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If it's Broke, Fix it

**Restoring Federal Government
Ethics and Rule of Law**

Edited by Norman Eisen



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Editor's Note: A New Day Dawns

By Norman Eisen

"If it ain't broke, don't fix it." So goes the old adage. Its corollary, however, is equally important, particularly to U.S. governance and its constant reinventions over the past almost 250 years: if it is broken, do fix it. That principle has guided the American experiment from the earliest days of the Republic through the Civil War and its aftermath, cycles of depression and recovery, grievous domestic and foreign policy blunders and atrocities, and alternating progress and triumphs.

When it comes to federal government ethics and the rule of law, a great deal was broken in the past four years that must now be repaired. In this report, a group of distinguished scholars and practitioners has come together to provide an independent assessment of that problem and its solutions.

The mission that these accomplished individuals undertook was to think deeply about what went awry, the deeper weaknesses that were exposed, and how to fix these weaknesses moving forward in their particular domains of expertise. They range from ethics and conflicts of interest, to the Hatch Act and big money in politics, to transparency and independence at the Department of Justice (DOJ), to ethics issues impacting the U.S. role on the international scene. Because these issues are interwoven, and because our authors have dealt with all of them in their long professional careers, any one of them could have written any of the following sections. Topics were ultimately chosen based on areas of preeminent expertise among the group.

My only other request of them was to imagine what would be the best fixes to these complex issues, without regard for any other consideration. The editor and the authors certainly recognize that many compromises will be necessary in order to translate these ideas into law and practice. Indeed, we welcome that as part of the normal policy process in which we have all worked collectively for well over a century. But compromise must not come at the expense of comprehensiveness. As the broad and interlocking

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scope of this report demonstrates, the challenges are interconnected, and any solution must address each of these areas. We followed Brookings practice which does not generally allow endorsement of particular proposed legislation, including H.R. 1 and S. 1, the comprehensive reform bills introduced in the House and Senate in January 2021. Instead we focused on what we thought were the best solutions; the extent to which our recommendations may track with the proposed legislation or other bills is not intended as an endorsement of this legislation, although it merits and receives close attention.

As for the executive branch of government, we are encouraged as we launch this report. The new Biden administration has already commenced the reconstruction that will be needed after the ethics and rule of law devastation of the Trump era by announcing its own ethics plan through an executive order on January 20, Inauguration Day.¹ Many of the solutions discussed in this report are addressed by the Biden plan.

Its significance is not to be minimized. The editor, along with a number of the authors, had the privilege of implementing President Barack Obama's demanding ethics vision for his administration, including its centerpiece, his "Day One" executive order setting tough new rules on conflicts of interest.² It may seem like a very long time ago after four years of Donald Trump, but Obama had arguably the most scandal-free presidency in memory owing to those clear ethics rules, backed by strong transparency about their application.³

Biden's new executive order on ethics does us one better. It restores the fundamentals of the Obama plan by closing loopholes Trump opened—but going further, it includes new crackdowns on special-interest influence. If implemented rigorously

(always a big if) Biden's plan promises to go further to "drain the swamp" than either of his predecessors.

As we discuss in this report, federal law establishes the basic rules for government officials to avoid conflicts of interest and other behavior that is corrupt or appears corrupt by benefiting themselves, their families, or associates. Obama went further, ordering each of his appointees to sign a pledge committing to additional safeguards on their behavior. Trump greatly watered down the standards with scandalous results. And that was before he abrogated his plan entirely on the last night of his presidency, wiping away post-employment restrictions for his officials, including restrictions on serving as foreign agents. Biden has done the opposite, restoring the Obama rules and expanding them, including when it comes to lobbying and working for foreign governments.

For example, take one of the centerpieces of the Obama plan: "reverse" revolving door restrictions. Most ethics plans focus on officials leaving government, but in the Obama administration, we also imposed limits on those coming into government, with even tougher restrictions on ex-lobbyists. Trump's executive order loosened those lobbying rules, lifting our limitation on lobbyists serving at an agency they lobbied. It is little wonder a flood of lobbyists inundated Trump's administration—more than four times the number in just one Trump term than served under Obama in twice that time. We have much more to say about these issues in the pages that follow.

