforcing them consistently and not just in the most egregious cases.

Currently, enforcement of conflict of interest law and ethics standards is left primarily to the president and thousands of other administration officials who have supervisory authority to reprimand or fire subordinates who break ethics rules. This decentralized system is prone to inconsistency[107] and can break down entirely in an administration that simply does not view compliance with these rules as a priority.

Where a conflict of interest is serious enough to warrant criminal or civil penalties, the Department of Justice has the power to pursue enforcement in federal court (including on a referral from OGE).[108] But the department has rarely made such cases a priority. In 2016, for example, it appears to have secured (according to data collected by OGE) only seven criminal convictions and one civil settlement under the federal conflict of interest statute and laws under OGE's purview.[109]

The existing framework for administering and enforcing federal ethics rules in the executive branch does not provide sufficient accountability. A politically sensitive issue like ethics needs a regulator with some independence who has the power to formulate broad policy through regulations and pursue civil enforcement actions in serious cases that do not rise to the level of criminal misconduct but still need to be addressed in the interest of deterrence.[110]

OGE already has primary rulemaking authority for ethics matters in the executive branch. Its expertise is widely acknowledged. The agency's director, while not protected against removal, customarily serves a term of five years,[111] spanning multiple presidential terms, which helps to foster independence. There is also a tradition of professionalism at OGE, evidenced by the appointment of directors with significant ethics experience and nonpartisan credentials.[112] It therefore makes sense for OGE to take on this critically important enforcement role.

To ensure proper accountability for ethical standards at all levels of the executive branch, Congress should pass legislation giving OGE a measure of formal independence from the president akin to that of other independent regulators. The agency should also have the full range of civil enforcement tools that are at the disposal of other watchdog bodies, along with sufficient safeguards to protect against the politicization of investigations and bureaucratic overreach. Finally, Congress should take other steps to ensure more uniform application of ethical standards across the executive branch.

To insulate rulemaking and civil enforcement processes on ethics matters from undue political interference, legislation passed by Congress should:

- **Specify that the president cannot remove OGE's director during his or her statutory term except for good cause,** such as neglect of duty or misconduct in office. Such limitations on removal are the most important way to ensure agency independence. The process of nominating and confirming new directors and ongoing congressional oversight can be used to ensure that the director remains politically accountable to elected leaders.

- **Empower OGE to communicate directly with Congress.** Most agencies must go through the White House to submit budget requests or otherwise communicate with Congress, limiting their ability to pursue goals that do not align with the priorities of the administration. To ensure a measure of autonomy from the president, OGE should, like other independent agencies, be permitted to submit its own budget estimates, substantive reports, and legislative recommendations without White House approval.[113]

To ensure effective enforcement of ethics rules, this legislation should also:

- **Grant OGE power to initiate and conduct investigations of alleged ethics violations** in the executive branch on referral from another government body or on

PROPOSAL

Protecting the Justice Department from Political Interference

PRINCIPLE

The White House shouldn't interfere with investigative and law enforcement decisions made by the Justice Department and other enforcement agencies for personal, financial, or partisan purposes. No one is above the law.

PROBLEM 1

President Richard Nixon's tenure shone a light on the extreme dangers of political interference in law enforcement. In 1969, Nixon appointed his campaign manager, John Mitchell, as attorney general. Two years later, Nixon ordered Mitchell's eventual successor as attorney general, Richard Kleindienst, not to pursue an antitrust suit against a company that had made large political donations to the upcoming Republican National Convention. And in 1973, Nixon ordered the firing of Special Prosecutor Archibald Cox to stop his investigation of the Watergate scandal. In what is known as the "Saturday Night Massacre," Attorney General Elliot Richardson resigned, and Deputy Attorney General William Ruckelshaus was fired, after refusing to carry out the order. Solicitor General and then-Acting Attorney General Robert Bork carried out the order to fire Cox.

RESPONSE

In 1975, President Gerald Ford's White House chief of staff issued the first "limited contacts" policy to reduce opportunities for actual or perceived political interference in DOJ matters, creating a precedent followed by all subsequent administrations. Three years later, Congress passed the Independent Counsel Act, which created a way to investigate high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest and insulated the independent counsel from improper firing. Congress also passed the Civil Service Reform Act of 1978, which codified the principle that members of the civil service should be insulated from administrations' political whims.

PROBLEM 2

Three decades later, the pendulum swung back. In 2006, Attorney General Alberto Gonzales relaxed DOJ's "limited contacts" policy, ballooning the number of officials eligible to communicate with the department about specific cases and investigations. The same year, President George W. Bush took the unprecedented step of dismissing nine U.S. attorneys in the middle of his term. Investigations later revealed evidence that the removals were improper and tied to decisions made in politically sensitive cases. Those moves prompted no significant new laws to combat political interference.

PROBLEM 3

In 2016, Attorney General Loretta Lynch had a brief private meeting with former president Bill Clinton on an airport tarmac in the midst of the FBI's ongoing investigation into Hillary Clinton's use of a private email server while serving as secretary of state. The same year, President Barack Obama stated that Hillary Clinton's use of the email server never endangered national security, despite the FBI's ongoing investigation into the issue.

PROBLEM 4

In 2017 and 2018, President Trump took numerous steps to undermine American law enforcement. He issued a stream of public comments seeking to influence the special counsel's investigation into Russian election interference and suggested the investigation played a role in his decision to fire the FBI director. He urged the Justice Department to investigate his political opponents and lamented his attorney general's perceived lack of personal loyalty. And he demanded that DOJ take action against two companies whose owners also control major media outlets whose reporting President Trump frequently criticizes. "I have the absolute right to do what I want to do with the Justice Department," he declared.

TASK FORCE PROPOSED RESPONSE

Congress should require that the White House publish policies on who can participate in discussions with DOJ or other federal agencies with enforcement authority about specific civil or criminal enforcement matters and that it maintain a log of covered White House contacts. In addition, Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

its own initiative. To prevent abuse in this politically sensitive area, the agency's investigative power should be constrained through best practices used at other independent watchdog bodies. Among other things, the legislation should require the director to sign off on all subpoenas to compel testimony or the production of documents; require agency staff to keep pending investigations strictly confidential (with criminal penalties for violators); and specify that all decisions to investigate must be supported by a written determination approved by the director that there are reasonable grounds to believe a violation may have occurred.[114]

- **Grant the OGE director power to bring civil enforcement actions in federal court and seek other corrective action** where the director has determined in writing that there is probable cause to believe a violation occurred. Almost all independent watchdog agencies have authority to either impose penalties and other sanctions or seek them in court. For an agency to assess major fines or hand out other punishment itself requires the creation of elaborate internal procedures to protect the due process rights of alleged wrongdoers.[115] It makes more sense for an agency of OGE's size to instead bring enforcement actions for civil or injunctive relief in federal court. Cases where the only sanction sought is a personnel action like dismissal could be brought to the Merit Systems Protection Board, the body that adjudicates employment issues for federal workers.

- **Create an OGE Enforcement Division.** Enforcing rules is very different from writing them or providing informal guidance. These functions should not be entrusted to the same staffers. The best approach would be for OGE, like other watchdog agencies, to have a separate enforcement division staffed by lawyers and professional investigators with civil service protection. Given the sensitivity of their role, employees of the new Enforcement Division (and potentially all OGE staff) should be barred under civil service rules from participating in partisan politics.[116] While enforcement staff would do the day-to-day work of investigating alleged violations and pursuing sanctions, major decisions — including whether to launch an investigation or bring an enforcement action once the investigation is done — would require the director's approval.

- **Establish minimum qualifications for the OGE director,** in light of these expanded responsibilities, such as experience in ethics, compliance, law enforcement, or related fields; management experience; and reputation for integrity. This would help guard against abuse and ensure that future directors would meet the standards that have previously been met in practice. Detailed qualifications are not necessary because the director is subject to confirmation by the Senate, providing an additional check.

- **Direct OGE and DOJ to establish a process for confidential referrals of potential criminal violations.** As noted, OGE can refer potential criminal matters to the Department of Justice for investigation and potential prosecution, but the process is informal and possibly subject to leaks. DOJ has no obligation to respond. Congress should require that referrals be kept confidential and that DOJ respond to referrals within 120 days to allow OGE to determine whether to take other action on its own.

Finally, to ensure more uniform application of ethical standards across the executive branch, legislation passed by Congress should:

- **Give OGE authority to review and raise objections to individual conflict of interest exemptions.** Currently, federal law gives officials the power to exempt their subordinates from conflict of interest law in specific cases where they determine that the potential violation is not sufficiently important to justify recusal or other action.[117] OGE not only should be notified of these waivers (as is already the practice)[118] but also should have the ability to formally object within a reasonable period of time. The official who granted the waiver should, in turn, be obligated to respond to OGE's concerns in writing, and the waiver, along with OGE's objections and the official response, should be made public.

- **Confirm that White House staff must follow federal ethics rules.** White House staff are subject to the prohibition on conflicts of interest and most federal ethics laws, and they have also long followed the guidance OGE promulgated via regulation. As noted, however, administration officials recently questioned whether OGE rules actually bind them, based on a legal technicality.[119] Congress should amend the law to remove this ambiguity and make clear that OGE has authority to promulgate rules for all executive branch officers, including White House staff.

The proposals here are modeled on other successful independent agencies. Many have been advanced for years by nonpartisan reform groups.[120] They represent a balanced framework that will give ethics rules real teeth while also protecting alleged violators who may not have committed any wrongdoing. Congress should revamp our ethics enforcement system along these lines.

The Rule of Law and Evenhanded Administration of Justice

The Founders established "a government of laws and not of men."[121] As Thomas Jefferson wrote, "[t]he most sacred of the duties of government [is] to do equal and impartial justice to all its citizens."[122] But the rule of law does not enforce itself. Those in power will always be tempted to favor friends and allies over adversaries. That is why, over the course of American history, we have built up a robust set of laws, practices, and norms to promote the evenhanded application of the law, without bias or political favor.

Conflict of interest law bars officials from involvement in law enforcement matters where they have an actual or perceived bias. Detailed professional responsibility rules guide most career law enforcement officials and, when followed, ensure different cases and investigations proceed according to similar standards and guidelines. Mechanisms within agencies — internal review processes, inspectors general, and auditors — seek to enforce standards and hold officials accountable.

Informal policies matter even more. Every administration since that of President Ford has limited which officials in the White House may communicate with Department of Justice personnel about active investigations or cases and how they may do so.[123] Another norm discourages senior political officials from making premature declarations about the guilt or innocence of a defendant or the outcome of a trial before it is complete.[124] And yet another discourages law enforcement from issuing indictments or taking other public steps that could affect an election in the period directly before the vote.[125] No law requires these policies, but they reduce the risk that politics distorts vital law enforcement processes.

It wasn't always this way. When American government was far less formal, it was assumed that the attorney general would be a close legal adviser to the president. Theodore Roosevelt saw no problem in minutely directing antitrust prosecutions.[126] Robert F. Kennedy was his brother's chief political adviser and was preparing to resign as attorney general to serve as campaign manager in November 1963.[127] When Richard Nixon appointed his campaign manager, John Mitchell, as attorney general in 1969, few eyebrows were raised.[128]

That all changed nearly five decades ago, when Watergate showed the costs of politicized justice — and spurred a national reckoning with the abuse and politicization of law enforcement.

From the outset, White House lawyers carefully monitored and molded the federal investigation of the break-in at the Democratic National Committee headquarters. Then, in the "Saturday Night Massacre," Nixon famously ordered his subordinates to fire the special prosecutor. (His attorney general quit and his deputy attorney general was fired rather than carry out this improper order.[129]) In other abuses, Nixon interfered with an antitrust enforcement action on behalf of a large political donor, IT&T,[130] and his White House counsel provided an "enemies list" to the IRS commissioner, asking that hundreds of people be targeted for investigation during the 1972 election (a request that the IRS did not follow).[131]

In the years afterward, Americans learned that the politicization of law enforcement had extended well beyond the Nixon administration. The 1976 Church Committee report documented decades of FBI abuses, especially under the Kennedy and Lyndon Johnson administrations, including the bureau's blackmailing of high officials.[132] Presidents were revealed to have wielded the FBI for political purposes, as when President Johnson had it spy on civil rights protestors at the 1964 Democratic convention.[133]

Nixon's two immediate successors, Presidents Gerald Ford and Jimmy Carter, made rebuilding public confidence in the Department of Justice and other law enforcement institutions a central goal of their administrations.[134] The White House, Justice Department, and others adopted formal and informal practices that aimed to ensure arm's-length dealings — in public and private — between senior political officials and career law enforcement personnel. At the same time, the FBI was reined in by having its director report to the attorney general as well as directly to the White House.[135] The CIA, too, was required to operate under the Foreign Intelligence Surveillance Act.[136] To fill the gap, the White House counsel's office grew in stature and size.[137]

These new rules had an important practical impact. But even more significant, they helped create a new set of expectations — mostly unspoken but nonetheless powerful — that largely constrained political interference in law enforcement.

This system served the country well. It is now under direct attack.

We are still early in the current administration, but already President Trump has taken numerous steps to

undermine American law enforcement. He has issued a steady stream of public comments seeking to influence the special counsel's investigation into Russian election interference.[138] He has urged the Justice Department to investigate his political opponents.[139] He has fired or prompted the resignations of top FBI officials and has lamented his attorney general's perceived lack of personal loyalty.[140] He has demanded that DOJ take action against two companies, Amazon and Time Warner, whose owners also control major media outlets whose reporting frequently angers him.[141] (See, *e.g.*, DOJ's lawsuit to block Time Warner's merger with AT&T, widely condemned as being at odds with decades of antitrust practice,[142] which was rejected in federal court.)[143] He has threatened to tax Harley Davidson "like never before" after the company announced the trade war is forcing some of its operations overseas and has targeted other companies for retribution in response to personal or policy slights.[144] "I have the absolute right to do what I want to do with the Justice Department," he has said.[145]

Other recent administrations also have at times let political considerations influence law enforcement. During President George W. Bush's tenure, the Justice Department inspector general found evidence that nine U.S. attorneys (including Capt. David Iglesias, a member of this Task Force) were removed for their prosecutorial decisions in politically sensitive cases rather than for "underperformance," as DOJ had claimed in congressional testimony at first, and that officials used political affiliation as a factor in hiring, which is prohibited.[146] The scandal resulted in the resignations of senior officials including Attorney General Alberto Gonzales.[147]

During the Obama administration, Attorney General Loretta Lynch was widely criticized for an airport tarmac encounter with former President Bill Clinton, which came while the FBI was investigating the use of a private email server by Hillary Clinton while she was secretary of state.[148] The episode, combined with President Obama's premature statement that Secretary Clinton's actions never endangered national security, raised fears that the administration was inappropriately seeking to influence the probe.[149]

These departures from long-accepted practices have real and lasting consequences. They distort decision-making. They shield wrongdoing by high officials. They risk converting the fearsome power of the prosecutorial machine into a political weapon. They undermine the fundamental notion that the law applies to everyone equally. They corrode public trust. And ultimately, they cast doubt on a crucial premise of any healthy democracy: that the law not be used to favor or punish anyone based on politics.

In the past, the half-century-old system of de facto independence for much of law enforcement and respect for the role of independent courts was a norm largely — though not always — honored by those in power. But that norm has eroded, with the result that few explicit rules now constrain executive behavior. It is time to put in place more explicit and enforceable restrictions to ensure a return to the proper balance.

Safeguard Against Inappropriate Interference in Law Enforcement for Political or Personal Aims

First, we need to strengthen the guardrails preventing improper political interference in law enforcement by the White House. There is no question that it is appropriate for the president and his staff to set priorities for law enforcement and to weigh in on key decisions. At the same time, it is entirely inappropriate for them — as it is for all government officials — to interfere in specific law enforcement matters for personal, financial, or partisan political gain.

To prevent abuse, most public officials involved in law enforcement are subject to a range of checks on their powers — from detailed procedures that constrain their actions, to formal supervisory systems that can discipline them, to inspectors general who can investigate them, to designated congressional committees that provide regular oversight of them.[150] The same is not true for the president and other White House officials. The White House is mainly checked by political processes. But those processes do not work unless the public and political actors know what is going on.

Our proposals do not seek to impose restrictions on the White House. They simply seek to reinforce longstanding practices designed to prevent abuse in the executive branch by enhancing transparency of political contacts with law enforcement and allowing for more meaningful oversight of potential problems.

PROPOSAL 7

Congress should pass legislation requiring the executive branch to articulate clear standards for and report on how the White House interacts with law enforcement.

To prevent both intentional and inadvertent political interference with law enforcement, the White House, Justice Department, and other law enforcement agencies have for decades voluntarily limited contact between senior political officials and career law enforcement personnel.

These curbs on White House contacts are not required by law. They are found only in written policies, voluntarily adopted by each administration, limiting who from the White House and who from the Department of Justice and other enforcement agencies can discuss ongoing investigations and cases. Typically, these policies restrict conversations to high-level officials on both sides, with the White House counsel's office playing a central role in managing and monitoring White House contacts.[151] They also include special protocols for cases affecting national security[152] or where the Department of Justice is defending an administration policy.[153]

These policies recognize that political actors are, at least in part, motivated by political concerns that should not affect the application of the law and that law enforcement personnel are better situated to make decisions about specific cases or investigations. They guard against overt direction from the White House, or the use of investigative agencies to punish political foes. They also protect against the inadvertent pressure or bias that may result from a call from a White House official about a specific matter. Even a question about a case can lead an official to presume an interest in its outcome; the official then may try to ensure the desired outcome. As former Attorney General Benjamin Civiletti put it, presidents and other top officials "unintentionally can exert pressure by the very nature of their positions."[154]

At the same time, the policies recognize that the president has a unique and personal role in executive branch *policy* determinations, including in how our laws are enforced. For example, presidents have, appropriately, told antitrust enforcers to step up enforcement without directing the prosecution of a specific firm.[155] By contrast, White House influence in *individual* cases risks creating the perception — and potentially the reality — that law enforcement is being used as a political or personal tool.[156]

Every administration since Ford has established such "limited contacts" policies between the White House and the Justice Department.[157] Although less consistent, there have also been similar policies covering other agencies with law enforcement responsibilities, such as the Internal Revenue Service and the Department of Labor.[158] Despite their importance, these policies have received scant public notice. Often, they have not been released until well after the end of a presidency. The Obama administration's most recent internal White House policy still has not been released.