The Biden plan puts that core Obama restriction for lobbyists back in place, barring them from jobs in agencies they previously sought to influence. This makes sense—letting the fox into the henhouse he just stalked is simply too dangerous, as proved by the numerous controversies involving Trump officials who led agencies they once lobbied.

The new Biden plan not only fixes what Trump got wrong, it does the same for Obama's ethics regime. For example, the Biden executive order adds a restriction on so-called golden parachutes—cash bonuses granted to executives as they leave a business to join the government. These windfalls create the perception that an ex-employee may favor her benefactor, and it is about time they ended, as we explain below. The Biden plan does that, restricting exit bonuses and requiring entering officials to certify that they have not accepted other benefits (such as deferred ones) in lieu of such packages. It goes well beyond existing law and is a strong step forward.

The new plan also builds on Obama's in closing the revolving door on the other side of government employment: When employees leave. Federal law imposes a one-year limit on a departing senior official communicating on behalf of clients with the agency where the official worked. In the Obama administration, we extended that to two years, on the theory that an employer might pay an ex-official to do nothing for 12 months, but 24 months is a long time for cold storage. Trump eliminated the Obama extension, farcically declaring that his officials must follow the applicable statute—which they already had to do.

Here too, Biden not only restores the Obama restriction of two years, he goes further. Now not only are officials restricted from representing clients to their former agencies, they are also cordoned off from their peers in the White House itself. This recognizes the reality that senior agency officials engage with the White House constantly and have ties there too, not just at their former agency. This rule will restrict them from using the special access and influence that follows, and they should not be allowed to use it for private gain.

A number of other post-employment restrictions are added as well, including materially assisting

others in making communications or appearances that ex-officials are prohibited from undertaking themselves under the pledge. Here the Biden plan again improves on the Obama ethics rules by closing a loophole for "shadow lobbying"—when former officials who might not themselves be able to meet with an agency prepare and strategize with their colleagues to do so instead. There is no reason that a former official should be able to do indirectly what they cannot do directly. The Biden plan also carries over one of the few good aspects of the otherwise spurious Trump plan: restricting former officials from working as an agent for a foreign country after leaving government. But Biden also goes further, not allowing any former lobbyists for foreign countries from entering his administration.

The Obama plan gets another upgrade when it comes to one of its most controversial aspects: waivers. These are written authorizations that make an exception to the rules when doing so is in the public interest. While working for Obama, controversy erupted when I started authorizing waivers. I learned they need to be tightly regulated and highly transparent. That's why I'm glad to see the waiver provision of the Obama plan improved. That includes a new provision that waivers be made public within 10 days and imposing much more detailed rules guiding when waivers are appropriate. Above all, the new policy makes explicit that service as a public-interest lobbyist may be taken into account in deciding whether a waiver shall be issued; there is no reason that someone who advocates on behalf of charitable causes should be on the same footing as a corporate lobbyist.

Not in Biden's executive order but critically important to its success is another recently announced step: restoring the Obama-era policy of releasing White House visitor records that Trump ended. When everyone knows who is visiting the White House, its

employees don't schedule meetings they shouldn't, and are too busy to sneak off campus for them (much). So the tough Biden ethics rules will be reinforced by the restored visitor-records policy. While the specifics have not yet been released, arrangements should be made to reveal both in-person meetings and details of formal video conferences that would otherwise have been in person.

Is the new Biden plan perfect? Of course not. Even more restrictions could have been loaded on prior relationships coming into government and even longer exclusions onto officials leaving the administration. Corporate lobbyists could have been barred altogether, and public interest ones automatically waived in. But all of those strictures would have come at a cost of finding the right people to do the urgent work of government in a time of pandemic, economic crisis, domestic unrest, and continued foreign war.

Biden's ethics plan is the strongest, most ambitious swamp-draining plan ever. All of us will be watching to make sure it is scrupulously followed. If it is, cleaner government lies ahead—finally.

As you will read in the pages below, the Biden ethics plan captures many of the best ideas that our authors advocate and that policymakers have advanced for decades. As we have noted, both the House and the Senate are moving forward with H.R. 1 and S. 1, which also address concerns that are analyzed throughout this report, including campaign finance, ethics rules for public servants, and enforcement of the Foreign Agents Registration Act (FARA). Readers can learn a great deal more about the policy concerns these bills address in the pages that follow. The editor and the authors are proud to contribute these insights to the vibrant discussions about reconstructing ethics and the rule of law in which Washington and the United States are now engaged. It represents a burst of sun after a very dark period indeed.

Introduction

Since the Watergate scandal, a complex web of ethics and disclosure statutes, together with long-established norms, had governed the conduct in the office of the president.⁴ For decades they largely stood the test of time—until they ran headlong into Donald Trump. From the moment he descended his golden escalator to announce his candidacy, Trump signaled he was a rule-breaker interested in blowing up American governance and remaking it in his own image. His conduct while in office lived up to that promise, and his presidency can be summed up in four words: a failure of accountability.⁵

The lawlessness of the Trump presidency taught Americans that the traditions of our government were not as sturdy as many had thought. Restoring our democracy to its full strength will require more than renewing laws and norms alone; it will require sober leadership that sets high expectations for ethical conduct. But legal reforms can raise the floor for ethics and close gaps in the current legal framework.

President Trump's initial decision not to divest ownership or control of his vast business empire put him on a personal collision course with many of our existing ethics rules and principles.⁶ Placing his businesses in a revocable trust that gave him the right to control and enjoy its assets did little to assuage concerns about continuing conflicts of interest.⁷ Congress exempted the president from the federal

conflicts-of-interest statute, a judgment that was vindicated by the unbroken precedent presidents had set since the 1970s of placing their assets in blind trusts administered by independent trustees.⁸ As a voluntary practice, that precedent proved no match for Trump. He did not share the institutional interest of his predecessors in maintaining both the legitimacy and the appearance of legitimacy of the presidency. His foreign entanglements and self-dealing quickly fueled concerns that he was elevating his personal interests over those of the United States.⁹

Nor did the limited disclosure requirements to which he was subject provide a sufficient brake against this conduct. Had President Trump followed the course of all previous presidents and released his taxes, the public may have had a clearer picture of the extent of his foreign entanglements and the degree to which his business holdings posed conflicts of interest and raised national-security risks.¹⁰ But by also flouting this norm, Trump was able to keep the public and Congressional overseers in the dark.

These problems highlight the urgent need to refresh our commitments to ethics and the rule of law. We must, for starters, legislatively mandate that presidential candidates release their tax forms and enhance public financial-disclosure requirements for presidents. We also propose new legislative tools for preventing conflicts of interest, limiting outside

influence on high-level officials, detecting ethics violations, taking corrective action in the executive branch, and giving the Office of Government Ethics (OGE) greater powers. Other proposed reforms would enhance the independence of inspectors general, protect whistleblowers, and attend to the interaction between domestic and international ethics and rule of law issues.

The foreign dignitaries that flocked to President Trump's Washington D.C. hotel raised the specter of emoluments paid by governments seeking to win favor with the American president, as did the 66 or more foreign trademarks the Trump Organization received during his presidency, mostly from China.¹¹ A subservient Department of Justice and a Republican majority in the Senate allowed the president to violate the constitutional prohibition against accepting emoluments.¹² We propose legislation clarifying the meaning of key terms in the Emoluments Clauses and their reach.

This report proposes a three-step program that minimizes big money in politics, provides for robust disclosure to expose the role of those who pour large sums into political campaigns, and suggests a counter-balance by bringing more small donors into the picture.