Unfortunately, it has become increasingly clear that these voluntary policies, without formal legal requirements or enforcement mechanisms, cannot prevent political interference in law enforcement activities. For example, President George W. Bush's administration dramatically relaxed its own limited contacts policies, ballooning the number of political officials eligible to have contact with law enforcement personnel to more than 800.[159] After the U.S. attorneys' scandal, Attorney General Michael Mukasey reinvigorated the policy.[160]

The current administration, too, has adopted a limited contacts policy.[161] But reports suggest the policy has not always been followed. For example, the president's then-Chief of Staff Reince Priebus reportedly asked a top FBI official to publicly disclose alleged facts pertaining to the bureau's investigation of Russian interference in the 2016 election in order to refute a news report that senior members of the Trump campaign had frequent contacts with Russian agents.[162]

Trump himself, on several occasions, directly contacted the U.S. attorney in the Southern District of New York, who had jurisdiction over a number of matters involving the president's private and financial interests, ostensibly to develop a personal relationship, before ultimately firing him.[163] (That former U.S. attorney is the co-chair of this Task Force.) Trump also drew criticism for taking the unusual step of personally interviewing candidates for the U.S. attorney's successor.[164] While there is no evidence that the president made inappropriate requests in these conversations, they make clear that it is possible for a president to put inappropriate pressure on prosecutors.

When longstanding norms governing contacts between the White House and law enforcement officials are violated, even for reasons that are not inappropriate, it creates a troubling precedent for future administrations and opens the door to inappropriate breaches.

While Congress should not itself regulate how the executive branch deals with law enforcement, it can take steps to increase transparency and bolster accountability, thereby deterring misconduct. Specifically, Congress should pass legislation to:

- **Require the White House, the Department of Justice, and other law enforcement agencies to issue and publish a White House contacts policy.** The legislation should require each administration to identify specific officials, in both the White House and the relevant enforcement agencies, who are authorized to communicate about individual law enforcement matters. This will send a strong message that Congress believes limitations on White House influence are critical to impartial law enforcement. The public disclosure requirement will enable the public to assess whether the policies are

adequate to ensure that law enforcement is not subject to undue political influence.[165] Disclosure also makes it possible for Congress to use hearings and other oversight powers to address any deficiencies.[166]

- **Require law enforcement agencies to maintain a log of contacts** with the White House pertaining to specific civil or criminal enforcement matters undertaken by the Justice Department or other federal agencies with enforcement authority. The log should be limited to communications about individual cases or investigations, including communications about the litigants, subjects, targets, and witnesses, spelling out the people involved in the communication and the matter discussed.[167] It should not include routine (and necessary) contacts where the White House seeks legal

PROPOSAL

Safeguarding the Pardon Process

PRINCIPLE

Presidents should follow established procedures when using the pardon power and should use it to right clear miscarriages of justice, not to reward political allies.

PROBLEM 1

In 1981, President Ronald Reagan pardoned two FBI officials who had authorized illegal surveillance of the homes of friends of the militant radical organization the Weather Underground. No pardon applications were submitted prior to issuance of the pardons, and the pardons did not go through the pardon attorney's office.

PROBLEM 2

In 1992, President George H.W. Bush pardoned six former government officials, including former Defense Secretary Caspar W. Weinberger, who were prosecuted in the Iran-Contra affair. The pardon request was sent directly to the White House, rather than to the pardon attorney's office.

PROBLEM 3

In 2001, President Bill Clinton issued pardons on his last day in office to a fugitive investor whose ex-wife made substantial donations to the Clinton Presidential Library and to Hillary Clinton's Senate campaign, as well as to a Florida businessman who had retained Hillary Clinton's brother to advocate for his clemency application.

PROBLEM 4

President George W. Bush commuted the prison sentence of Lewis "Scooter" Libby, a former top aide in the Bush White House. Libby had been convicted of lying to federal investigators probing the leak of the name of a CIA operative.

PROBLEM 5

In 2017, President Donald Trump pardoned Joe Arpaio, a former Arizona sheriff and Trump supporter who had been convicted for disobeying a federal judge's order to stop racial profiling in detaining suspected undocumented immigrants. The next year, Trump pardoned Dinesh D'Souza, a conservative pundit who had been convicted of violating campaign finance laws by using a straw donor to contribute to a Republican Senate campaign. Not long afterward, Trump became the first president to publicly declare an absolute right to pardon himself.

TASK FORCE PROPOSED RESPONSE

Congress should require written justifications for pardons involving close associates and should pass a resolution expressly disapproving of self-pardons.

advice from the agency or is participating in legal policy issues; contacts relating to a matter in which the United States or one of its subdivisions is a defendant or a matter concerning national security; and other ordinary contacts that do not concern specific cases or investigations.[168]

- **Require relevant agencies to submit reports based on the above logs to relevant House and Senate committees,** the Department of Justice's Inspector General, and covered agencies' inspectors general. Those reports should omit information that could jeopardize confidential witnesses, undercover operations, or the rights of those under scrutiny. Congress and inspectors general could pose follow-up questions about the propriety of particular White House contacts.

These measures, by allowing for oversight of improper communications, will help deter inappropriate White House conduct. If someone knows there will be a record of their contact, they will likely take care to ensure it is appropriate. White House staffers are already accustomed to making similar judgments because White House emails that would otherwise remain confidential risk being publicly released under the Freedom of Information Act[169] if they are sent to agencies.

Based on our experience serving in government, we do not believe a logging and reporting requirement would be overly burdensome. In fact, we expect that reportable White House contacts about a specific pending case or investigation outside of the interagency coordination process would be rare. The White House and Department of Justice already maintain records of similar types of information; indeed, the Department of Justice electronically tracks all of its communications, including with outside parties.[170]

Nor are these measures likely to raise legitimate constitutional concerns. Congress currently regulates White House contacts with the Internal Revenue Service, preventing officials, including the president, from requesting that IRS employees start or stop an audit.[171] It would be on strong constitutional footing to also require the White House and executive branch enforcement agencies to adopt and publish policies to regulate White House-agency contacts, codifying longstanding practice.[172] Congress has passed other laws that require executive branch documents and records of activities to be retained and disclosed in order to further Congress' oversight functions and the public's interest in transparency and accountability.[173] For instance, most White House documents are publicly released after an administration has concluded, pursuant to the Presidential Records Act.[174] The president does not have an absolute right to protect personal or White House contacts from disclosure.[175]

PROPOSAL 8
Congress should empower agency inspectors general to investigate improper interference in law enforcement matters.

Congress should establish a clear mechanism within the executive branch for investigating instances of inappropriate interference with law enforcement for political or personal ends.

We recommend that Congress utilize an oversight mechanism that already exists: agency inspectors general.

In 1978, Congress established inspectors general as independent, nonpartisan watchdogs housed within the executive branch.[176] Their traditional areas of authority relate to financial integrity, with a mandate to eradicate fraud, waste, and abuse.[177] They are empowered to conduct investigations and issue reports relating to the administration of their agencies' programs and operations, and they have a staff of investigators.[178] Some inspectors general are nominated by the president and confirmed by the Senate "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations,"[179] while others are appointed by agency heads.[180] All inspectors general report to and submit operating budget requests to agency heads.[181] Inspectors general are subject to removal by the president, with the president required to communicate in writing the reasons for the removal to both houses of Congress within 30 days of that action.[182]

Congress should expand the jurisdiction of agency inspectors general to expressly include investigations into improper interference in law enforcement functions. Inspectors general arguably already have that authority under existing law, which empowers them to investigate "abuse" and violations of agency policies.[183] But a clear mandate, subject to clear standards, is needed for such an important and sensitive function.

Under this proposal the inspectors general would investigate whether improper White House contacts influenced a specific law enforcement matter at their agency; it would not install an inspector general in the White House or empower an inspector general to go on open-ended, and potentially partisan, witch hunts. Inspector general investigations are also constrained by DOJ guidelines,[184]

professional standards published by the Council of Inspectors General for Integrity and Efficiency,[185] and other controls in the Inspector General Act.[186] Congress should also direct the attorney general to issue guidelines outlining the standards and procedures by which inspectors general are to investigate improper interference.

This proposal also has the benefit of efficiency. It does not reinvent the wheel. Inspectors general are already familiar with the roles and missions of their own agencies. They already have investigators. They know their way around the building. Therefore, we can add this important feature of democratic accountability without creating — and paying for — a whole new bureaucracy.[187]

Ensure No One Is Above the Law

Political leaders and their powerful allies present a special challenge to impartial enforcement of the law. When those in charge of law enforcement are the subject of law enforcement, there is a risk of abuse. Abuse sends a message that there are two sets of rules: a lenient one for the politically well-connected and a far more unforgiving one for everyone else. That is why our system has built-in safeguards to ensure that no one is above the law, from recusal rules to special prosecutor laws. But when the president is involved, the system has two vulnerabilities that merit attention: the possibility of abuse of the pardon power and the possibility of political interference into investigations of the president, senior political aides, and close personal associates. The following recommendations would help protect against such abuse.

PROPOSAL 9
Congress should require written justifications from the president for pardons involving close associates.

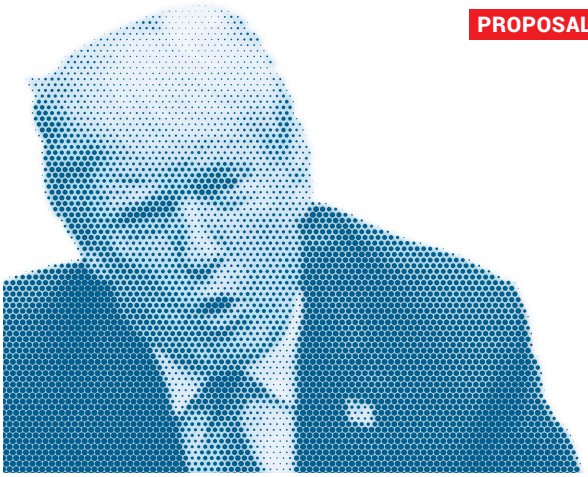
The Constitution endows the president with the "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."[188] This power allows a president to ensure that "inflexible adherence" to the law does not itself become a source of injustice.[189] Presidents have also used pardons to heal national wounds, as George Washington did with the first pardons granted to Whiskey Rebellion participants convicted of treason and as Gerald Ford and Jimmy Carter did by issuing amnesties to draft law violators from the Vietnam era.[190]

By giving the president exclusive authority to exercise the pardon power, the Founders believed it would "naturally inspire scrupulousness and caution."[191] To ensure such "scrupulousness and caution," and to prevent abuse, for over a century, presidents have voluntarily adhered to an established process for considering prospective pardons, overseen by the Department of Justice's Office of the Pardon Attorney.[192] Under this process, the pardon attorney reviews pardon applications and makes written recommendations to the president based on published pardon guidelines.[193] The guidelines reflect the values of mercy and justice, and require consideration of factors including the applicant's post-conviction conduct, the extent to which the applicant accepted responsibility for their crime, how long ago the crime took place, and the seriousness of the offense.[194] Although the president remains free to ignore the pardon attorney's recommendations, this process ensures that all pardon applications are assessed in the same way without regard for the president's personal or partisan political interests.

Controversy has arisen primarily when presidents have deviated from this standard process.[195] There are, unfortunately, several recent examples of such controversial pardons. Some pardons were criticized as inappropriate favors to donors or benefactors, like President Clinton's pardon of financier Marc Rich[196] or President George W. Bush's pardon of real estate developer Isaac Toussie.[197] In fact, President Bush immediately rescinded the pardon following press reports that Toussie's father had donated tens of thousands of dollars to Republicans.[198] Other pardons were criticized as favors for former colleagues, like President George W. Bush's commutation of the prison sentence of Scooter Libby (former chief of staff to his vice president, Dick Cheney),[199] or President George H.W. Bush's pardon of former officials involved in the Iran-Contra affair.[200]

Reports that President Trump has considered pardons for two former members of his campaign, Michael Flynn and Paul Manafort, have also drawn criticism, not only because these are his former associates.[201] Flynn and Manafort are potential witnesses in an investigation that may implicate the president, and the floating of pardons is seen by some as an attempt to lure positive testimony, thereby obstructing justice.[202]

While it is certainly an abuse of the pardon power to use it to advance one's self-interest, that does not mean that Congress can or should try to limit the president's power to make pardon determinations. Nor do we think it wise for Congress to try to restore longstanding safeguards by requiring the president to consult with the pardon attorney before making pardons. Instead, we propose a much more limited measure designed to increase transparency around the exercise of the pardon power in cases raising legitimate questions.



PROPOSAL

Limiting Conflicts of Interest

PRINCIPLE

Presidents and their spouses should limit their direct holdings to assets that pose no risk of a conflict of interest and should use a blind trust for all other investments — as they've all done since the 1970s. In addition, top executive branch officials should refrain from conduct that could create even the appearance of self-interested decision-making.

PROBLEM 1

In 2009, while serving as Secretary of State, Hillary Clinton had dealings with donors to the Clinton Foundation, which was run by President Bill Clinton and Chelsea Clinton at the time.

PROBLEM 2

In 2017, Trump maintained ownership and control of his international business, becoming the first president since Nixon not to comply voluntarily with conflict of interest rules. In addition, the family business of Jared Kushner, Trump's son-in-law and senior adviser, pursued relationships with foreign governments and with foreign companies that have business before the U.S. government. And EPA Administrator Scott Pruitt rented a luxury apartment at below-market rates from the wife of an energy lobbyist with business before the EPA, among other ethical lapses.

TASK FORCE PROPOSED RESPONSE

Congress should pass a law to enforce the Constitution's Emoluments Clauses. And it should extend safeguards against conflicts of interest to the president and vice president, with exemptions that recognize the president's unique role. Congress also should revamp the Office of Government Ethics so it's better able to craft and enforce common-sense ethical standards for the executive branch.

Specifically, Congress should pass legislation requiring the president, in a small subset of cases, to explain his or her decision for pardons or grants of clemency in a written report to the House and Senate Judiciary Committees. To minimize any burden on the president, the reporting requirement should apply only in cases where the individual seeking a pardon has a close personal, professional, or financial relationship to the president — a family member, business partner, current or former employee or professional colleague, or political contributor — or to the president's spouse, close family member, or business associate. In courts, similar relationships typically warrant recusal by a judge.[203] The report should address whether and how the president considered the factors historically used by the pardon attorney in evaluating requests.[204]

This legislation would provide the public with some confidence that the pardon power is being used to further justice, rather than to favor presidential allies or to reduce the president's own criminal liability. At the same time, it would create an avenue for political accountability for abuse of an otherwise unchecked authority. And it would provide Congress with an opportunity to respond to abuse if the president flouts the reporting requirement.

There is ample support and precedent for greater transparency in the pardon process.[205] From 1885 to 1932, presidents submitted detailed reports to Congress about pardons and clemencies they had granted, which included, in many (if not most) instances, some explanation for the grants. These reports even noted if there were disagreements between the president and the pardon attorney or the attorney general and whether the applications did not go through "normal channels."[206] Even without a mandatory reporting requirement, some recent presidents have felt compelled to explain their use of the pardon power.[207] Reporting requirements are also in place in at least 14 states, which require governors to provide reasons for each use of their pardon authority.[208] There are currently at least three bills pending in Congress that aim to increase the transparency and prevent abuse of the pardon power.[209]

We do not believe that this limited reporting requirement would unduly burden the executive branch. There have been on average only 193 acts of clemency a year going back to 1900.[210] Only a minute number of these would be subject to the reporting requirement. Indeed, at least one former U.S. pardon attorney has called for a return to the pre-1933 policy of reporting to Congress on *all* grants of clemency,[211] though we do not believe we need to go that far. In short, the risk of added burden is far outweighed by the accountability that further transparency would bring.

Finally, analogizing from other reporting requirements Congress has imposed on the president, such as reporting to Congress the reasons for removing inspectors general (in the Inspector General Act)[212] or making White House documents available to Congress (in the Presidential Records Act),[213] we believe that such a reporting requirement is within Congress's constitutional authority.[214] Requiring a president to state the reasons for granting pardons in limited instances does not control or limit the president's ability to grant a pardon.[215] And it helps Congress enforce other constitutional provisions and better exercise its powers.[216]

PROPOSAL 10
Congress should pass a resolution expressly and categorically condemning self-pardons.

In recent months, the president has raised the possibility of using the pardon power to absolve himself of criminal liability — an idea that has gone from politically unthinkable to a presidentially asserted "absolute right."[217] For a country born in revolt against a king, it is hard to imagine an act more damaging to the principle that no one is above the law than a self-pardon by the president.

No president has ever pardoned himself, but two have now considered it. In 1974, President Nixon explored the possibility of a "self-pardon" before resigning, prompting the Department of Justice's Office of Legal Counsel (OLC) to opine that the president cannot pardon himself, based on the "fundamental rule that no one may be a judge in his own case."[218]

Rather than waiting to criticize such an act after the fact, Congress should try to prevent this offense to the rule of law by passing a resolution making clear it opposes so-called "self-pardons" and believes they are an unconstitutional exercise of the pardon power. The resolution should also make clear that Congress will initiate impeachment proceedings if the president uses the pardon power to try to pardon himself and could express concern about, and potential responses to, other abuses of the pardon power that suggest public corruption or lack of regard for rule of law and separation of powers principles.[219]

There is precedent for this kind of congressional resolution.[220] At least 33 "sense of" Congress resolutions have been introduced in Congress to disapprove, censure, or condemn a president's actions, with a 1912 resolution condemning President Taft being the latest that was adopted.[221] Some members of Congress have recently argued for a more significant response — like amending the Constitution to expressly limit the president's pardon power[222] — with three bills pending in the current Congress aiming to do so.[223] In fact, Rep. Karen Bass (D-Calif.) proposed a similar resolution in 2017 disapproving of a self-pardon or a pardon for any member of the president's family, but the resolution has not attracted bipartisan support.[224]

A strong bipartisan resolution would send an important message that Congress will hold the president accountable for any attempt at self-pardon.

PROPOSAL 11
Congress should pass legislation to protect special counsels from improper removal.