Laws against nepotism also were no obstacle for President Trump, who brought his daughter Ivanka Trump and son-in-law Jared Kushner into the White House after an Office of Legal Counsel (OLC) memo, released on his first day in office, concluded that

the White House was exempt from the anti-nepotism statute.¹³ Once ensconced in the White House as top aides, Jared and Ivanka used the levers of power to advance their financial interests and exert significant influence over U.S. domestic and foreign policies.¹⁴ Journalist Jill Abramson characterized this combination of nepotism and corruption as “the handmaidens of Trump’s presidency.”¹⁵ We propose legislation making express that the anti-nepotism statute applies to the president and vice president.

The post-Watergate reforms also were no match for an attorney general intent on expanding the scope and strength of the president’s executive powers and willing to use his power to protect the president’s personal and political interests. At Barr’s direction, the Justice Department took the extraordinary step of interfering in politically charged prosecutions, breaching the line that historically had protected federal criminal prosecutions from undue political interference—a line that largely existed only as a matter of practice and comity.¹⁶

Barr also deployed scores of federal agents to Democratic-controlled cities. He claimed a need to quell left-wing protesters, when in reality the rioters were largely right-wing extremists responding in part to the president’s inflammatory rhetoric.¹⁷ The now iconic image of President Trump standing in front of a church in Washington’s Lafayette Square holding a bible—a scene made possible only by federal agents reportedly sent at the direction of Barr to violently clear the area of peaceful protesters—illustrates the key role the attorney general played in the Trump presidency.¹⁸

These abuses highlight the need to restore the Department of Justice’s independence, protect it from partisan politics, and assure its commitment to the rule of law through changes in DOJ’s policies, executive orders, and legislation. This report

proposes specific recommendations that range from giving other entities a role in monitoring and reporting on what is happening at DOJ to strengthening the independence of the special counsel.

Money in politics remains a threat to American democracy, influencing who wins American elections and controlling decisions that elected officials make once in office. While Trump began his presidential campaign railing against the corrosive effect of money in politics and promised to inoculate himself from the influence of donors, the reality was far different. Trump campaign donors wielded enormous influence at all levels of his administration, laying the groundwork for the most corrupt presidency in modern history.¹⁹ This report proposes a three-step program that minimizes big money in politics, provides for robust disclosure to expose the role of those who pour large sums into political campaigns, and suggests a counterbalance by bringing more small donors into the picture.

Foreign interference has threatened the basic institutions of our democracy since its founding. The 2016 general election was a crash course for the U.S. intelligence community and lawmakers in malign foreign interference in democratic institutions.²⁰ A key legal tool to combat foreign interference—the Foreign Agent Registration Act—has proven to be ineffective. The Department of Justice has undertaken only minimal enforcement efforts and FARA's self-reporting nature, convoluted structure, and many exemptions render it toothless.²¹ This report proposes reforms to strengthen its effectiveness.

The actions of the Trump administration also revealed the critical role of an open government in countering attacks on the foundations of our democracy. President Trump set the tone early with the announcement that the White House would no longer continue the practice of the Obama administration of

making public White House visitor logs.²² To protect our democracy, Congress must arm citizens with the necessary tools for transparency: A Freedom of Information Act (FOIA) law that works, recordkeeping laws that ensure the preservation of our nation's history, and access to a wealth of data.

Making these reforms is not only a matter of domestic importance. Rededicating our democracy will also be powerfully salient on the international stage. It signals our nation's commitment to taking steps to avoid the recurrence of a profoundly compromised leader such as Donald Trump, and so helps restore confidence and trust in the United States as an ally. Both for reasons of principle and American global leadership, it is also critical for the United States to reassert itself on existing multilateral rule of law efforts. These include two multi-stakeholder partnerships—the Open Government Partnership (OGP) and the Extractive Industries Transparency Initiative (EITI). In addition, there will be critical moments across the first year of the new administration to re-engage foreign governments, to showcase domestic reforms, and to exchange learning with other countries, including at President Biden's proposed "Summit for Democracy."