There is also risk of abuse when a law enforcement investigation implicates high level government officials — especially the president. At minimum, investigators must be secure in the knowledge that their pursuit of justice will not result in their termination. And the American public must be confident that even our highest-ranking officials are subject to the rule of law.

For at least the last several decades, the American public and Congress have consistently supported efforts to insulate prosecutorial decisions from improper partisan or personal considerations. For instance, in the immediate aftermath of the Watergate special prosecutor's firing during the Saturday Night Massacre,[225] public opinion shifted in support of impeaching President Richard Nixon,[226] members of Congress introduced impeachment resolutions,[227] and a federal district court judge ruled that the firing of the special prosecutor was unlawful.[228] A few years later, Congress enacted the now-expired Independent Counsel Law, along with the Civil Service Reform Act of 1978, which codified the principle that federal employees (specifically, members of the civil service) should be insulated from administrations' political whims.[229]

In 1999, after Congress declined to renew the independent counsel statute, the Department of Justice adopted regulations laying out a process for appointing a special counsel to pursue investigations of White House officials or other senior political appointees.[230] The special counsel is appointed by the attorney general and may only be removed for "misconduct, dereliction of duty, incapacity, conflict of interest, or for good cause."[231] These provisions are meant to protect the special counsel from actual or perceived threats that could otherwise influence or impede his or her investigation, while providing a mechanism to hold the special counsel accountable in the event of misconduct.

To be sure, tenure protections have not kept presidents from bristling at investigations by independent or special counsels. President Clinton, for example, famously sparred with Independent Counsel Kenneth Starr during his investigation.[232] Nevertheless, recent statements and actions by President Trump suggest a far more serious threat to Special Counsel Robert Mueller's investigation, reinforcing the importance of the department's protections against removal, while simultaneously demonstrating why Congress should pass a law to protect the special counsel from removal without cause, rather than relying on executive branch regulations that can be amended or rescinded.

To give a partial review: After President Trump fired FBI Director James Comey, at least in part because of "this Russia thing,"[233] Deputy Attorney General Rod Rosenstein appointed Special Counsel Robert Mueller to continue the investigation. Since then, President Trump has repeatedly accused Mueller and his team of having "conflicts of interest" and has regularly referred to the investigation as a "witch hunt."[234] He reportedly ordered Mueller's firing in June of 2017 but walked back the order after White House Counsel Donald F. McGahn threatened to resign.[235] He has also made statements that appear intended to limit the scope of the investigation, stating that if the investigation veers into a review of his personal finances that would cross a "red line."[236] President Trump has also publicly berated those he holds responsible for appointing the special counsel, including threatening to fire Attorney General Jeff Sessions because of Sessions's decision to follow Department of Justice rules and recuse himself from the investigation[237] and publicly attacking Rosenstein over the Mueller appointment.[238]

Notably, of course, the president has not yet removed the special counsel. The critical Department of Justice regulations forbid him from doing so, but they are hardly a guarantee that he will not eventually do so. Because the current protections are merely regulations created by the Department of Justice rather than law, the executive branch can repeal or modify them without involving Congress.[239]

President Trump's aggressive actions and statements against the Russia investigation, as well as Special Counsel Mueller and his team, have left many to fear that his administration will eventually repeal or modify the current DOJ regulations,[240]or that a future president facing a special counsel he or she deems hostile may be emboldened to do so. It is increasingly clear that special counsel protections need to be enshrined in a statute. For these reasons:

- **Congress should pass legislation to shield special counsel investigations from improper political interference.** The legislation should require that the special counsel may only be removed for cause, and it should establish judicial review of any for-cause determination.

The Task Force recommends supporting the bipartisan Special Counsel Independence and Integrity Act (S. 2644),[241] introduced by Sens. Lindsay Graham (R-S.C.), Thom Tillis (R-N.C.), Chris Coons (D-Del.), and Cory Booker (D-N.J.) amid concerns that Special Counsel Mueller would be fired. The bill, which was voted favorably out of the Senate Judiciary Committee,[242] would only allow the special counsel to be removed for cause, and it limits the removal power to the attorney general or the

PROPOSAL

Making Tax Returns Public

PRINCIPLE

Presidents should release their tax returns — as every president since Nixon has done (Ford released a detailed summary of them) — to ensure that they can be fully vetted by the public and the media.

PROBLEM

In 2017, Trump became the first president not to release his tax returns since Lyndon Johnson.

TASK FORCE PROPOSED RESPONSE

Congress should require the president and vice president, and candidates for those offices, to publicly release their personal and business tax returns.

most senior Senate-confirmed Department of Justice official who is not recused from the matter. The bill also allows the special counsel to challenge his or her removal in court, requiring that any such challenge be considered on an expedited basis and that any appeals be directed to the Supreme Court, and provides for the preservation of the special counsel's materials in the event of dismissal. This legislation would not prevent a future president from publicly railing against or even threatening those involved in a special counsel investigation, but it would provide greater assurance that the president cannot unilaterally end an investigation.

Legislation to protect the special counsel from improper removal is within Congress's constitutional authority, as evidenced by similar exercises of its authority in the past that have been found to be constitutional.[243] Congress previously established an independent counsel with jurisdiction to investigate criminal misconduct by high-level executive branch personnel whose prosecution by the administration might give rise to conflicts of interest.[244] Congress insulated the independent counsel from improper removal by superiors.[245] Congress has also enacted legislation protecting numerous other federal officers from arbitrary removal.[246]

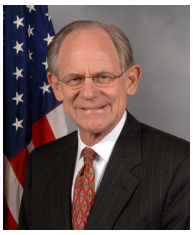
About the Task Force Members

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 healthcare 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, Mr. 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.

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 the 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. Currently a partner at 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. At DLA Piper, he works on financial issues, international trade, legislative affairs, and healthcare. 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 for 23 years and co-founded the Harvard Civil Rights Project. Prof. Edley co-chaired the congressionally chartered National Commission on Education Equity and Excellence. He served in 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

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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 Senate 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, American Security Project Board, and is a Senior Advisor to Gallup. He is a graduate of the University of Nebraska at Omaha.

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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, Professor 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. Professor 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. He received his bachelor's 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 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.

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About the Brennan Center for Justice

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving Constitutional protection in the fight against terrorism. 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, the courts, and in the court of public opinion.

Appendix: Ethics and Disclosure Requirements

Is the official required to:	President and Vice President	Cabinet members and other senior executive branch officials	Members of Congress	Federal judges	Candidates for federal office
Make annual financial disclosures* using OGE Form 278?	Yes	Yes (including nominees)	Yes	Yes	Yes
Follow federal conflict of interest law and regulations, and related rules?	No	Yes	No	No	No
Abide by the insider trading rules and transaction reporting requirements of the STOCK Act?**	Reporting requirements only	Reporting requirements only	Yes	No	No
Follow other rules to prevent conflicts of interest?	No	Some, depending on the agency	Yes (House and Senate ethics rules)	Yes (Code of Judicial Conduct)	No

*** Form 278 requires disclosure of the filer's compensation, investments, assets, gifts, liabilities, certain employment agreements or arrangements, and similar information regarding their spouse and dependent children.**

**** The STOCK Act forbids members of Congress and their staffs from engaging in insider trading on the basis of information derived from their position. It also requires certain officials to report securities transactions valued above $1,000.**

Endnotes

1 The Federalist No. 51 (James Madison) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.").

2 S. Res. 338, 88th Cong. (1964) (establishing a Select Committee on Standards and Conduct in the Senate); "Senate Committee Reorganization," *Congressional Record*, vol. 123, Feb. 1, 1977, p. 2886 (creating a permanent Select Committee on Ethics to replace the Select Committee on Standards and Conduct); H.R. Res. 1013, 89th Cong. (1966) (establishing a Select Committee on Standards and Conduct in the House of Representatives); H.R. Res. 418, 90th Cong. (1967) (establishing a Committee on Standards of Official Conduct in the House of Representatives); H.R. Res. 895, 110th Cong. (2008) (establishing an independent Office of Congressional Ethics in the House of Representatives).

3 "Code of Conduct for Judicial Employees," in *Guide to Judiciary Policy*, Administrative Office of the United States Courts, 2013*, available at* http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees.

4 "Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of Independence para. 2 (U.S. 1776); "We the People of the United States, . . . do ordain and establish this Constitution for the United States of America." U.S. Const. preamble.; "…Government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, the Gettysburg Address (Gettysburg, PA, Nov. 19, 1863).

5 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.").

6 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.").

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

8 See *infra* at 8 (discussing divestment by past presidents and vice presidents).

9 See *infra* at 6-7 (discussing public disclosure of tax returns by past presidents and presidential candidates).

10 James Grimaldi, "Denise Rich Gave Clinton Library $450,000," *Washington Post*, Feb. 10, 2001, https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30.

11 James V. Grimaldi and Peter Slevin, "Hillary Clinton's Brother Was Paid for Role in 2 Pardons," *Washington Post*, Feb. 22, 2001, https://www.washingtonpost.com/archive/politics/2001/02/22/hillary-clintons-brother-was-paid-for-role-in-2-pardons/c5c94a42-b71c-4fe0-a90e-b6189664a8a4/.

12 Rosalind S. Helderman, Spencer S. Hsu, and Tom Hamburger, "Emails Reveal How Foundation Donors Got Access to Clinton and Her Close Aides at State Dept.," *Washington Post*, Aug. 22, 2016, http://wapo.st/2bxLDlH.

13 See, *e.g.*, Jane Coaston, "GOP Rep. Chris Collins Was Just Charged with Insider Trading," *Vox,* Aug. 8, 2018, https://www.vox.com/2018/8/8/17663938/chris-collins-arrested-insider-trading-immunotherapeutics; Susan Davis, "Senate Ethics Panel Admonishes Sen. Menendez," *NPR,* Apr. 26, 2018, https://www.npr.org/2018/04/26/606165063/senate-ethics-panel-admonishes-sen-menendez; Matt Rourke, "Veteran Pa. Congressman Convicted in Racketeering

Case," *CBS News,* June 21, 2016, https://www.cbsnews.com/news/veteran-pennsylvania-congressman-convicted-in-racketeering-case-chaka-fattah/; Susan Schmidt and James V. Grimaldi, "Ney Sentenced to 30 Months in Prison for Abramoff Deals," *Washington Post,* Jan. 20, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/19/AR2007011900162.html; "Abscam Scandal Clouded Congress' Image," *CQ Almanac, 36th ed. (Washington, D.C.: Congressional Quarterly, 1981), 513–21 available at* http://library.cqpress.com/cqalmanac/cqal80-1174797 (several members of Congress convicted of various bribery and conspiracy charges in connection with payments received in exchange for government contracts, promises to introduce legislation, or help obtaining official U.S. residency).

14 Peter Overby, "Change to President Trump's Trust Lets Him Tap Business Profits," *NPR*, Apr. 3, 2017, http://www.npr.org/2017/04/03/522511211/change-to-president-trumps-trust-lets-him-tap-business-profits; Jennifer Calfas, "Eric Trump Says He'll Give the President Quarterly Updates on Business Empire," *Fortune Magazine*, Mar. 24, 2017, http://fortune.com/2017/03/24/eric-trump-president-business-organization/; Rosalind S. Helderman and Drew Harwell, "Documents Confirm Trump Still Benefiting from His Business," *Washington Post*, Feb. 4, 2017, http://wapo.st/2k7rTFa; see generally *infra* 8-15.

15 Daniel I. Weiner, *Strengthening Presidential Ethics Law,* Brennan Center for Justice, 2017, 4–5 & nn. 23–41, *available at* https://www.brennancenter.org/sites/default/files/publications/Strengthening%20Presidential%20Ethics%20Law.%20Daniel%20Weiner.pdf.

16 *Id.* at 3.

17 See Mark Sullivan, "Why Trump's Desire to Bail Out Chinese Tech Giant ZTE Is so Alarming," *Fast Company*, May 16, 2018, https://www.fastcompany.com/40573250/why-trumps-desire-to-bail-out-chinese-tech-giant-zte-is-so-alarming.

18 See, *e.g.,* Matthew Yglesias, "Trump Helps Sanctioned Chinese Phone Maker after China Delivers a Big Loan to a Trump Project," *Vox*, May 15, 2018, https://www.vox.com/policy-and-politics/2018/5/15/17355202/trump-zte-indonesia-lido-city.

19 Ana Swanson, "Trump Strikes Deal to Save China's ZTE as North Korea Meeting Looms," *New York Times*, June 7, 2018, https://www.nytimes.com/2018/06/07/business/us-china-zte-deal.html.

20 As David Frum, formerly a top aide to President George W. Bush, has noted, "legitimacy is important precisely because it shapes the behavior and beliefs of non-supporters," who will only accept policies with which they disagree if they perceive them as a legitimate exercise of authority. David Frum, "Trump's Crisis of Legitimacy," *The Atlantic*, July 17, 2018, https://www.theatlantic.com/politics/archive/2018/07/is-trumps-presidency-legitimate/565451/.

21 Shawn M. Carter, "More Signs Point to Mark Zuckerberg Possibly Running for President in 2020," *CNBC*, Aug. 15, 2017, https://www.cnbc.com/2017/08/15/mark-zuckerberg-could-be-running-for-president-in-2020.html; "Company Info," Facebook Newsroom, accessed Aug. 31, 2018, https://newsroom.fb.com/company-info/ (summarizing information about the company's global user base and multiple offices abroad).

22 Beth Kowitt, "Starbucks' Howard Schultz to Retire. Will His Next Role Be Presidential Candidate?" *Fortune*, June 4, 2018, http://fortune.com/2018/06/04/howard-schultz-starbucks-retire-president/. Starbucks' website boasts offices in 75 markets. "Starbucks Coffee International," Starbucks, accessed Aug. 27, 2018, https://www.starbucks.com/business/international-stores.

23 Michael Levenson, "Deval Patrick Plans to Ramp Up His Political Activity This Year," *Boston Globe*, Apr. 13, 2018, https://www.bostonglobe.com/metro/2018/04/13/deval-patrick-contemplating-white-house-run-says-plans-ramp-his-political-activity-this-year/6QGDvtMznB2bmBpIlgg1PM/story.html; "Global Offices," Bain & Company, https://www.bain.com/about/offices/ (summarizing information about the company's global reach).

24 Eric Lipton, "Pruitt Had a $50-a-Day Condo Linked to Lobbyists. Their Client's Project Got Approved," *New York Times,* Apr. 2, 2018, https://www.nytimes.com/2018/04/02/climate/epa-pruitt-pipeline-apartment.html, (reporting that Democrats on the House Committee on Energy and Commerce were intent on examining the terms of the lease); Sean Sullivan, "Three Republican Senators Voice Concern about EPA Head Scott Pruitt's Conduct," *Washington Post*, Apr. 8, 2018, https://wapo.st/2qgcjvq (Senators John Neely Kennedy, Lindsey O. Graham, and Susan Collins criticizing Pruitt for the lease and his response to scrutiny about it).

25 Ashley Kirzinger et al., *Kaiser Health Tracking Poll — Late Summer 2018: The Election, Pre-existing Conditions, and Surprises on Medical Bills*, Sept. 5, 2018, https://www.kff.org/bca7b93.

26 The Supreme Court called self-dealing of this sort "an evil that endangers the very fabric of a democratic society." United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961). See also Zephyr Teachout, "The Anti-Corruption Principle," *Cornell Law Review* 94 (2009): 342, 345 (arguing that the Constitution "carries within it an anti-corruption principle" and that "power-and-wealth seeking by representatives and elites is a major and constant threat to our democracy"); Philip B. Heymann, "Democracy and Corruption," *Fordham International Law Journal* 20 (1996): 327–28 (discussing impact of corruption on democracy, citing international examples).

27 Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: Frederick A. Stokes Co., 1914), 62.

28 Specifically, the OGE 278 requires that officials disclose their personal sources of income, assets, debts, and other financial information, and employment arrangements and agreements, as well as information for spouses and dependent children. 5 C.F.R. § 2634; Office of Government Ethics, Form 278-e, Public Financial Disclosure (2018); see also Table 1.

29 Most states did not pass laws permitting LLCs until the late 1980s and early 1990s. See Larry Ribstein, "The Emergence of the Limited Liability Company," *Business Lawyer* 51, no. 1 (1995): 1, 2 (noting that between 1977, when Wyoming enacted first LLC statute, and 1995, all U.S. jurisdictions but Vermont and Hawaii had enacted LLC statutes); see also American Bar Association, "LLCs: Is the Future Here? A History and Prognosis," *Law Trends and News* 1 (Oct. 2004), *available at* https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/llc.html (discussing 1977 Wyoming statute and evolution of other states' LLC statutes). According to the IRS, based on tax returns, the number of LLCs went from 17,335 in 1993 to 1,898,178 in 2008. See "Statistics of Income (SOI) Tax Stats — Integrated Business Data 1980–2008," Internal Revenue Service, https://www.irs.gov/pub/irs-soi/80ot1all.xls.

30 Daniel I. Weiner and Lawrence Norden, *Presidential Transparency: Beyond Tax Returns*, Brennan Center for Justice, 2017, 2–3, *available at* https://www.brennancenter.org/sites/default/files/publications/Presidential%20Transparency%20Beyond%20Tax%20Returns.pdf. Ethics officials can request such information from specific filers as a condition for certifying, but they do not have to do so, and the information is not publicly disclosed. See generally *Guide to Drafting Ethics Agreements for PAS Nominees*, Office of Government Ethics, September 2014*, available at* https://www.oge.gov/Web/oge.nsf/Resources/PAS+Nominee+Ethics+Agreement+Guide+(MS+Word).

31 See Ethics in Government Act, 5 U.S.C. App. § 102 (listing disclosure requirements, which do not include reporting for family businesses). In the case of President Trump, for instance, most of his holdings are tied up in a web of approximately 500 LLCs and other closely-held entities, which makes it likely his disclosure reports omit critical information about the president's finances. See Ben Popken, "What Trump's Disclosure of His 500 LLCs Can and Can't Tell Us," *NBC News*, May 16, 2018, https://www.nbcnews.com/business/taxes/what-trump-s-disclosure-his-500-llcs-can-can-t-n874391.

32 Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining Paperwork for Executive Nominations* (Washington, D.C.: Executive Office of the President of the United States, 2012), 4, 48, https://www2.oge.gov/Web/OGE.nsf/0/2CE9B19C0F0ED82A85257EA600655818/$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf (finding that the "two areas particularly ripe for reform are: (1) eliminating the requirement to report investment income…and (2) raising and rationalizing minimum reporting thresholds across reporting categories to exclude the disclosure of financial items too insignificant to raise a concern over conflict of interest" and that implementing these

changes may attract more civic and private-sector leaders to senior government service); Terry Sullivan, "Fabulous Formless Darkness: Presidential Nominees and the Morass of Inquiry," *Brookings*, Mar. 1, 2001, https://www.brookings.edu/articles/fabulous-formless-darkness-presidential-nominees-and-the-morass-of-inquiry/ (calling for simplification of paperwork nominees are required to complete); Memorandum from O'Melveny and Myers, on behalf of the Partnership for Public Service, to Fred Fielding, White House Counsel, "Proposals to Reform the Presidential Appointments Process" (Apr. 10, 2008): 2, 3, 5, *available at* http://presidentialtransition.org/publications/viewcontentdetails.php?id=807 (noting that burdensome process and divestiture requirements may deter qualified people from public service, and recommending that nominees' paperwork be streamlined in order to reduce error).

33 Ninety-six percent of Americans polled this year said that it is important that government be "open and transparent." *The Public, the Political System and American Democracy*, Pew Research Center, 2018, 23, *available at* http://assets.pewresearch.org/wp-content/uploads/sites/5/2018/04/15160829/4-26-2018-Democracy-release1.pdf. Polling shows that large swaths of the American public believe it is possible to "address the problem of political corruption by reforming current ethics and election laws." Jeffrey D. Milyo and David M. Primo, *Public Attitudes and Campaign Finance*, Bipartisan Policy Center, 2017, 17, *available at* https://bipartisanpolicy.org/wp-content/uploads/2018/01/Public-Attitudes-and-Campaign-Finance.-Jeffrey-D.-Milyo-David-M.-Primo.pdf.

34 James Wieghart, "President Nixon Says, 'I'm Not a Crook,' on National Television," *New York Daily News*, Nov. 18, 1973, http://www.nydailynews.com/news/politics/president-nixon-national-television-not-crook-article-1.2876186.

35 See "Presidential Tax Returns," *Tax History Project*, accessed July 27, 2018, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns; Matt Clary, "DNC Says Presidential Candidates Usually Release Tax Returns but Romney Won't," *Politifact*, Dec. 16, 2011, https://www.politifact.com/truth-o-meter/statements/2011/dec/16/democratic-national-committee/dnc-says-presidential-candidates-usually-release-t/. The completeness of these disclosures has varied over the years. For example, President Obama disclosed all his returns from the eight years before he took office, while President Ford disclosed only summary data about his federal taxes from 1966 to 1975. *Id.* In addition, while every major party nominee for president and vice president between 1976 and 2016, and many other top contenders, disclosed tax information for at least the year prior to the election (and in some cases many years), there have been notable exceptions, including Ross Perot, Ralph Nader, and most other third-party candidates. See Karen Yourish, "Clinton Released Her Taxes. Will Trump Follow This Tradition?" *New York Times*, Aug. 12, 2016, https://www.nytimes.com/interactive/2016/08/05/us/elections/presidential-tax-returns.html; Emily Schultheis and Maggie Haberman, "Rich Pols Play Taxes Hide-and-Seek," *Politico*, July 20, 2012, https://www.politico.com/story/2012/07/rich-candidates-play-hide-and-seek-with-taxes-078747; James Bornemeier, "Candidate Nader Silent on Finances," *L.A. Times*, June 4, 1996, http://articles.latimes.com/1996-06-04/news/mn-11625_1_ralph-nader; Form SF-278 (Ralph Nader addendum), Public Financial Disclosure Form, June 14, 2000, at 21, *available at* http://pfds.opensecrets.org/N00000086_99.pdf.

36 See, *e.g.*, Stephen Gandel, Shawn Tully, and Stacy Jones, "Here's Why Donald Trump 'Not Releasing' His Taxes Could Be Disastrous for his Candidacy," *Fortune*, July 27, 2016, http://fortune.com/2016/07/27/donald-trump-not-releasing-taxes/ (reporting that, since 1980, every party nominee produced a tax return, and all but three released their returns before the nominating conventions); Joshua Gillin, "Which Presidential Candidate Has Released the Most Tax Returns in History?" *Politifact*, July 1, 2015, https://www.politifact.com/florida/statements/2015/jul/01/jeb-bush/which-presidential-candidate-has-released-most-tax/ (reporting on presidential candidates' tax return disclosures). Before President Trump, the last significant controversy over a candidate's tax returns involved Mitt Romney, the 2012 Republican Party nominee. Romney delayed releasing any tax information until after he won the nomination, but bowing to public pressure he eventually disclosed returns for the two prior tax years (2010 and 2011) and summary information for the preceding two decades. See Philip Rucker, Jia Lynn Yang, and Steven Mufson, "Mitt Romney Releases Tax Return for 2011, Showing He Paid 14.1 Percent Tax Rate," *Washington Post*, Sept. 21, 2012, http://wapo.st/UyPfls.

37 Mitchell Zuckoff, "Why We Ask to See Candidates' Tax Returns," *New York Times*, Aug. 5, 2016, https://www.nytimes.com/2016/08/06/opinion/why-we-ask-to-see-candidates-tax-returns.html.

38 James M. Naughton, "Agnew Quits Vice Presidency and Admits to Tax Evasion in '67; Nixon Consults on Successor," *New York Times*, Oct. 10, 1973, https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/1010.html#article.

39 Under current law, candidates are required to file a statement of candidacy once their campaign raises $5,000, see 5 U.S.C. App. § 101(c); 11 CFR § 101.3; this proposal would add tax returns to the list of required disclosures at that point.

40 While disclosure of business tax returns has not been part of the longstanding practice, for the reasons stated above, it makes sense to update our disclosure requirements to include them.

41 Three years is the length of time that the IRS already requires taxpayers to keep their returns. This benchmark creates public accountability without overburdening the candidates. See "How long should I keep records?" Internal Revenue Service, last modified Apr. 23, 2018, https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records. See generally "Presidential Tax Returns," *Tax History Project*, accessed July 27, 2018, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns (reflecting that many candidates disclosed three prior years or more).

42 Presidential Tax Transparency Act, S. 26, 115th Cong. (2017); H.R. 305, 115th Cong. (2017).

43 Legislators have introduced bills to require tax return disclosure as a condition for access to the ballot in at least 28 states. Max Rieper, "States Continue to Pursue Legislation on Presidential Tax Return Disclosure," *Multistate Insider*, Sept. 20, 2017, https://www.multistate.us/blog/updated-on-presidential-candidates-to-disclose-tax-returns. See also Alexi McCammond, "The Big Picture: The State Efforts to Keep Trump Off the 2020 Ballot," *Axios*, June 24, 2018, https://www.axios.com/states-tax-return-laws-presidential-2020-trump-88e84cce-7214-409d-b4c7-a24aad919bdb.html. None of the bills has passed into law, but in some states like New Jersey and California, the legislation passed both legislative bodies before being vetoed. See Matt Friedman, "Christie Vetoes Trump-Inspired Bill to Require Tax Returns From Presidential Candidates," *Politico*, May 1, 2017, https://www.politico.com/states/new-jersey/story/2017/05/01/christie-vetoes-bill-to-require-tax-returns-from-presidential-candidates-111677; David Siders, "Jerry Brown Vetoes Bill to Pry Loose Trump's Tax Returns," *Politico*, Oct. 16, 2017, https://www.politico.com/story/2017/10/16/jerry-brown-trump-tax-returns-bill-243799.

44 Ronald Reagan, "Remarks on Signing the Intermediate-Range Nuclear Forces Treaty" (speech, The White House, Washington, D.C., Dec. 8, 1987), *available at* http://www.presidency.ucsb.edu/ws/?pid=33795.

45 See, *e.g.,* James Hill, "A Look Inside Trump's Global Business Interests," *ABC News*, Jan. 10, 2017, https://abcnews.go.com/Politics/inside-trumps-global-business-interests/story?id=44416694; Jesse Drucker and Kate Kelly, "Kushner's Firm Deepens Ties to Those with Business in Washington," *New York Times*, July 11, 2018, https://www.nytimes.com/2018/07/11/business/jared-kushner-business-washington.html; Emma Brown and Danielle Douglas-Gabriel, "Betsy DeVos's Ethics Review Raises Further Questions for Democrats and Watchdogs," *Washington Post*, Jan. 24, 2017, https://wapo.st/2ko1c2M; Dan Alexander, "Lies, China and Putin: Solving the Mystery of Wilbur Ross' Missing Fortune," *Forbes*, June 18, 2018, https://www.forbes.com/sites/danalexander/2018/06/18/lies-china-and-putin-solving-the-mystery-of-wilbur-ross-missing-fortune-trump-commerce-secretary-cabinet-conflicts-of-interest/#-61d760a7e879.

46 See Shane Harris et al., "Kushner's Overseas Contacts Raise Concerns as Foreign Officials Seek Leverage," *Washington Post*, Feb. 27, 2018, http://wapo.st/2EVqm3q.

47 See *supra* at 5 (discussing reported contenders for presidential nomination in 2020). See also Shawn Carter, "More Signs Point to Mark Zuckerberg Possibly Running for President in 2020," *CNBC*, Aug. 15, 2017, https://www.cnbc.com/2017/08/15/mark-zuckerberg-could-be-running-for-president-in-2020.html; Benjamin Hart, "Report: Michael Bloomberg Is, Once Again, Thinking of Running for President," *New York Magazine*, June 26, 2018, http://nymag.com/daily/intelligencer/2018/06/report-bloomberg-is-again-thinking-of-running-for-president.html; Lauren

Dezenski, "Patrick Plans 2020 Decision by End of the Year," *Politico*, June 4, 2018, https://www.politico.com/story/2018/06/04/deval-patrick-2020-elections-622825.

48 The Committee on Foreign Investment in the United States (CFIUS) reviews certain transactions involving foreign investments ("covered transactions") in order to determine the effect of such transactions on the national security of the United States. See Defense Production Act of 1950, 50 U.S.C. § 2170.

49 See, *e.g.*, Secure Elections Act, S. 2261, 115th Cong. (2017) (bipartisan bill that would increase federal support for state and municipal election cybersecurity initiatives with the goal of preventing foreign interference, introduced by Sen. James Lankford (R-Okla.), with three Democratic and two Republican co-sponsors). Seventy-two percent of Americans say they are alarmed about foreign interference in U.S. elections, including 90 percent of Democrats, 68 percent of Independents, and 53 percent of Republicans. Emily Stewart, "Most Americans Are Worried about Russian Election Meddling — And Think Trump Isn't Taking It Seriously," *Vox*, Feb. 27, 2018, https://www.vox.com/policy-and-politics/2018/2/27/17057764/poll-trump-election-meddling-russia-interference (citing a CNN poll conducted by SSRS between February 20 and 23, 2018, among a sample of 1,016 respondents, *available at* http://cdn.cnn.com/cnn/2018/images/02/26/rel3c.-.russia.pdf).

50 U.S. Const. art. I, § 9, cl. 8.

51 See *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1 (2009), *available at* https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace_0.pdf (finding that President Obama's receipt of Nobel Peace Prize did not implicate the Foreign Emoluments Clause because Nobel Committee was not an instrumentality of a foreign government); *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13 (1994), *available at* https://www.justice.gov/file/20391/download (concluding that two scientists on leave from the National Aeronautics and Space Administration could be employed by a public university in Canada without violating the Foreign Emoluments Clause because the public university did not constitute an instrumentality of a foreign government).

52 U.S. Const. art. II, § 1, cl. 7.

53 For example, the Voting Rights Act codifies and implements the protections for voting rights in the Fourteenth and Fifteenth Amendments. See Katzenbach v. Morgan, 384 U.S. 641 (1966). Similarly, the Religious Freedom Restoration Act (RFRA) was passed to codify and expand upon the First Amendment's protections for religious liberty. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2767 (2014).

54 5 U.S.C. § 7342 (defining statutory terms "gift," "decoration," and "minimal value," and establishing categories of gifts and decorations to federal employees, the receipt of which Congress consents).

55 See, *e.g.*, Treasury and General Government Appropriations Act of 2000, 3 U.S.C. § 102 (1999) (increasing the president's salary from $200,000 to $400,000, effective at noon on January 20, 2001).

56 Matt O'Brien, "Donald Trump Won't Do What Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush Did," *Washington Post*, Nov. 15, 2016, https://wapo.st/2gcbamH; Roger Parloff, "Why Aren't Donald Trump's Epic Conflicts of Interest Illegal?" *Fortune*, Nov. 15, 2016, http://fortune.com/2016/11/15/donald-trump-conflicts-interest-ethics/; Laura Lee, "What Is a Blind Trust? And Why It May Be Donald Trump's Best Option," *Fox Business*, Dec. 13, 2016, https://www.foxbusiness.com/politics/what-is-a-blind-trust-and-why-it-may-be-donald-trumps-best-option.

57 For the first time this year, a federal court interpreted the definition of "emolument" and held that the term "extends to any profit, gain, or advantage, of more than *de minimis* value, received by [the president], directly or indirectly, from foreign, the federal, or domestic governments." D.C. v. Trump, No. 17-1596, 2018 WL 3559027, at 23 (D. Md. July 25, 2018).

58 See Elise Viebeck, "Guam Delegate May Have Violated Emoluments Clause with Lease, Ethics Office Says," *Washington Post*, Sept. 11, 2017, http://wapo.st/2vQQowg; John Bresnahan, "Report: Azerbaijani Oil Company Secretly Funded 2013 Lawmaker Trip," *Politico*, May 13, 2015, https://www.politico.com/story/2015/05/congress-2013-trip-azerbaijan-house-ethics-committee-117907; John Bresnahan, "Taiwan Trip Center of Roskam Probe," *Politico*, July 26, 2013, https://www.politico.com/story/2013/07/peter-roskam-ethics-investigation-taiwan-trip-094808; Scott Armstrong and Charles R. Babcock, "Ex-Director Informs on KCIA Action," *Washington Post*, June 6, 1977, http://www.washingtonpost.com/archive/politics/1977/06/06/ex-director-informs-on-kcia-action/de45d7d6-db72-45d0-a817-5234901db8b8; Associated Press, "Rangel and Four Others in House Investigated over Caribbean Travel," *New York Times*, Jun. 26, 2009, https://www.nytimes.com/2009/06/26/us/politics/26inquiry.html.

59 For instance, foreign diplomats now frequently stay at the president's Washington, D.C., hotel, raising questions about whether they are hoping to curry influence or favor with the president. Jonathan O'Connell and Mary Jordan, "For Foreign Diplomats, Trump Hotel Is Place to Be," *Washington Post*, Nov. 18, 2016, http://wapo.st/2fNSW6E.

60 See *supra* n. 57 (denying President Trump's motion to dismiss Foreign Emoluments Clause suit filed by District of Columbia and Maryland); Citizens for Responsibility & Ethics in Washington (CREW) v. Trump, No. 1:17-cv-00458 (S.D.N.Y. Dec. 21, 2017) (dismissing Foreign Emoluments Clause case due to lack of standing); Richard Blumenthal, et al. v. Donald J. Trump, No. 1:17-cv-01154 (D.D.C. 2017) (pending). See also Peter Overby, "Emoluments Lawsuit against President Trump Allowed to Proceed," *NPR*, Mar. 28, 2018, https://n.pr/2GhzbFL. Task Force member Amy Comstock Rick joined an amicus brief filed on behalf of ten former federal government ethics officers in *CREW v. Trump*.

61 *Hobby Lobby,* 134 S. Ct. at 2760 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."); Cf. Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 728 (2003) (recognizing that Congress can go beyond the narrow requirements of the 14th Amendment to enforce that amendment).

62 See 18 U.S.C. § 208(a) (barring most "officers" and "employees" of the federal government from participating "personally and substantially" in specific matters in which they, their spouse or minor child, business partners, or organizations with which they are affiliated have a "financial interest"); see also "18 USC § 208: Acts affecting a personal financial interest," Office of Government Ethics, accessed Nov. 16, 2017, https://www.oge.gov/Web/OGE.nsf/Resources/18+U.S.C.+%C2%A7+208:+Acts+affecting+a+personal+financial+interest (explaining that, under Section 208, an employee has "a disqualifying financial interest . . . if there is a close causal link between a particular Government matter . . . and any effect on the asset or other interest (direct effect) and if there is a real possibility of gain or loss as a result of . . . that matter (predictable effect)").

63 See 18 U.S.C. § 202(c) (exempting the president, vice president, members of Congress and federal judges from the definition of "officer" or "employee" in the conflict of interest statute). Members of Congress and federal judges are also exempt, although they have their own ethics codes that prohibit some of the same conduct. See, *e.g.*, "Code of Conduct for Judicial Employees," at 6–9 (defining conflicts of interest); "Rule XXIII – Code of Official Conduct," included in *Rules of the House of Representatives*, H.R. Doc. No. 114-192 (2017) (regulating, inter alia, receipt of gifts and honoraria); "Rule XXXVII – Conflict of Interest," included in *The Standing Rules of the Senate*, S. Doc. No. 113-18 (2013) (defining conflicts of interest and regulating, inter alia, outside compensation).

64 See 5 C.F.R. § 2635.402(b) note ("If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect[] . . . on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock."); Jack Maskell, *Financial Assets and Conflict of Interest Regulation in the Executive Branch*, CRS Report No. R43365 (Washington, D.C.: Congressional Research Service, 2014), 6–7 (discussing recusal process and waivers).

65 5 C.F.R. § 2635.402(b)(3).

66 See 5 C.F.R. § 2635.402(b)(3) example 1 ("The Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants.").

67 For example, then future Supreme Court Justice Antonin Scalia, during his time at the Department of Justice, wrote in a memo on the applicability of an Executive Order on conflicts of interest, that "it would obviously be undesirable as a matter of policy for the President or Vice President to engage in conduct proscribed by" conflict of interest rules even if they did not technically apply. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, "Applicability of 3 C.F.R. Part 100 to the President and Vice President" (official memorandum, Washington, D.C.: Department of Justice, 1974), https://fas.org/irp/agency/doj/olc/121674.pdf. See also Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017) (requiring presidents and vice presidents, as well as their spouses and minor children, to put any potentially conflicting assets into a blind trust).