President Trump's Profiteering

By Virginia Canter

President Trump's decision to retain interests in the companies that comprise the Trump Organization gave rise to unprecedented presidential profiteering and conflicts of interest.²³ From the outset, Trump was alleged to have violated the U.S. Constitution by profiting from foreign and domestic governments who patronized his hotels and other companies.²⁴ Trump's businesses served as vehicles for personal enrichment leading to literally thousands of conflicts of interest.²⁵ His debt-laden businesses made him particularly susceptible to foreign influence and a possible national-security risk. Trump's White House appointments of his son-in-law and daughter paved the way for them to advance their own financial interests. We include below a number of recommendations to prevent similar abuses by presidents in the future.

Shortly after Trump took office, he was sued for violating the Foreign²⁶ and Domestic²⁷ Emoluments Clauses due to his Trump Organization financial interests.²⁸ Unlike most modern presidents who placed their assets in independently managed blind trusts, U.S. Treasuries, or publicly held diversified mutual funds, which are widely acceptable means for addressing conflicts of interest,²⁹ Trump retained his business interests through a trust managed by his adult sons and former business associate.³⁰

Because the Trump Organization profits from business dealings with foreign and domestic governments,³¹ it posed a risk of corrupt influences like those feared by the Framers.³² His businesses collected millions in rent from a majority-state-owned Chinese enterprise,³³ and profited from foreign diplomat-held national day celebrations.³⁴ The federal government paid millions to Trump businesses covering costs for official events Trump hosted for foreign dignitaries and charges incurred by the Secret Service.³⁵ To prevent similar abuses, legislation should be enacted to define "emolument" to include "any profit, gain, or advantage, of more than *de minimis* value, received from foreign, the federal, or domestic governments, including for transactions involving services provided at fair-market value."³⁶

Trump's failure to divest resulted in more than 3,400 conflicts of interest.³⁷ His businesses were vehicles for personal enrichment collecting more than \$13 million from special interests³⁸ and \$9.7 million from political groups.³⁹ Because the primary conflict-of-interest statute does not apply to the president,⁴⁰ Trump could not be held accountable through it for making official decisions that further his own financial interests. To prevent future abuses, legislation should be adopted to make presidents subject to 18 U.S.C. § 208 with regard to publicly or privately

held “business interests,” except for non-conflicting assets like U.S. Treasuries, diversified mutual funds, and non-income-producing residential property.⁴¹

Although Trump indicated he would release his tax returns once his tax audit was over, he did not release them during his presidency and has yet to do so.⁴² If Trump released his tax returns like his modern predecessors,⁴³ we would not need to rely on reporting to learn he paid no federal income taxes in some years,⁴⁴ claimed millions in tax refunds for “abandoned” interests that may not be legitimate,⁴⁵ holds secret Chinese bank accounts, and paid foreign income tax to various countries over several years.⁴⁶ To ensure greater transparency, legislation should be adopted to mandate public disclosure of a president’s tax returns each filing year.⁴⁷

With more than \$400 million in loans coming due over the next four years,⁴⁸ and traditional financing drying up,⁴⁹ Trump’s business losses⁵⁰ and history of bankruptcies presented a possible national-security risk.⁵¹ But because the president is not subject to national-security adjudication procedures, legislation should require fuller public disclosure, particularly about privately held business interests, including debts, major investors, creditors, and customers.⁵²

A DOJ nepotism opinion overturned 40-plus years of precedent, paving the way for Ivanka Trump and Jared Kushner to use their White House positions to advance their financial interests and exert significant influence over U.S. domestic and foreign policies.⁵³ By appointing them, Trump not only made clear that personal loyalty took precedence over allegiance to the U.S. Constitution,⁵⁴ but he enabled Kushner to effectively resist important checks on his power.⁵⁵ The anti-nepotism statute should be amended to expressly bar the president from appointing relatives to positions in the executive branch—including the White House Office—and to grant them security clearances only through regular procedures.⁵⁶

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Conflicts of Interest

By Walter Shaub

Congress should take several steps to strengthen conflict-of-interest laws applicable to executive-branch employees.