68 The Department of Justice opined in 1974 that such concerns weighed against finding that Congress had intended to include the president and vice president in the most recent version of the conflict of interest statute, which dates back to 1962. See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (Sept. 20, 1974), *available at* https://fas.org/irp/agency/doj/olc/092074.pdf ("[T]he conflict of interest problems of the President and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch." (quoting Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, Association of the Bar of the City of New York (1960): 16–17)). Congress formally codified the exemption in 1989. 18 U.S.C. § 202(c) (amending 18 U.S.C. § 202 (1989)).

69 Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (remarks, Brookings Institution, Washington, D.C., Jan. 11, 2017), *available at* https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf ("[E]very President in modern times has taken the strong medicine of divestiture. This means OGE Directors could always point to the President as a model. They could also rely on the President's implicit assurance of support if anyone balked at doing what OGE asked them to do.").

70 "Announcement of the Formation of a Blind Trust to Manage the President's Personal Assets," Jan. 30, 1981, in Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=44168.

71 See Christopher T. Anderson and Yuliya V. Tverdova, "Corruption, Political Allegiances, and Attitudes toward Government in Contemporary Democracies," *American Journal of Political Science* 47 (2003): 91–92 (using survey data and statistical analysis, authors demonstrate that "high levels of corruption reduce citizen support for democratic political institutions across mature and newly established democracies around the globe"); Weiner, *Strengthening Presidential Ethics Law*, 5–6.

72 "Donald Trump's Many, Many Business Dealings in 1 Map," *Time*, Jan. 10, 2017, http://time.com/4629308/donald-trump-business-deals-world-map/; David A. Fahrenthold and Jonathan O'Connell, "Nine Questions about President Trump's Businesses and Possible Conflicts of Interest," *Washington Post*, March 28, 2018, http://wapo.st/2DLYv5f; Emily Stewart, "Trump Is 'Definitely Still Involved' in his Hotel Business, a New Report Says," *Vox*, Dec. 30, 2017, https://www.vox.com/2017/12/30/16832964/trump-business-washington-hotel.

73 For instance, 66 percent of respondents to a Quinnipiac poll said that Donald Trump should place all of his business holdings into a blind trust. Tim Malloy et al., *U.S. Voters Approve of Obama, Disapprove of Trump, Quinnipiac University National Poll Finds; Trump Should Stop Tweeting, Voters Say 2-1,* Quinnipiac University, Jan. 10, 2017, 12, *available at* https://poll.qu.edu/images/polling/us/us01102017_Utb35mky.pdf/.

74 U.S. Const. art. I, § 7.

75 Under OGE rules, mutual funds that track major U.S. indices like the Dow and S&P 500 are not deemed to pose any conflict risk. See 5 C.F.R. § 2634.310. President Barack Obama, for instance, kept much of his wealth in such assets during his time in office, and it makes sense to allow future presidents to do the same. See Michael Galvis, "Barack Obama's Net Worth on his 55th Birthday," *Time*, Aug. 4, 2016, http://time.com/money/4439729/barack-obama-net-worth-55th-birthday/.

76 Typically, recusal is documented in a memo or other communication to an agency's Designated Agency Ethics Official (DAEO) or, for White House staff, a memo to the White House counsel.

77 See Letter from Laurence H. Silberman, Acting Attorney General, to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing view that applying conflict of interest statute to the president would "disable him from performing some of the functions prescribed by the Constitution").

78 As a practical matter, one way for the president or vice president to avoid having to divest would be to refrain from involvement in matters where they have a financial interest. Under this proposal, the decision as to whether to do so would remain up to them. In the event a president chooses to avoid participation in a matter that raises a possible conflict, divestiture would remain an option if his participation later proved necessary.

79 See, *e.g.*, Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017); Presidential Conflicts of Interest Act of 2017, H.R.371, 115th Cong. (2017); We the People Democracy Reform Act of 2017, S. 1880, 115th Cong. (2017).

80 Both the Ethics in Government Act of 1978 and the criminal conflicts of interest statute, 18 U.S.C. § 208, passed with strong bipartisan support. Senate Vote #245, "To Pass S. 555," 95th Cong. (1978), *available at* https://www.govtrack.us/congress/votes/95-1977/s245; House Vote #1500, "To Agree to the Conference Report on S. 555, The Ethics in Government Act of 1978," 95th Cong. (1978), *available at* https://www.govtrack.us/congress/votes/95-1978/h1500. See also "Congress Amends Conflict-of-Interest Laws," *CQ Almanac*, 18th ed. (Washington, D.C.: Congressional Quarterly, 1962) (the Kennedy and Eisenhower administrations both supporting a criminal conflict of interest statute).

81 See Letter from Laurence H. Silberman, Acting Attorney General to Howard W. Cannon, Chairman, Senate Committee On Rules and Administration (endorsing the view that applying conflict of interest statute to the president would "disable him from performing some of the functions prescribed by the Constitution"). The other objection that is sometimes raised is that making the president and vice president subject to conflict of interest law would amount to an unconstitutional qualification on their offices. See *id*. The Constitution sets forth specific qualifications for these offices (natural born citizens at least 35 years old), U.S. Const. art. II, § 1, cl. 5, as it does for Congress, U.S. Const. art. I, § 2, cl. 2 (House of Representatives); U.S. Const. art. I, § 3, cl. 3 (Senate); other qualifications are disallowed absent a separate constitutional amendment. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that state constitutional prohibition of the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot, if that candidate has already served three terms in the House of Representatives or two terms in the Senate, violates the Qualifications Clause of the Constitution for members of the House of Representatives). But making the president and vice president subject to the same ethical rules as other officials does not amount to imposition of an additional "qualification" on either office any more than subjecting him or her to other laws barring egregious official misconduct like bribery or obstruction of justice does.

82 There is reason to believe that a president can indeed recuse himself from a particular matter. Recusal means refraining from active involvement in the matter, not giving up all legal responsibility. Stephen D. Potts, Director, "Recusal Obligation and Screening Arrangements" (official memorandum, Washington, D.C.: Office of Government Ethics, 1999), http://webapp1.dlib.indiana.edu/virtual_disk_library/index.cgi/4248912/FID265/DAEOGRAM/99/Do99018.pdf. Given that the president already does not actually participate in the vast majority of executive branch matters, some have argued that there is no constitutional bar to requiring him to recuse in many instances. See, *e.g.,* Weiner, *Strengthening Presidential Ethics Law*; see also Daphna Renan, "Presidential Norms and Article II," *Harvard Law Review* 131 (2018): 2210–15, *available at* https://harvardlawreview.org/wp-content/uploads/2018/06/2187-2282_Online.pdf (discussing practices and norms to which presidents and executive branch agencies have conformed to prevent the president's direct involvement in specific enforcement matters).

83 See *Managing Conflict of Interest in the Public Sector: A Toolkit*, Organization for Economic Cooperation and Development, 2005, *available at* https://www.oecd.org/gov/ethics/49107986.pdf

84 See, *e.g.,* 5 C.F.R § 7501.104(a) (detailing certain prohibited assets and transactions for even high-ranking Department of Housing and Urban Development employees). See also 5 C.F.R § 3501.103(b) (detailing certain prohibited land or natural resource interests and transactions for high-ranking officials in the Department of the Interior).

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

86 United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961).

87 For example, most commentators agree that the president can be punished for obstruction of justice, at least once he or she leaves office. See Daniel J. Hemel and Eric A. Posner, "Presidential Obstruction of Justice," *Public Law and Legal Theory Working Papers* 665 (2017): 5, *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2115&context=public_law_and_legal_theory ("[I]f the president interferes with an investigation because he worries that it might bring to light criminal activity by himself, his family, or his top aides—and not for reasons related to national security or faithful execution of federal law—then he acts corruptly, and thus criminally."); Sean Illing, "Trump's Lawyer: The President Can't Obstruct Justice. 13 Legal Experts: Yes, He Can," *Vox*, Jan. 5, 2018, https://www.vox.com/2017/12/4/16733422/donald-trump-new-york-times-sessions-russia-mueller-probe; Benjamin Wittes, "The Flaw in Trump's Obstruction-of-Justice Defense," *The Atlantic*, June 4, 2018, https://www.theatlantic.com/politics/archive/2018/06/even-the-president-can-obstruct-justice/561935/ (arguing that where president's "allegedly obstructive action was taken provably outside the contours of the president's oath office and his take-care clause obligations," obstruction statutes should apply).

88 18 U.S.C. § 202(c)

89 Meredith McGehee and Willian Gray, *The Ethics Blind Spot*, Issue One, 2018, *available at* https://www.issueone.org/wp-content/uploads/2018/02/Ethics-Blind-Spot-Final.pdf (explaining that the Office of Congressional Ethics lacks subpoena power and requires reauthorization every new Congress).

90 Maggie Severns, "Reckless Stock Trading Leaves Congress Rife with Conflicts," *Politico*, May 14, 2017, https://www.politico.com/story/2017/05/14/congress-stock-trading-conflict-of-interest-rules-238033.

91 *Id.* (reporting that 28 House members and six senators each traded more than 100 stocks in the past two years).

92 See Viebeck, "Guam Delegate May Have Violated Emoluments Clause with Lease, Ethics Office Says"; Bresnahan, "Report: Azerbaijani Oil Company Secretly Funded 2013 Lawmaker Trip"; Bresnahan, "Taiwan Trip Center of Roskam Probe"; Armstrong and Babcock, "Ex-Director Informs on KCIA Action"; Associated Press, "Rangel and Four Others in House Investigated Over Caribbean Travel."

93 See, *e.g.*, Jerry Markon, "Ex-Rep Jefferson (D-La.) Gets 13 Years in Freezer Cash Case," *Washington Post*, Nov. 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111301266.html; "Former Ohio Congressman Sentenced to Eight Years in Prison," *PBS News Hour*, July 30, 2002, https://www.pbs.org/newshour/politics/politics-july-dec02-traficant_07-30; Associated Press, "3-year prison term for Rick Renzi," *Politico*, Oct. 28, 2013, https://www.politico.com/story/2013/10/rick-renzi-prison-sentence-098963.

94 See 5 C.F.R. § 2635.807 (preventing federal employees from receiving outside compensation for teaching, speaking or writing that relates to the employee's official duties). See also "Gifts from Outside Sources," Office of Government Ethics, last modified Apr. 11, 2017, accessed Aug. 12, 2018, https://www.oge.gov/web/oge.nsf/Gifts%20and%20Payments/8CEAAC03A29FDE9C85257E96006364F8?opendocument.

95 See, *e.g.*, Kathleen Clark, "Do We Have Enough Ethics in Government Yet? An Answer from the Fiduciary Theory," *University of Illinois Law Review* 57 (1996): 63, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2054648 (concluding that "many executive branch restrictions are too strict"); Alfred S. Neely IV, *Ethics-In-Government Laws: Are They Too "Ethical"?*, American Enterprise Institute, 1984, *available at* http://www.aei.org/publication/ethics-in-government-laws-are-they-too-ethical/ (calling for reforms to, inter alia, rules regarding financial disclosure, divestment, and outside compensation); Thomas D. Morgan, "Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency," *Duke Law Journal* 1980, no. 1 (1980), *available at* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2730&context=dlj (discussing difficulties and disincentives created by federal employee ethics laws).

96 Ethics in Government Act, 5 U.S.C. App. §§ 401–08 (1978).

97 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. This was a continuation of a long tradition. See, *e.g.,* John A. Rohr, "Bureaucratic Morality in the United States," *International Political Science Review* 9 (1988): 174 (noting that Ronald Reagan kept on his Democratic predecessor's OGE Director to avoid the appearance of political influence).

98 The Ethics in Government Act does give OGE the power to "order corrective action" when it discovers an ethical violation but does not explain what that might look like or how OGE can enforce its own orders. 5 U.S.C. App. § 402(b)(9). There is no record of the agency exercising this authority. See Alex Guillén, "Ethics Office Weighs 'Corrective Action' for Pruitt," *Politico*, June 15, 2018, https://www.politico.com/story/2018/06/15/ethics-office-investigation-scott-pruitt-scandals-1425413.

99 5 U.S.C. App. § 401 (containing appointment procedure and term length for director, but no for-cause removal provision).

100 See Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) ("The parties agree that the Commissioners cannot themselves be removed by the President except [for] . . . 'inefficiency, neglect of duty, or malfeasance in office,' . . . and we decide the case with that understanding.") (internal citations omitted); Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) *(*"The [Federal Election] Commission suggests that the President can remove the commissioners only for good cause, which limitation is implied by the Commission's structure and mission as well as the commissioners' terms. We think the Commission is likely correct[] . . . .").

101 See Jim Jukes, Assistant Director for Legislative Reference, "Agencies with Legislative and Budget 'Bypass' Authorities – Information," (official memorandum, Washington, D.C.: Office of Management and Budget, 2001), https://www.citizen.org/sites/default/files/ombdocument1.pdf.

102 *Supra* n. 69.

103 *Id.*

104 See, *e.g.*, Clifford D. May, "Washington Talk: Office of Government Ethics; Taking Lots of Heat from and about Meese," *New York Times*, July 8, 1987, *available at* https://www.nytimes.com/1987/07/08/us/washington-talk-office-government-ethics-taking-lots-heat-about-meese.html (OGE came under fire in past decades for its failure to sufficiently scrutinize Attorney General Edwin Meese's financial disclosures, which contained several notable omissions; critics argued that greater scrutiny and stronger enforcement of the rules could have avoided the Wedtech scandal, in which Meese was accused of bringing improper influence to bear on behalf of a contractor to which he had financial ties).

105 In one notable example, after presidential counselor Kellyanne Conway urged Americans to purchase Ivanka Trump-branded products, she was merely "counseled," though the OGE Director recommended more forceful disciplinary action consistent with the norm under prior administrations. Matt Ford, "Ethics Office: 'Disciplinary Action Is Warranted' Against Kellyanne Conway," *The Atlantic*, Feb. 14, 2017, https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-ethics-discipline/516729/; see also Matea Gold, "Power Struggle Intensifies between White House and Ethics Office," *Washington Post*, May 22, 2017, http://wapo.st/2qIoGBW.

106 See Letter from Stefan Passantino, Deputy Counsel to the President, Compliance and Ethics, to Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics (Feb. 28, 2017), 1, *available at* https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Oversight%20Response%20to%20Shaub%20re%20KAC.PDF. The Passantino letter notes the OGE is statutorily authorized to issue regulations and other guidance with respect to "agency" employees, and that the Executive Office of the President is not technically an agency.

107 See Letter from Campaign Legal Center, Common Cause, Democracy 21, Public Citizen, U.S. PIRG, to Richard M. Thomas, Associate General Counsel, Office of Government Ethics (Nov. 14, 2011), 5, *available at* https://www.citizen.org/sites/default/files/oge-gift-comments.pdf (discussing inconsistent application of the gift rule throughout the ranks of the civil service).

108 See 18 U.S.C. § 216(b). For a recent example, see "Acting Ethics Chief Flags Trump Financial Disclosure Form for Rod Rosenstein," *CBS News*, May 16, 2018, https://www.cbsnews.com/news/trumps-financial-disclosure-form-released-by-ethics-office-live-updates/.

109 See David J. Apol, "2016 Conflict of Interest Prosecution Survey" (official memorandum, Washington, D.C.: Office of Government Ethics, 2017, https://www.oge.gov/web/OGE.nsf/0/FEB69F94825247F2852581750045FE2B/$FILE/FINAL%202016%20Prosecution%20Survey%20LA.pdf (detailing conflict of interest enforcement actions taken against federal employees in 2016). In 2015 and 2016 combined, there were only 12 prosecutions for violations of the federal conflict of interest statute at all. *Id*. Walter M. Shaub, "2015 Conflict of Interest Prosecution Survey" (official memorandum, Washington, D.C.: Office of Government Ethics, 2016), https://www.oge.gov/Web/OGE.nsf/0/42DCFE53F8D2211F85257FFD0058DB04/$FILE/Clean%20FINAL%202015%20Proseuction%20Survey%207_26_16.pdf.

110 See Nuno Garoupa and Fernando Gomez-Pomar, "Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties," *American Law and Economics Review* 6 (2004): 415 (civil enforcement is often more effective than criminal enforcement given the lower burden of proof and greater likelihood of a sanction); see also Celena Vinson and Julie Countiss, "The Power of Civil Enforcement," *American Journal of Criminal Law* 43 (2015) (discussing the utility of civil injunctions and other enforcement mechanisms to prevent gang activity, prostitution, and the illegal sale of alcohol); V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?" *Harvard Law Review* 109 (1996): 1532 – 33 (finding that there are very limited circumstances in which corporate criminal liability is more socially desirable than civil liability). Even with OGE as the primary civil enforcer of ethics laws, the Department of Justice would continue to have sole jurisdiction over criminal matters. Overlapping responsibilities of this sort are common in the federal government. Agencies will typically resolve any conflicts (such as between ongoing criminal and civil investigations) through informal communications or by drafting a formal cooperation agreement, either of which could be used here.

111 5 U.S.C. App. § 401.

112 *Supra* n. 97.

113 For instance, the Federal Election Commission submits its budget to Congress and OMB concurrently, rather than using OMB as an intermediary. See *Fiscal Year 2018 Congressional Budget Justification* (Washington, D.C.: Federal Election Commission, 2017). https://www.fec.gov/resources/cms-content/documents/FEC_FY_2018_Congressional_Budget_Justificiation.pdf.

114 Similar requirements are contained in the statute authorizing the Federal Election Commission to investigate potential violations of campaign finance law. See 52 U.S.C. §§ 30107(a)(3), 30109(a)(2), 30109(a)(12)**.** Of course, the FEC is an evenly-divided commission that is prone to gridlock. These safeguards would be far more important at a watchdog agency headed by a single director.

115 See 5 U.S.C. § 556(d) (outlining the procedural protections in place for those facing sanction in an agency adjudication); see also Richardson v. Perales, 402 U.S. 389, 401 (1971) ("[P]rocedural due process is applicable to the adjudicative administrate proceeding involving 'the differing rules of fair play, which through the years, have become associated with different types of proceedings.'"); Muset v. Ishimaru, 783 F. Supp. 2d 360 (E.D.N.Y. 2011) (holding that due process requires that an agency adjudicator give those being punished notice and an opportunity to be heard before enforcing the punishment).

116 See 5 U.S.C. § 7323(B)(1) (preventing employees of certain agencies from taking an active part in political management or political campaigns).

117 18 U.S.C. § 208(b)(1). One recent waiver, for example, allowed a senior White House economic adviser to work on matters affecting companies whose stock was still in his portfolio (the White House claims he has since divested). See Peter Overby, "Ethics Documents Suggest Conflict of Interest by Trump Adviser," *NPR*, March 14, 2017, https://www.npr.org/sections/thetwo-way/2017/03/14/520121822/ethics-documents-suggest-conflict-of-interest-by-trump-adviser. However, the waiver problem is not new. In one notorious example from the George W. Bush administration, the administration's Medicare chief, Thomas A. Scully, was granted a waiver to seek employment representing private healthcare clients even as he was helping to craft the administration's proposal to expand Medicare coverage to prescription drugs. See Amy Goldstein, "Administration Alters Rules on Ethics Waivers," *Washington Post*, Jan. 14, 2004, https://www.washingtonpost.com/archive/politics/2004/01/14/administration-alters-rules-on-ethics-waivers/b92bb516-b3a0-483f-8e11-58f989318999/?utm_term=.25f4a0a9616f.

118 For a discussion of OGE's various statutory authorities, see Letter from Walter M. Shaub, Director, Office of Government Ethics, to John M. Mulvaney, Director, Office of Management and Budget (May 22, 2017), *available at* https://assets.documentcloud.org/documents/3728657/OGE-Letter-to-OMB-Director-Mulvaney.pdf.

119 See *supra* n. 106.

120 See, *e.g.,* Memorandum from Issue One to Editorial Boards (May 23, 2017), *available at* https://www.issueone.org/wp-content/uploads/2017/08/IO-OGE-Edit-Memo-2017.pdf ("RE: Time to Revisit the Office of Government Ethics (OGE)"); Letter from Liz Hempowicz, Project on Government Oversight, to Honorable Jason Chaffetz, Chairman, and Honorable Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform (Feb. 14, 2017), *available at* https://www.pogo.org/letter/2017/02/suggested-ethics-reforms-for-2017/ ("Suggested Ethics Reforms for 2017"); *Executive Branch Reform Act of 2007: Hearings on H.R. 984, Before the House Comm. on Oversight and Government Reform*, 110th Cong. 6 (2007) (testimony of Craig Holman, Ph.D., Legislative Representative for Public Citizen), *available at* https://fas.org/sgp/congress/2007/021307holman.pdf.

121 Mass. Const. art. XXX (1780) (John Adams).

122 Thomas Jefferson, "Note," in Antoine Louis Claude Destutt de Tracy, *Treatise on Political Economy*, ed. Thomas Jefferson (1817), 202.

123 See *infra* n. 151.

124 See *infra* 17-21, A generally; see also Andrew McCanse Wright, "Justice Department Independence and White House Control" (Feb. 18, 2018): 51 *available at* http://dx.doi.org/10.2139/ssrn.3125848 ("The White House has traditionally avoided comment on pending criminal investigations because of the perception of presidential control."); Luke M. Milligan, "The 'Ongoing Criminal Investigation' Constraint: Getting away with Silence," *William & Mary Bill of Rights Journal* (2008): 756, *available at* https://scholarship.law.wm.edu/wmborj/vol16/iss3/4/ ("The White House has historically behaved as though it were constrained from commenting on the merits, progress, or information gathered during ongoing federal criminal investigations or prosecutions of which the President is perceived to be at least nominally in control.").

125 In its examination of conduct at the FBI during the 2016 Presidential election, the Department of Justice's Office of the Inspector General conducted interviews with several current and former law enforcement officials who described the existence of an unwritten "Sixty Day Rule," under which prosecutors avoid public disclosure of investigative steps related to electoral matters or the return of indictments against a candidate for office within 60 days of a primary or general election. See Department of Justice Office of the Inspector General, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* (Washington, D.C.: U.S. Department of Justice, 2018), 17–18, https://www.oversight.gov/sites/default/files/oig-reports/2016_election_final_report_06-14-18_0.pdf.

126 Roosevelt directed his attorney general to produce a memo analyzing the legality of J.P. Morgan's Northern Securities Trust and had a hand in choosing the venue for bringing the government's suit to enjoin the combination. Later, he

provided his assurances that other combinations would not be subject to anti-trust complaints. James F. Rill and Stacy L. Turner, "Presidents Practicing Antitrust: Where to Draw the Line?" *Antitrust Law Journal* 79 (2017).

127 "Bobby Kennedy: Is He the 'Assistant President'?" *U.S. News & World Report*, Feb. 19, 1962, https://www.usnews.com/news/articles/2015/06/05/bobby-kennedy-is-he-the-assistant-president.

128 Gerald Caplan, "The Making of the Attorney General: John Mitchell and the Crimes of Watergate Reconsidered," *McGeorge Law Review* 41 (2010).

129 Eventually, Solicitor General and then-Acting Attorney General Robert Bork carried out Nixon's order to fire Watergate Special Prosecutor Archibald Cox. Carroll Kilpatrick, "Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit," *Washington Post*, Oct. 21, 1973, https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm.

130 While the Justice Department evaluated its merger case against IT&T, the corporation donated hundreds of thousands of dollars to the Republican National Convention. White House tapes recorded President Nixon ordering Attorney General Richard Kleindienst to tell the Department's lead antitrust lawyer to "stay the hell out" of "the IT&T thing" or risk being fired. See Impeachment Inquiry Staff for the House Judiciary Committee, 93d Cong., *Transcript of a Recording of a Meeting Among the President, John Ehrlichman and George Shultz on April 19, 1971 from 3:30 to 3:34 P.M.* (1974), *available at* https://www.nixonlibrary.gov/sites/default/files/forresearchers/find/tapes/watergate/wspf/482-017_482-018.pdf; see also J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* (New York: Viking Press, 1976): 132–34.

131 White House Counsel John Dean gave Commissioner of Internal Revenue Johnnie Mac Walters an "enemies list" of hundreds of prominent Democrats the White House wanted "investigated and some put in jail" during the 1972 election season. Walters and Treasury Secretary George Shultz agreed that neither Treasury nor the IRS would fulfill the White House's request. Walters eventually turned the list over to the executive director of the Joint Tax Committee. Select Committee on Presidential Campaign Activities ("Watergate Committee"), Final Report, S. Rep. No. 93-981, at 130–33 (1974). See also David Dykes, "Former IRS Chief Recalls Defying Nixon," *USA Today*, May 26, 2013, https://www.usatoday.com/story/news/nation/2013/05/26/irs-chief-defied-nixon/2360951/.

132 Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee"), Final Report, S. Rep. No. 94-755 (1976), *available at* https://www.intelligence.senate.gov/resources/intelligence-related-commissions.

133 "Johnson Reported to Have Used F.B.I. to Spy on the Democrats," *New York Times*, Aug. 16, 1973, https://www.nytimes.com/1973/08/16/archives/johnson-reported-to-have-used-fbi-to-spy-on-the-democrats.html.

134 Cornell W. Clayton, *The Politics of Justice: The Attorney General and the Making of Government Legal Policy* (New York: Routledge, 2015), 5, 143; David Leonhardt, "The Sense of Justice That We're Losing," *New York Times*, Apr. 29, 2018, https://www.nytimes.com/2018/04/29/opinion/the-sense-of-justice-that-were-losing.html (discussing role Attorneys General Edward Levi and Griffin Bell played in changing the rules for FBI investigations and instituting strict protocols for communication between the White House and the Department of Justice). President Ford later recalled his words to Attorney General Levi upon offering him the post of attorney general in 1975: "I was in no position to offer job security. But I could and did promise Ed that no politician would encroach on the Department. I wanted him to protect the rights of American citizens, not the President who appointed him." Gerald Ford, "In Memoriam: Edward H. Levi (1912–2000)," *University of Chicago Law Review* 67 (2000): 976.

135 Henry B. Hogue, *Nomination and Confirmation of the FBI Director: Process and Recent History,* CRS Report No. RS20963, (Washington, D.C.: Congressional Research Service, 2005), https://fas.org/sgp/crs/natsec/RS20963.pdf.

136 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (1978).

137 Maryanne Borrelli, Karen Hult, and Nancy Kassop, "The White House Counsel's Office," *Presidential Studies Quarterly* 31 (2001): 576–77 (describing the role and growth of the White House counsel's office over time and naming potential reasons for its expansion).

138 See, *e.g.,* Donald J. Trump (@realDonaldTrump), "Attorney General Jeff Sessions should stop this Rigged Witch Hunt right now, before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!" Twitter, Aug. 1, 2018, 9:24 a.m., https://twitter.com/realDonaldTrump/status/1024646945640525826; Donald J. Trump (@realDonaldTrump), "Looking back on history, who was treated worse, Alfonse Capone, legendary mob boss, killer and 'Public Enemy Number One,' or Paul Manafort, political operative & Reagan/Dole darling, now serving solitary confinement - although convicted of nothing?" Twitter, Aug. 1, 2018, 8:35 a.m., https://twitter.com/realDonaldTrump/status/1024680095343108097.

139 See, *e.g.*, Donald J. Trump (@realDonaldTrump), "Everybody is asking why the Justice Department (and the FBI) isn't looking into all of the dishonesty going on with Crooked Hillary & the Dems..[sic]" Twitter, Nov. 3, 2017, 3:57 a.m., https://twitter.com/realDonaldTrump/status/926403023861141504.

140 Devlin Barrett, John Wagner, and Seung Min Kim, "Trump and Sessions Feud over the Direction of the Justice Department," *Washington Post*, Aug. 23, 2018, https://wapo.st/2PyCIjF; Aaron Rupar, "In Unhinged Tweetstorm, Trump Admits McCabe Firing Was about Politics," *Think Progress*, Mar. 17, 2018, https://thinkprogress.org/trump-unhinged-tweets-about-mccabe-firing-88eb9da60335/ ("Trump . . . repeatedly publicly pressured Sessions to fire McCabe[] . . . ."); Michael D. Shear and Matt Apuzzo, "F.B.I. Director James Comey Is Fired by Trump," *New York Times*, May 9, 2017, https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html.

141 See*, e.g.*, Donald J. Trump (@realDonaldTrump), "In my opinion the Washington Post is nothing more than an expensive (the paper loses a fortune) lobbyist for Amazon. Is it used as protection against antitrust claims which many feel should be brought?" Twitter, July 23, 2018, 6:35 a.m., https://twitter.com/realDonaldTrump/status/1021388295618682881. President Trump stated on the campaign trail, "AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration . . . ." Ryan Knutson, "Trump Says He Would Block AT&T-Time Warner Deal," *Wall Street Journal*, Oct. 22, 2016, https://www.wsj.com/articles/trump-says-he-would-block-att-time-warner-deal-1477162214.

142 The Department of Justice's suit to block the merger was a sharp departure from how the Department has treated such "vertical mergers" for decades. See J. Thomas Rosch, Commissioner, Federal Trade Commission, "The Challenge of Non-Horizontal Merger Enforcement" (prepared remarks, Fordham Competition Law Institute, 34th Annual Conference on International Anti-Trust Law and Policy, Sept. 2007), 11–12, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/challenge-non-horizontal-merger-enforcement/070927-28non-horizontalmerger_1.pdf; James Hohmann, "Analysis: 7 Reasons to Be Suspicious of the DOJ Lawsuit to Stop AT&T from Buying CNN," *Chicago Tribune*, Nov. 21, 2017, http://www.chicagotribune.com/business/ct-biz-doj-lawsit-time-warner-att-20171121-story.html.

143 United States v. AT&T, Inc., No. 17-2511 (D.D.C. June 12, 2018) (denying Department of Justice's request to enjoin the merger), *appeal pending*.

144 Danielle Wiener-Bronner and Julia Horowitz, "Amazon and 16 Other Companies Trump Has Attacked Since his Election," *CNN Money*, Apr. 4, 2018, https://money.cnn.com/2018/04/04/news/companies/trump-companies-attacks/index.html.

145 Michael S. Schmidt and Michael D. Shear, "Trump Says Russia Inquiry Makes U.S. 'Look Very Bad,'" *New York Times*, Dec. 28, 2017, https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html?_r=0 (The President asserting that, although he would be within his rights to fire the special counsel, he was choosing not to do so.).

146 U.S. Department of Justice Office of Inspector General and Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Washington, D.C.: Department of Justice Office of the Inspector General

and Office of Professional Responsibility, 2008): 356–58, https://oig.justice.gov/special/s0809a/final.pdf (concluding that the process used to remove the U.S. Attorneys was "fundamentally flawed"); U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (Washington, D.C.: Department of Justice Office of the Inspector General and Office of Professional Responsibility, 2009): 64, https://oig.justice.gov/special/s0901/final.pdf (concluding that Bradley Schlozman, the political official overseeing the Civil Rights Division at the Department of Justice, "considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division").

147 Dan Eggen and Michael A. Fletcher, "Embattled Gonzales Resigns," *Washington Post*, Aug. 28, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/27/AR2007082700372.html (recounting the difficult last months of Attorney General Gonzales' tenure and his eventual resignation).

148 For a summary of bipartisan criticism, see Paula Reid, "AG Loretta Lynch Faces Storm of Criticism over Bill Clinton Meeting," *CBS News*, June 30, 2016, https://www.cbsnews.com/news/loretta-lynch-bill-clinton-meeting-storm-of-criticism/; see also Mark Landler, Matt Apuzzo and Amy Chozick, "Loretta Lynch to Accept F.B.I. Recommendations in Clinton Email Inquiry," *New York Times*, July 1, 2016, https://www.nytimes.com/2016/07/02/us/politics/loretta-lynch-hillary-clinton-email-server.html.

149 Matt Apuzzo and Michael Schmidt, "Obama's Comments about Clinton's Emails Rankle Some in the F.B.I.," *New York Times*, Oct. 16, 2015, https://www.nytimes.com/2015/10/17/us/politics/obamas-comments-on-clinton-emails-collide-with-fbi-inquiry.html.

150 Such checks on prosecutors' power are critical because, as Attorney General Robert H. Jackson explained, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent force in our society, when he acts from malice or other base motives, he is one of the worst." Attorney General Robert H. Jackson, "The Federal Prosecutor: Address to the Second Annual Conference of the United States Attorneys," *Journal of the American Judicature Society* 24 (1940): 18, https://www.roberthjackson.org/wp-content/uploads/2015/01/The_Federal_Prosecutor.pdf.

151 See, *e.g.*, Jack Quinn, Counsel to the President, "Contacts with Agencies" (official memorandum, Washington, D.C.: The White House, Jan. 16, 1996), 1 ("Unless you are certain that a particular contact is permissible, you should take care before making the contact to consult with the Counsel's Office."); Donald F. McGahn II, Counsel to the President, "Communications Restrictions with Personnel at the Department of Justice" (official memorandum, Washington, D.C.: The White House, Jan. 27, 2017), 1 ("Communications with DOJ about individual cases or investigations should be routed through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General, unless the Counsel's Office approves different procedures for the specific case at issue.").

152 See, *e.g.*, Eric Holder, Attorney General, "Communications with the White House and Congress" (official memorandum, Washington, D.C.: Department of Justice, May 11, 2009), 2, https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download (exempting communications relating to national security from limited contacts policies because "[i]t is critically important to have frequent and expeditious communications relating to national security matters").

153 See, *e.g.*, Benjamin Civiletti, Attorney General, "Communication from the White House and Congress" (official memorandum, Washington, D.C.: Department of Justice, Oct. 18, 1979), 2 ("White House or Congressional inquiries concerning policy decisions or legislation are different from those directed at specific investigations and cases. The positions of the Administration on those kinds of matters often must be coordinated. Additionally, there is less chance for improper influences in this area. Consequently, different considerations for communication result."); Quinn, "Contacts with Agencies," 2; Holder, "Communications with the White House and Congress," 3 (allowing for "distinctive arrangements" for "[m]atters in which the Solicitor General's Office is involved" because those "often raise questions about which contact with the Office of the Counsel to the President is appropriate").

154 Civiletti, "Communication from the White House and Congress," 1 (outlining Department of Justice policy limiting contacts with the White House).

155 For instance, in 2009, Christine Varney, head of the Antitrust Division at the Department of Justice, stated publicly, "The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected." Cecilia Kang, "U.S. Clears the Way for Antitrust Crackdown," *Washington Post*, May 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051101189.html. The White House could also direct the Department of Justice to crack down on white collar crime, even on bankers, but it is generally frowned upon for the White House to direct the prosecution of an individual controversial CEO. A recent example of the White House setting enforcement policy is when the Obama administration announced a policy to no longer initiate the deportation of young undocumented immigrants meeting certain qualifications. In response, Homeland Security Secretary Janet Napolitano instructed immigration enforcement agents to "immediately exercise their discretion, on an individual basis, in order to prevent low-priority individuals from being placed into removal proceedings." Julia Preston and John H. Cushman, Jr., "Obama to Permit Young Migrants to Remain in U.S.," *New York Times*, June 15, 2012, https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html.

156 See, *e.g.*, Renan, "Presidential Norms and Article II," 2207 (discussing "the norm of investigatory independence" for the presidency, which "prohibits presidential direction in individual investigatory matters"), 2236–39 (discussing the president's political control over policymaking through the administrative process).

157 See, *e.g.*, Donald Rumsfeld, White House Chief of Staff, "Standards of Conduct: Contacts with Regulatory Agencies and Procurement Officers" (official memorandum, Washington, D.C.: The White House, Oct. 10, 1975); Fred F. Fielding, Counsel to the President, "Communications with the Department of Justice" (official memorandum, Washington, D.C.: The White House, Feb. 10, 1981); C. Boyden Gray, Counsel to the President, "Prohibited Contacts with Agencies" (official memorandum, Washington, D.C.: The White House, Feb. 1989); Quinn, "Contacts with Agencies"; Michael Mukasey, Attorney General, "Communications with the White House" (official memorandum, Washington, D.C.: Department of Justice, Dec. 19, 2007), *available at* https://www.justsecurity.org/wp-content/uploads/2017/06/AG-2007-Memo-Communications-with-White-House.pdf; Holder, "Communications with the White House and Congress"; McGahn, "Communications Restrictions with Personnel at the Department of Justice."