Mandatory Divestitures

The primary conflict-of-interest law, 18 U.S.C. § 208, bars executive-branch employees from participating in particular matters affecting their financial interests or those of persons whose interests are imputed to them.⁵⁷ It does not require divestiture. In practice, top officials usually have to divest some assets to be able to perform their duties. But negotiations over divestiture can be contentious, and there is no guarantee they will always produce good results. Subject to exceptions for certain assets that are exempt from the conflict-of-interest law or are difficult to divest, Congress should mandate a broad range of divestitures for “senior employees” and “very senior employees” whose authority poses heightened risks of conflicts of interest.⁵⁸ The Office of Government Ethics should be permitted to issue individual waivers, which should be required to be posted online with an explanation.

Blind-Managed Accounts

Federal employees have established no new blind trusts since July 2006. There are several reasons for the failure of this program, including the cost of establishing blind trusts.⁵⁹ To mitigate the financial impact of the proposed new mandatory divestitures, Congress should authorize a new vehicle for resolving conflicts of interest. Stated simply, an employee would place cash in an account, then receive no information about assets the account’s manager acquires. OGE would issue regulations, certify participating institutions, and approve forms for communications to ensure employees remain unaware of account holdings.⁶⁰ For the program to succeed, Congress would need to change a tax-law provision that permits deferral of capital gains when employees sell assets to resolve conflicts of interest and roll the proceeds into permitted investments. The new law should provide that the holdings of a blind-managed account qualify as permitted investments.

Notification of Divestitures

The Ethics in Government Act (EIGA) requires high-level employees to disclose sales of certain assets, but does not require them to identify the purchaser of an asset, nor does it require disclosure of the recipient of a gift.⁶¹ This gap creates a risk of sham transactions, through which employees may “park” assets with relatives or in certain trusts and reclaim them after leaving government. Congress should enact a law requiring a financial disclosure filer to identify an asset’s purchaser or recipient, unless the filer sold the asset on the open market through a broker. If the purchaser or recipient is a relative, the filer should have to disclose the sale price, quantity, and any arrangement to reacquire the asset in the future.

Review of Financial Disclosure Reports

OGE reviews financial disclosure reports of presidential nominees for Senate-confirmed positions before they enter government, but it does not conduct a similarly timed review of the reports of new agency heads whose positions do not require Senate confirmation.⁶⁴ Thus, OGE never reviews the financial disclosure report of the director of the Centers for Disease Control and Prevention.⁶⁵ To take another example, OGE reviews the financial disclosure of the postmaster general only after postal-service ethics officials have finished their review, which begins only after a new postmaster general has already entered government.⁶⁶ This gap has created problems, and Congress should amend EIGA to provide for OGE to review the financial disclosure reports of all agency heads before they enter government.

Discretionary Trusts

Gaps in EIGA and the conflict-of-interest law make discretionary trusts problematic. A discretionary trust is one whose trustee has the authority to decide whether to make distributions to eligible beneficiaries, potentially giving some less than others or nothing at all.⁶² OGE has said an eligible beneficiary lacks a financial interest in a discretionary trust’s holdings and needs not disclose them in a financial disclosure report.⁶³ Congress should amend EIGA to require disclosure. Congress could also consider creating a narrow recusal obligation as to trust assets that exceed a specified value, with the option for OGE to issue a waiver that would be posted on its website.

Outside Influence

By Walter Shaub

Gaps in existing laws and regulations leave executive-branch employees vulnerable to outside influences.

Golden Parachute Payments

Current law fails to prevent outside employers from making gratuitous payments to employees leaving to accept executive-branch positions. A conflict of interest law, 18 U.S.C. § 209, prohibits executive-branch employees from receiving certain payments from sources outside the government. But the law applies only if:

- the payment is made “as compensation for” the employee’s federal service, a difficult showing to make;
- the payment was made *after* the employee entered government;⁶⁷ and
- the employee serves in the government with compensation.

OGE’s regulations only partly close this gap through a very narrow recusal obligation that applies when

an employee received an “extraordinary payment” before entering government.⁶⁸ Therefore, Congress should enact a new law that imposes a prohibitively broad recusal obligation on non-career senior and very senior employees, such as the one that applies when they own stock in companies. The law should apply whether the employee received the payment before or after entering government, and whether or not the employee serves in government for compensation. An exception should apply if the employee demonstrates to the satisfaction of OGE’s director that a payment in the same amount would have been made even if the employee had not gone into government.

Post-Employment Restrictions

A conflict-of-interest law restricts former senior employees for one year from lobbying their former agencies and restricts former very senior employees for two years from lobbying a broader swath of the government.⁶⁹ Reflecting the heightened risk of a “revolving door” conflict, President Obama issued an executive order extending the restriction for former non-career senior employees to two years, but President Trump rescinded that extension.⁷⁰

Congress should extend the restriction to two years for former non-career senior employees to more firmly close the revolving door. A two-year cooling off period is a long time for an employer to pay a former official before influence peddling can begin, whereas a mere one-year gap is more tolerable. For former non-career very senior employees, reflecting the greater power they held and so the greater risk of post-employment influence, the restriction should last for the duration of the administration in which they were appointed or two years, whichever is longer.⁷¹

Outside Activities

To reduce the risk of conflicts of interest associated with outside positions, Congress should amend EIGA to prohibit any non-career senior or very senior employee from serving, with or without compensation, as a director, officer, employee or trustee of an outside entity.⁷² Congress should also amend an exception that allows certain White House employees to engage in political activity while on duty or in a federal building, so that only *de minimis* political activity is permitted.⁷³

Congress should also amend an exception that allows certain White House employees to engage in political activity while on duty or in a federal building, so that only *de minimis* political activity is permitted.

Spouse's Employment

Existing laws permit the spouse of a high-level employee to represent clients before the employee's agency,⁷⁴ creating an appearance of profiting inappropriately from public service. Recusal can help, but even if the employee recuses, agency employees may feel pressure to give the spouse's client preferential treatment. Congress should address this risk by prohibiting a non-career senior or very senior employee from participating in any particular matter affecting the known financial interests of any client the employee's spouse represents before the agency.

Investigation and Enforcement

By Walter Shaub

Executive-branch ethics restrictions are of little value if violations are not detected and addressed. These proposals would strengthen investigative and enforcement systems.

Enforcing Conflict-of-Interest Prohibitions

The executive branch lacks an effective mechanism for enforcing conflict-of-interest laws and ethics regulations against political appointees when a president does not care about ethics. Even in the best of times, the predominantly criminal nature of conflict-of-interest laws makes the Justice Department reluctant to enforce them. Although there is an option to pursue civil monetary penalties instead of criminal prosecution, the Justice Department has shown relatively little interest in this alternative.⁷⁵ In addition, because the primary conflict-of-interest laws are criminal in nature, courts must interpret them narrowly.

Congress should enact a noncriminal conflict-of-interest statute applicable to non-career employees that has a broader reach, lighter penalties, and an effective enforcement mechanism. The law would provide for OGE and the Merit Systems Protection

Board (MSPB) to impose fines administratively. EIGA currently allows OGE and agency ethics offices to impose a \$200 fine when an employee misses a financial disclosure filing deadline.⁷⁶ The Hatch Act allows the MSPB to impose a \$1,112 fine when a career employee or a non-career employee not confirmed by the Senate violates that law.⁷⁷ Consistent with this existing framework, OGE should be allowed to impose the \$200 fine when an employee violates the noncriminal conflict-of-interest law or government ethics regulations.⁷⁸

OGE should also be allowed to ask the MSPB to impose a larger fine, which in the case of noncriminal conflict-of-interest violations could be as much as the full value of the asset at issue. The MSPB should be required to defer to any reasonable adverse factual inference OGE has drawn when the employee and the employee's agency have refused to cooperate with OGE's investigation (subject to any applicable Fifth Amendment right). The law should provide an off-ramp that incentivizes bad actors to leave government by automatically waiving a fine if the individual resigns within 30 days of its final imposition. The MSPB enforcement mechanism should include safeguards and procedures similar to those that apply to appeals filed by career employees challenging a termination, including a limited right to seek review by the Federal Circuit Court of Appeals.⁷⁹

Although reducing penalties may seem counter-intuitive to strengthening ethics enforcement, officials would be more likely to enforce a noncriminal conflict-of-interest law. To prevent politically motivated abuse, the law should require OGE to suspend any investigation or enforcement action in the 12-month period prior to a presidential election.