158 See, *e.g.*, Quinn, "Contacts with Agencies" (Clinton Administration); Kathryn Ruemmler, Counsel to the President, "Prohibited Contacts with Agencies and Departments" (official memorandum, Washington, D.C.: The White House, Mar. 23, 2012).

159 See *supra* n. 157; see also *Report: The Security from Political Interference in Justice Act of 2007*, S. Rep. No. 110-203, at 3 (2007), *available at* https://www.congress.gov/110/crpt/srpt203/CRPT-110srpt203.pdf (stating that Attorney General Gonzales implemented a limited contacts policy permitting "at least 895 people in the executive branch to communicate with at least 42 people at the Department of Justice on non-national security related matters."). The policy shift was opposed by members of Congress and became a key focus of the nomination process of Gonzales' successor, Attorney General Michael Mukasey. Dan Eggen, "Mukasey Limits Agency's Contacts with White House," *Washington Post*, Dec. 20, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121902303.html.

160 Mukasey committed to reinstating a more stringent limited contacts policy at his nomination hearing, and upon confirmation, he restricted allowable contacts about pending criminal and civil cases to the attorney general and his deputy and to the White House counsel and deputy counsel, with a provision that civil enforcement matters could also be discussed with the associate attorney general. Jeannie Shawl, "Mukasey Memo Limits DOJ Case Discussions with White House," *Jurist*, Dec. 20, 2007, http://www.jurist.org/paperchase/2007/12/mukasey-memo-limits-doj-case.php; Mukasey, "Communications with the White House."

161 Donald F. McGahn II, Counsel to the President, "Communications Restrictions with Personnel at the Department of Justice," (official memorandum, Washington, D.C.: White House, Jan. 27, 2017), *available at* https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000.

162 Brooke Seipel, "Priebus Could Have Violated WH Policy by Speaking to FBI: Report," *The Hill*, Mar. 17, 2017, http://thehill.com/blogs/blog-briefing-room/news/324596-priebus-could-have-violated-wh-policy-by-speaking-to-fbi-report.

163 Matt Ford, "Why Trump's Dismissal of Preet Bharara Matters," *Atlantic*, Mar. 12, 2017, https://www.theatlantic.com/politics/archive/2017/03/trump-bharara/519318/.

164 Trump personally interviewed Geoffrey Berman, then a partner at Rudy Giuliani's former law firm, for the U.S. Attorney position for the Southern District of New York; Ed McNally, a partner at the law firm founded by Trump's former personal attorney Marc Kasowitz, for the U.S. Attorney position for the Eastern District of New York; and Jessie Liu for the U.S. Attorney position for the District of Columbia. Seung Min Kim and John Bresnahan, "Trump Personally Interviewed U.S. Attorney Candidates," *Politico*, Oct. 19, 2017, https://www.politico.com/story/2017/10/19/trump-us-attorney-interviews-243962.

165 While all administrations since the 1970s have enacted policies, many of them have not been released until long after they were issued, and some have yet to be publicly released. For example, a White House contacts policy memorandum issued by President Obama's White House counsel has not been released publicly as of the publication of this report. Ruemmler, "Prohibited Contacts with Agencies and Departments."

166 The story of the changes to the limited contact policy during George W. Bush's administration provides an illustration of how congressional scrutiny of contacts policies can make a difference. See *supra*, nn. 159–60.

167 This proposal builds on existing DOJ guidance for particular contacts with outside parties. The U.S. Attorneys Manual directs U.S. Attorneys and staff to report contacts with Members of Congress, their staffs, or the media. See Office of the United States Attorneys, *U.S. Attorneys' Manual* (Washington, D.C.: United States Department of Justice, 2018), §§ 1-7.000, 1-8.000, https://www.justice.gov/usam/united-states-attorneys-manual. Law enforcement officers are already required to record certain information regarding their activities and communications; intra-agency structure already exists to manage any additional required disclosures. See Freedom of Information Act, 5 U.S.C. § 552.

168 To reduce duplication (or any perceived burden), Congress could make clear that once the log indicates the subject and individuals involved in communications about a particular matter, subsequent log entries for each communication on the same matter are not required.

169 5 U.S.C. § 552.

170 Pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a, the Department of Justice has procedures and rules in place to electronically track Department communications, including with outside parties. See 66 Fed. Reg. 41445 (Aug. 8, 2001) (implementing new Department-wide correspondence-tracking system proposed on June 4, 2001, 66 Fed. Reg. 29992); "DOJ Systems of Records," *Department of Justice*, last accessed Sept. 4, 2018, https://www.justice.gov/opcl/doj-systems-records. The White House also maintains its records pursuant to the Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2209; see also Julie Hirschfeld Davis, "White House to Keep Its Visitor Logs Secret," *New York Times*, Apr. 14, 2017, https://www.nytimes.com/2017/04/14/us/politics/visitor-log-white-house-trump.html (noting that White House records are maintained pursuant to law and that disclosure practices vary from one administration to the next).

171 Internal Revenue Service Restructuring and Reform Act of 1998, 26 U.S.C. §§ 6654, 7217 (1998). This legislation has not been challenged as unconstitutional.

172 See *supra* n. 157.

173 See Federal Records Act, 44 U.S.C. §§ 2101–2118, 2901–2910, 3101–3107, and 3301–3324 (requiring creation and retention of agency records); Freedom of Information Act, 5 U.S.C. § 552.

174 The Presidential Records Act, 44 U.S.C. §§ 2201–2207. Presidents have consistently conformed to the Presidential Records Act (PRA) without questioning its constitutionality. See Jonathan Turley, "Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records," *Cornell Law Review* 88 (2003): 666–72. While the PRA has not faced a significant constitutional challenge, the Supreme Court upheld the constitutionality of a PRA predecessor, the Presidential Recordings and Materials Preservation Act, in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (holding that requiring the publication of presidential records in no way "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and discussing the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch"). See also Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991) (noting that, when enacting the Presidential Records Act, "Congress was . . . keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations").

175 See United States v. Nixon, 418 U.S. 683, 706–07.

176 Inspector General Act of 1978, 5 U.S.C. App. § 1 et seq. (1978). Special inspectors general can also be appointed to oversee the administration of temporary government initiatives, such as the Troubled Asset Relief Program in the Treasury Department. See Vanessa K. Burrows, *The Special Inspector General for the Troubled Asset Relief Program (SIGTARP)*, CRS Report No. R40099 (Washington, D.C.: Congressional Research Service, 2009), https://fas.org/sgp/crs/misc/RS22981.pdf.

177 5 U.S.C. App. § 5.

178 *Id.* § 6(a).

179 5 U.S.C. App. 3 § 3(a). Inspectors general are subject to removal by the president, with the president required to communicate in writing the reasons for the removal to both houses of Congress within 30 days of that action. *Id.* § 3(b).

180 *Id.* § 8G. See also "The Inspectors General," *Council of the Inspectors General on Integrity and Efficiency*, 2014, *available at* https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf.

181 5 U.S.C. App. 3 §§ 3(a), 6(f)(1). Agency heads transmit the budget proposals to the president, who submits them to Congress. *Id.* §§ 6(f)(2) – (3).

182 *Id*. § 3(b).

183 Inspectors general do not currently have express statutory authority to investigate political interference. When the Department of Justice Inspector General and Office of Professional Responsibility investigated political interference during the Bush administration's U.S. Attorney firing scandal, the report the Offices co-authored explained that each of the two Offices had jurisdiction to investigate certain aspects of U.S. Attorney and Department of Justice misconduct, and did not reference improper White House interference in law enforcement. *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, 10 n. 12 ("OPR has jurisdiction to investigate allegations against U.S. Attorneys that involve the exercise of their authority 'to investigate, litigate, or provide legal advice.' The OIG has jurisdiction to investigate all other allegations against U.S. Attorneys. See 5 U.S.C. App. 3 § 8E."). The report also noted that, in the midst of congressional and media scrutiny of the U.S. Attorney firings, Deputy Attorney General Paul McNulty recommended to Attorney General Alberto Gonzales that he direct OPR to conduct an investigation into the removals of the U.S. Attorneys. *Id.* at 92–93.

184 5 U.S.C. App. 6 § 6(e)(4) ("[t]he Attorney General shall promulgate, and revise as appropriate, guidelines which shall govern the exercise of [inspectors general's] law enforcement powers"); John Ashcroft, Attorney General, "Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority" (official memorandum, Washington, D.C.: Department of Justice, 2003) (requiring, inter alia, adherence to attorney general guidelines applicable to criminal investigative practices and completion of law enforcement training program, and establishing special procedures for investigations involving senior executive branch officials and other sensitive targets).

185 The Council of Inspectors General for Integrity and Efficiency publishes professional standards pursuant to the Inspector General Reform Act of 2008, 5 U.S.C. App. § 11(c)(2)(A) (2008), which require that investigations be conducted ethically, with impartiality and objectivity, and in accordance with all applicable laws, rules, and regulations, guidelines from the Department of Justice and other prosecuting authorities, and internal agency policies and procedures, with due respect for the rights and privacy of those involved. *Quality Standards for Investigations*, Council of the Inspectors General for Integrity and Efficiency, 2011, *available at* https://www.ignet.gov/sites/default/files/files/invprg1211appi.pdf.

186 See, *e.g.,* 5 U.S.C. App. 6 § 4(b) (requiring reviews to ensure compliance with standards established by the comptroller general of the United States for audits and that internal quality controls are in place and operating); *Id.* § 6(e)(7) (requiring establishment of external review process, in consultation with the attorney general, to ensure that adequate internal safeguards and management procedures exist for exercise of law enforcement powers).

187 See Kathleen Clark, "Toward More Ethical Government: An Inspector General for the White House," *Mercer Law Review* 49 (1998): 553, 555–56, 564 (discussing downsides of independent counsel investigations, which included expense, increased political use of ethics allegations, and decreased public trust in government, and arguing that inspector general mechanism helps promote ethical environment); Letter from Walter M. Shaub, Senior Director for Ethics, Campaign Legal Center, to Trey Gowdy, Chairman, and Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform, United States House of Representatives (Nov. 9, 2017): 13–15, *available at* https://www.politico.com/f/?id=0000015f-a141-de5e-abff-bfd5436b0001 (advocating for establishment of inspector general with regular jurisdiction over small agencies and limited special jurisdiction to conduct ethics investigations throughout executive branch).

188 U.S. Const. art. II, § 2, cl. 1.

189 Margaret Colgate Love, "Reinventing the President's Pardon Power," *Federal Sentencing Reporter* 20 (2007): 6, *available at* http://pardonlaw.com/wp-content/uploads/pardonlawimport/FSR.Pardon.2007.final.pdf (quoting Alexander Hamilton in Federalist No. 74 ("the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel") and James Iredell, Address in the North Carolina Ratifying Convention ("It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.")).

190 Margaret Colgate Love, "Reinventing the President's Pardon Power," 6, n. 6; Proclamation 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977) (President Carter granting pardon for violations of the Selective Service Act, August 4, 1964 to March 28, 1973); Proclamation 4313, 39 Fed. Reg. 34511 (Sept. 16, 1974) (President Ford creating "amnesty discharge," 32 C.F.R. § 724.112); see also The Federalist No. 74 (Alexander Hamilton) ("in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall").

191 The Federalist No. 74 (Alexander Hamilton) ("The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution."). James Madison believed that the threat of impeachment would serve as a check on abuse of the pardon power: "There is one security in this case [a misuse of the pardon power by the president] to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President." Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J.B. Lippincott & co.; Washington, D.C.: Taylor & Maury, 1836–1859), 3:498, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=509&itemLink=r?ammem/hlaw:@field(DOCID+@lit(ed00318))%25230030509&linkText=1.

192 Presidents began to rely on the attorney general for advice on pardons in 1854, though it was not until 1865 that the Office of the Clerk of Pardons was established in the Office of the Attorney General. See Margaret Colgate Love, "Reinventing the President's Pardon Power," 6; see also "Department of Justice, Office of the Pardon Attorney. 1894

– Organization Authority Record," National Archives Catalog, accessed Sept. 10, 2018, *available at* https://catalog.archives.gov/id/10451179 (noting the administrative history of the Pardon Attorney office).

193 The Pardon Attorney submits recommendations to the president through the deputy attorney general. 28 C.F.R Part 1.6 (procedure for reviewing petitions and submitting recommendations to the president); 28 C.F.R. Part 0, Subpart G (delegating authority to the Pardon Attorney and specifying that pardon recommendations to the president are submitted through the deputy attorney general).

194 Office of the United States Attorneys, *U.S. Attorneys' Manual* (Washington, D.C.: Department of Justice, 2018), § 9-140.000 ("Pardon Attorney"), *available at* https://www.justice.gov/usam/usam-9-140000-pardon-attorney#9-140.112.

195 See Margaret Colgate Love, "Reinventing the President's Pardon Power," 6 (citing only three occasions between 1953 and 1999 where the Department of Justice's process was not followed: President Ford's pardon of President Nixon in 1974, President Reagan's 1981 pardon of two FBI officials who had authorized illegal surveillance of the homes of friends of the Weather Underground, and President Bush's 1992 pardon of six Iran-Contra defendants.); Samuel T. Morison, "The Politics of Grace: On the Moral Justification of Executive Clemency," *Buffalo Criminal Law Review* 9 (2005): 45 n. 85 (citing pardons of President Nixon, FBI officials, and Iran-Contra defendants as among those constituting "roughly one percent of th[e] total" cases granted between March 1945 and January 2001 for which there was no prior Justice Department review).

196 President Clinton pardoned fugitive billionaire Marc Rich hours before leaving office in 2001 after a carefully orchestrated lobbying campaign that included Rich's ex-wife, Denise Rich, who was a prominent donor to Democratic Party committees, Hillary Clinton's senatorial campaign, and the Clinton Foundation. Josh Getlin, "Clinton Pardons a Billionaire Fugitive, and Questions Abound," *Los Angeles Times*, Jan. 24, 2001, http://articles.latimes.com/2001/jan/24/news/mn-16268; Jackie Judd and David Ruppe, "Denise Rich Gave $450,000 to Clinton Library," *ABC News*, Feb. 9, 2001, https://abcnews.go.com/Politics/story?id=121846&page=1. The pardon was the subject of congressional and criminal investigations for alleged bribery. The pardon was the subject of congressional and criminal investigations for alleged bribery. Joe Conason, "What Sessions Should Tell Trump about Pardons—Before It's Too Late," *National Memo*, July 27, 2017, http://www.nationalmemo.com/sessions-tell-trump-pardons/.

197 Isaac Toussie pleaded guilty in 2001 to using false documents to have mortgages insured by the Department of Housing and Urban Development, and in 2002 to mail fraud. Ken Belson and Eric Lichtblau, "A Father, A Son, and a Short-Lived Presidential Pardon," *New York Times*, Dec. 25, 2008, https://www.nytimes.com/2008/12/26/us/26pardon.html. The White House maintained that when President Bush granted the pardon, neither he nor his advisers were aware that Toussie's father had recently donated a total of $30,800 to Republicans. *Id.*

198 *Id.*

199 Proclamation 8159, 72 Fed. Reg. 37095 (July 2, 2007), *available at* https://www.gpo.gov/fdsys/pkg/FR-2007-07-06/pdf/07-3328.pdf; see also Amy Goldstein, "Bush Commutes Libby's Prison Sentence," *Washington Post*, July 3, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800858.html (reviewing the facts and summarizing contemporary criticism of the commutation).

200 Proclamation 6518, 57 Fed. Reg. 62145 (Dec. 24, 1992) (granting clemency to Caspar Weinberger, Elliott Abrams, Duane Clarridge, Alan Fiers, Clair George, and Robert McFarlane), *available at* http://www.presidency.ucsb.edu/ws/?pid=20265; see also Walter Pincus, "Bush Pardons Weinberger in Iran-Contra Affair," *Washington Post*, Dec. 25, 1992, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800858.html (including independent counsel's objection that the pardons constituted a "coverup").

201 Flynn and Manafort are potential witnesses in the special counsel investigation into whether Russia interfered in the 2016 election, contributing to the condemnation of the reports. Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman, and Adam Goldman, "Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort," *New*

York Times, Mar. 28, 2018, https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html.

202 See, *e.g.*, Alex Whiting, "Why Dangling a Pardon Could Be an Obstruction of Justice—Even If the Pardon Power Is Absolute," *Just Security*, Mar. 28, 2018, https://www.justsecurity.org/54356/dangling-pardon-obstruction-justice-even-pardon-power-absolute/; Sean Illing, "I Asked 11 Legal Experts If Trump's Lawyer Obstructed Justice," *Vox*, Mar. 29, 2018, https://www.vox.com/2018/3/29/17174042/trump-pardons-manafort-flynn-mueller-probe.

203 Model Code of Judicial Conduct R. 2.11.

204 The factors considered by the Pardon Attorney include: (1) the perspectives of the prosecutors and sentencing judge; (2) the gravity of the offense; (3) the recipient's acceptance of responsibility; (4) the petitioner's criminal rehabilitation record; and (5) the need for relief. See *U.S. Attorneys' Manual* § 9-140.000.

205 Many scholars and writers on the pardon power have expressed support for greater pardon transparency, through increased congressional involvement or otherwise. See Glenn H. Reynolds, "Congressional Control of Presidential Pardons," *Nevada Law Journal Forum* 2 (2018) (Congress could require that the president submit pardon explanations to Congress, that pardons be recorded and preserved by the National Archives, or that the archivist maintain an index of pardons organized by crimes and circumstances); Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1989) (pardons should be accompanied by a written explanation of the reasons); Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States,* American Constitution Society, 2013, 9–10, *available at* https://www.acslaw.org/wp-content/uploads/2018/04/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf (the president should publicly announce a pardoning policy and publish an annual report setting forth the reasons for each grant of clemency); P.S. Ruckman, Jr., "Preparing the Pardon Power for the 21st Century," *University of St. Thomas Law Journal*, 12 (2016): 472–75, *available at* http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/JEdit.htm (proposing that a clemency board publish data on the efficiency of processing pardon applications, and further proposing a return to the pre-1933 practice of presidents submitting detailed annual reports on pardons to Congress); Brendan Koerner, "It's Time to Make the Clemency System Less Opaque," *Wired*, Oct. 7, 2016, https://www.wired.com/2016/10/time-make-clemency-system-less-opaque/ (proposing an "online clemency-monitoring system," essentially a digital version of the pre-1933 report).

206 Ruckman, "Preparing the Pardon Power for the 21st Century," 475–76. It is unclear why this process was abandoned. According to one reporter, the process was initially stopped as part of a broader cost-cutting measure to eliminate printing during the Great Depression, and it was not resumed to prevent embarrassment to those whose crimes were being pardoned. Koerner, "It's Time to Make the Clemency System Less Opaque."

207 See, *e.g.*, William Jefferson Clinton, "My Reasons for the Pardons," *New York Times*, Feb. 18, 2001, https://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html; Andrew Novak, "Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States," *Michigan Journal of Legal Reform* 49 (2016): 842 (citing remarks by President Ford on granting a pardon to President Nixon, and a proclamation by President Bush on granting clemency to former Secretary of Defense Caspar Weinberger and others). See Robert Pear, "President Reagan Pardons 2 Ex-F.B.I. Officials in 1970's Break-Ins," *New York Times*, Apr. 16, 1981, *available at* https://www.nytimes.com/1981/04/16/us/president-reagan-pardons-2-ex-fbi-officials-in-1970-s-break-ins.html (citing President Reagan's statement on pardoning two former FBI officials).

208 Colo. Const. art. IV, § 7; Ind. Const. art. V, § 17; Iowa Const. art. IV, § 16; Ky. Const. § 77; Md. Const. art. II, § 20; Ohio Const. art. III, § 11; N.J. Stat. Ann. § 2A:167-3.1; Or. Rev. Stat. § 144.660; Tenn. Code Ann. §§ 40-27-101, 107; Va. Const. art. V, § 12; Wash. Const. art. III, § 11; W. Va. Const. art. 7, § 11; Wis. Const. art. V, § 6; Wyo. Const. art. 4, § 5. See generally Margaret Colgate Love, "Reinvigorating the Federal Pardon Process: What the President Can Learn from the States," *University of St. Thomas Law Journal* 9 (2013): 743–51. For a discussion of the benefits and drawbacks of instating a reasons requirement, see Daniel T. Kobil, "Should Clemency Decisions Be Subject to a Reasons Requirement?" *Federal Sentencing Reporter* 13 (2000): 150.

209 See Presidential Pardon Transparency Act of 2017, H.R. 3489, 115th Cong. (2017) (requiring that the name of the person pardoned, the full text of the reprieve, and the date of issue is published in the Federal Register); Abuse of the Pardon Prevention Act, H.R. 5551 & S.2770, 115th Cong. (2018) (directing the attorney general to produce investigative materials to Congress in the event of certain pardons granted by the president).

210 We calculated this average from the yearly figures provided by the Pardon Attorney. "Clemency Statistics," U.S. Department of Justice, Office of the Pardon Attorney, accessed Aug. 23, 2018, https://www.justice.gov/pardon/clemency-statistics. In 2014, President Obama announced an initiative for federal inmates to have their sentences commuted or reduced if they met certain factors. The initiative resulted in 583 and 1,043 commutations in 2015 and 2016, respectively. Without these two years, the average drops further.

211 Former Pardon Attorney Margaret Colgate Love argues that President Roosevelt's 1933 "decision to stop publishing reasons for grants deprived the public of the factual predicate necessary to hold pardon decision-makers accountable and reinforced the impression that pardoning was mysterious, capricious, and possibly corrupt. It also encouraged both the president and the Justice Department to think that they did not need to be accountable to the public for pardoning." Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States,* American Constitution Society, 2013, 9–10*, available at* https://www.acslaw.org/wp-content/uploads/2018/04/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf.

212 5 U.S.C. App. 3 § 3(b).

213 44 U.S.C. § 2201–2209.

214 Congress also requires disclosure of foreign intelligence information to congressional intelligence committees despite the president bearing "primary responsibility for the scope and conduct of foreign intelligence activities" and acting as "the sole organ of the nation in foreign relations." Philip A. Lacovara, "Presidential Power to Gather Intelligence: The Tension between Article II and Amendment IV," *Law & Contemporary Problems* 40, no. 3 (1976): 107. See National Security Act of 1947, 50 U.S.C. §§ 3001, 3043(a)(1), 3091(a)(1), 3093(c) (requiring the president to transmit to Congress an annual report on the national security strategy of the United States; to keep congressional intelligence committees fully and currently informed of intelligence activities; to provide congressional intelligence committees written findings that covert actions are necessary, and, in instances when such findings are not reported to the committees, to provide a statement of the reasons for not giving prior notice, with an obligation to disclose the finding or provide an explanation for its continued withholding within 180 days); Intelligence Authorization Act for Fiscal Year 2015, Pub. L. No. 113-293, 128 Stat. 3990–4008.

215 The Supreme Court has held that, in some circumstances, the president can be required to disclose information without violating the separation of powers doctrine. United States v. Nixon, 418 U.S. 683, 706–07 (1974); see also Reynolds, "Congressional Control of Presidential Pardons," 33–34 ("Although Congress cannot tie the president's hands, it seems likely that it could take substantial steps to ensure that, under certain circumstances, those hands perform their actions in the open—and if not open to the entire public, then at least behind closed doors to Congress. Rules providing for such transparency would very likely withstand constitutional scrutiny given that a pardon is, by its nature, a public act.").

216 For instance, transparency can help Congress hold the president accountable, where appropriate, pursuant to its impeachment power. The Supreme Court has also recognized that the pardon power is appropriately limited by other constitutional provisions, such as the Spending Clause, Hart v. United States, 118 U.S. 62, 67 (1886) (explaining that pardons cannot have the effect of authorizing a governmental payment not authorized by Congress), the Fifth Amendment privilege against self-incrimination, Burdick v. United States, 236 U.S. 79, 93–94 (1915) ("[T]he power of the President under the Constitution to grant pardons and the right of a witness [against self-incrimination] must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both, to leave to each its proper place."), and the Fifth Amendment's Due Process Clause, Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (J. O'Connor, concurring) ("some minimal procedural safeguards apply to clemency proceedings").

217 Donald J. Trump (@realDonaldTrump), "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending [sic] Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!" Twitter, June 4, 2018, 5:35 a.m., https://twitter.com/realdonaldtrump/status/1003616210922147841.

218 *Presidential or Legislative Pardon of the President*, 1 Op. O.L.C. Supp. 370 (1974), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1974/08/31/op-olc-supp-v001-p0370_0.pdf.

219 Those potential abuses include pardons of family members or political supporters that would undermine the public's confidence in equal justice, or pardons of public officials who have violated the public's trust or their fundamental rights, signaling to other officials that they may do the same with impunity. Such a resolution would also respond to the recent pardon of former Arizona sheriff Joe Arpaio, who was convicted of criminal contempt for ignoring a court order to stop unconstitutional conduct, and recent speculation that President Trump could issue pardons to his son and son-in-law. See, *e.g.*, Carol Leonnig, Ashley Parker, Rosalind Helderman, and Tom Hamburger, "Trump Team Seeks to Control, Block Mueller's Russia Investigation," *Washington Post*, July 21, 2017, http://wapo.st/2uH7sqO (reporting that Trump has asked his advisers about his power to pardon aides, family members, and even himself). President Trump is also considering pardoning former Illinois Governor Rod Blagojevich, who is serving a prison sentence following convictions for public corruption. Jason Meisne, "Trump Says He's Considering Commuting Sentence of Imprisoned Former Gov. Rod Blagojevich," *Chicago Tribune*, May 31, 2018, http://www.chicagotribune.com/news/local/breaking/ct-met-illinois-governor-blagojevich-trump-20180531-story.html.

220 See, *e.g.,* H. Con. Res. 107, 112th Cong. (2012) (expressing the sense of Congress that use of military force without prior congressional authorization is an impeachable offense).

221 Jane A. Hudiberg and Christopher M. Davis, *Resolutions to Censure the President: Procedure and History*, CRS Report No. R45087 (Washington, D.C.: Congressional Research Service, 2018), https://fas.org/sgp/crs/misc/R45087.pdf.

222 Representatives Al Green and Steve Cohen have proposed amendments to the Constitution to expressly prohibit self-pardons. H.J. Res. 115, 115th Cong. (2017) ("The President shall have no power to grant to himself a reprieve or pardon for an offense against the United States"); H.J. Res. 120, 115th Cong. (2017) (prohibiting self-pardons and pardons for the president's family members, current or former members of the president's administration, or staff from the president's campaigns).

223 See *supra* nn. 209, 222. Members of Congress have introduced several other proposals to amend the pardon power over the years, including a 1974 proposal to give a two-thirds majority of Congress the power to reject pardons, resolutions in the 1990s to prohibit pre-conviction pardons, a 2001 proposal to prohibit pardons during lame-duck presidencies, and a 2009 resolution disapproving of pardons during the final 90 days of a president's term. Kristen H. Fowler, "Limiting the Federal Pardon Power," *Indiana Law Journal* 83 (2008): 1660–61; H Res. 9, 111th Cong. (2009).

224 H. Res. 523, 115th Cong. (2017).

225 See *infra* at 16 (discussing the Saturday Night Massacre).

226 One poll found that support for President Nixon's impeachment nearly doubled, from 23 percent to 44 percent in favor, after the episode. Associated Press, "Poll Shows Many for Impeachment," *Spokane Daily Chronicle*, Oct. 23, 1973, *available at* https://news.google.com/newspapers?id=kJNYAAAAIBAJ&sjid=VvgDAAAAIBAJ&pg=2407,2360158&dq=oliver-quayle&hl=en. Gallup polls showed a steady increase in support for President Nixon's impeachment after the firings. Andrew Kohut, "How the Watergate Crisis Eroded Public Support for Richard Nixon," *Pew Research Center*, Aug. 8, 2014, http://www.pewresearch.org/fact-tank/2014/08/08/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/.

227 Twenty-one members of Congress introduced resolutions calling for President Nixon's impeachment. Allen McDuffee, "The Saturday Night Massacre Actually Sped up Nixon's Political Demise," *Timeline*, May 10, 2017, https://timeline.com/saturday-night-massacre-nixon-1f7c2565c0d8.

228 Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973) ("[I]n the absence of a finding of extraordinary impropriety[,] [the firing] was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.").

229 5 U.S.C. § 2301(b)(2) (mandating that employees and applicants for employment receive fair and equitable treatment without regard to political affiliation); 5 U.S.C. § 2301(b)(8)(A) (protecting employees from coercion for partisan political purposes).

230 28 C.F.R. § 600.1. Special counsel regulations were implemented after the expiration of the independent counsel statute that same year. The Office of Independent Counsel was created pursuant to the Ethics in Government Act of 1978. The statute empowered the attorney general to petition a special three-judge panel of the U.S. Court of Appeals for the District of Columbia to name an independent counsel upon the receipt of credible allegations of criminal misconduct by certain high-level executive branch personnel whose prosecution by the administration might give rise to an appearance of a conflict of interest. The attorney general could remove the independent counsel for "good cause, physical or mental disability."

231 28 C.F.R. § 600.7(d).

232 See, *e.g.*, Darren Samuelsohn, "Trump's War against Mueller Borrows from Bill Clinton's Playbook," *Politico*, June 21, 2018, https://www.politico.com/story/2018/06/21/trump-mueller-clinton-independent-counsel-660491; Don Van Natta, Jr., "White House's All-Out Attack on Starr Is Paying Off, with his Help," *New York Times*, Mar. 2, 1998, https://www.nytimes.com/1998/03/02/us/white-house-s-all-out-attack-on-starr-is-paying-off-with-his-help.html.

233 David Smith, Julian Borger and Lauren Gambino, "Donald Trump Admits 'This Russia Thing' Part of Reasoning for Firing Comey," *The Guardian,* May 12, 2017, https://www.theguardian.com/us-news/2017/may/11/donald-trump-james-comey-firing-russia-investigation.

234 The President has sought to undermine Special Counsel Mueller's fitness to lead an independent investigation of Russian interference in the 2016 election, accusing Special Counsel Mueller and his team of having conflicts of interest. See, *e.g.*, Karoun Demirjian, "Conservative Republicans Demand Mueller Recuse Himself over Uranium Deal," *Washington Post*, Nov. 3, 2017, http://wapo.st/2zhDdsP; Adam Edelman, "Trump Slams Mueller Russia Probe, Accuses Team of Having 'Unrevealed Conflicts of Interest,'" *NBC*, May 7, 2018, https://www.nbcnews.com/politics/donald-trump/trump-slams-mueller-russia-probe-accuses-team-having-unrevealed-conflicts-n871866.

235 Michael S. Schmidt and Maggie Haberman, "Trump Ordered Mueller Fired, but Backed off When White House Counsel Threatened to Quit," *New York Times*, Jan. 25, 2018, https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html; Neal Katyal, "Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules," *Washington Post*, May 19, 2017, http://wapo.st/2qHggce.

236 "Excerpts From the Times's Interview With Trump," *New York Times*, July 19, 2017, https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?_r=1.

237 Max Greenwood, "Trump: Sessions Recusal 'Unfair' to Me," *The Hill*, July 19, 2017, http://thehill.com/homenews/administration/342843-trump-sessions-recusal-unfair-to-me.

238 Michael Shear, Charlie Savage and Maggie Haberman, "Trump Attacks Rosenstein in Latest Rebuke of Justice Department," *New York Times*, June 16, 2017, https://www.nytimes.com/2017/06/16/us/politics/trump-investigation-comey-russia.html.

239 Though it is not clear whether the regulations are subject to the Administrative Procedure Act's "notice-and-comment" rulemaking process (indeed, the regulations were promulgated by former Attorney General Reno without going through that process), legal scholars agree there is an avenue for the executive to rescind the regulations, either through the APA's rulemaking procedure or more expeditiously. See, *e.g.*, Katyal, "Trump or Congress Can Still Block Mueller" ("Trump could order the special counsel regulations repealed. . . ."); Josh Blackman, "Can the Special Counsel Regulations Be Unilaterally Revoked?" *Lawfare*, July 5, 2018, https://www.lawfareblog.com/can-special-counsel-regulations-be-unilaterally-revoked (though the regulations could be revoked, the special counsel may have standing to challenge a rescission that is "arbitrary and capricious"). *Cf. Nader*, 366 F. Supp. at 108 ("An agency's power to revoke its regulations is not unlimited—such action must be neither arbitrary nor unreasonable.") citing Kelly v. U.S. Dep't of Interior, 339 F. Supp. 1095 (E.D. Cal 1972).

240 See, *e.g.*, Alexi McCammond, "Democrats Worry Trump Will Fire Mueller," *Axios*, Oct. 30, 2018, https://www.axios.com/democrats-worry-trump-will-fire-mueller-1513306540-8e68256f-94a7-4c3c-9d7c-0c3af1386e59.html; Nicholas Kristof, "The Nation Will Pay If Trump Fires Mueller," *New York Times*, Apr. 11, 2018, https://www.nytimes.com/2018/04/11/opinion/fire-mueller-trump.html; Mark Warner, "Congress Must Draw 'Red Line' to Protect Mueller, Warn Trump against Firing and Pardons: Mark Warner," *USA Today,* Mar. 18, 2018, https://www.usatoday.com/story/opinion/2018/03/18/congress-protect-robert-mueller-warn-donald-trump-no-firing-no-pardons-senator-mark-warner-column/435883002/.

241 Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2018), *available at* https://www.congress.gov/115/bills/s2644/BILLS-115s2644rs.pdf.

242 Nicholas Fandos, "In Warning to Trump, Senators Advance Bill to Protect Mueller," *New York Times*, Apr. 26, 2018, https://www.nytimes.com/2018/04/26/us/politics/senate-mueller-protection-bill.html. The bill would not open the door for Congress to politicize investigations by imposing real-time reporting requirements on the special counsel, as one contemplated amendment to the bill while it was considered in committee would have done. Mary Clare Jalonick, "As Trump Fumes, Senators Bid to Protect the Special Counsel," *Associated Press*, Apr. 11, 2018, https://www.apnews.com/9a5a0ba245814a9b8259c6290b698ff5 (reporting that Senator Charles Grassley was preparing an amendment requiring new reports to Congress if the scope of the special counsel's investigation changed and a final report on the investigation with a detailed explanation of any charges).

243 Letter from Eric Posner, Professor of Law, University of Chicago Law School, and Stephen I. Vladeck, Professor in Law, University of Texas School of Law, to Senator Charles Grassley, Chairman, and Senator Dianne Feinstein, Ranking Member, Senate Judiciary Committee (Apr. 24, 2018), *available at* https://www.justsecurity.org/wp-content/uploads/2018/04/Posner-Vladeck-Letter-on-S2644.pdf.

244 28 U.S.C. § 591 et seq.

245 28 U.S.C. § 596 (requiring "good cause, physical or mental disability" for removal).

246 12 U.S.C. § 5491 (c)(3) (Consumer Financial Protection Bureau); 42 U.S.C. § 7412(r) (6)(B) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. § 1975(e) (Commission on Civil Rights); 15 U.S.C. § 2053(a) (Consumer Product Safety Commission); 42 U.S.C. § 7171 (b) (1) (Federal Energy Regulatory Commission); 12 U.S.C. § 4512(b)(2) (Federal Housing Finance Agency); 5 U.S.C. § 7104(b) (Federal Labor Relations Authority); 46 U.S.C. § 301(b)(5) (Federal Maritime Commission); 12 U.S.C. § 242 (Federal Reserve); 15 U.S.C. § 41 (Federal Trade Commission); 5 U.S.C. § 1202(d) (Merit Systems Protection Board); 30 U.S.C. § 823(b) (1) (Mine Safety and Heath Review Commission); 29 U.S.C. § 153(a) (National Labor Relations Board); 45 U.S.C. § 154 (National Mediation Board); 49 U.S.C. § 1111(c) (National Transportation Safety Board); 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); 29 U.S.C. § 661(b) (Occupational Safety and Health Review Commission); 5 U.S.C. § 1211(b) (Office of Special Counsel); 39 U.S.C. § 502(a) (Postal Regulatory Commission); 42 U.S.C. § 902(a)(3) (Social Security Administration); 49 U.S.C. § 1301(b)(3) (Surface Transportation Board).

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