Inspector General Independence

A 2008 law requires a president to give Congress 30 days' notice before firing an inspector general.⁸⁰ The idea was that Congress would use the notice period to investigate the firing and create public pressure on the president to back off of any inappropriate firing. But Congress proved unwilling to use its leverage to stop President Trump's retaliatory firings of inspectors general.⁸¹ Congress should strengthen the law by providing that the 30-day waiting period does not begin until the president has provided Congress with all information and records forming the basis of the termination.

Congress should also make this law enforceable by authorizing inspectors general to file suit challenging a termination.⁸² The law should place the burden of proof on the administration to establish that the termination was for one of several prescribed causes and that it followed applicable procedures. In meeting this burden, the administration should be limited to only the information and records it provided Congress 30 days before the termination became effective.

To deter politically motivated actions, the law should also provide that the highest-ranking career employee with the most seniority will automatically

backfill a fired inspector general until the Senate confirms a replacement. The law should give that official the right to sue to challenge efforts to appoint someone else as acting inspector general.

The past four years have made clear that additional protections are needed for whistleblowers.

Whistleblower Protection

For inspectors general to function effectively, they need access to information whistleblowers possess. The past four years have made clear that additional protections are needed for whistleblowers.⁸³

Congress should make it a criminal offense for a member of Congress, a Congressional staffer, or any political appointee in the executive branch to knowingly and willfully expose the identity of a whistleblower. The law should also grant any individual, whether or not a whistleblower, the right to sue for damages, including emotional distress, if the individual suffers harassment or retaliation soon after a covered government official—either knowingly and willfully or as a result of gross negligence—makes a public statement that they know or should know would reasonably lead members of the public to suspect the individual of being a whistleblower.⁸⁴

Current law provides that whistleblower protection applies only when an employee reasonably believes a disclosure evidences "any violation of any law, rule, or regulation; or ... gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial

and specific danger to public health or safety.”⁸⁵ Congress should eliminate this limitation when an employee has released unclassified information to a supervisor, the agency head, the inspector general, or the Office of Special Counsel (OSC). There is no need to discourage lawful whistleblowing accomplished through appropriate channels.

Congress should also adopt two recommendations by the Project on Government Oversight.⁸⁶ First, whistleblowers should be able to bypass the MSPB and take retaliation complaints directly to court. Second, Congress should put military whistleblowers on equal footing with civilian whistleblowers by eliminating a requirement to prove a personnel action would not have been taken absent whistleblower retaliation.

In the case of whistleblowing that involves classified information, Congress should create a special three-judge panel. The panel should have authority to issue an interim stay of any personnel action against a covered whistleblower upon a finding of probable cause to believe it was taken partly in retaliation for lawful whistleblowing. The panel should also be able to take specified steps to protect whistleblowers against retaliation. It could also serve as a backstop to review a claim of an “urgent concern” that the intelligence-community inspector general has found to be credible but has not reported to Congress.⁸⁷ In that case, the panel should have authority to take action to ensure Congress is notified.

Civil-Service Protections

Some of the most important anti-corruption laws are among the most overlooked or maligned: laws protecting civil servants from arbitrary personnel actions. Most career federal employees who have

completed probationary periods can be fired only for cause and can appeal a termination to the MSPB.⁸⁸ These protections make it harder for political appointees to pressure them to ignore fraud, waste, and abuse, or to reject unlawful orders.⁸⁹

In October of last year, President Trump issued an executive order laying the groundwork to undermine civil-service protections.⁹⁰ In doing so, he exploited a loophole that allows presidents to exempt positions from the law granting the right to appeal a termination.⁹¹ Even if the incoming administration rescinds this order, Congress should act to prevent a future president from picking up where President Trump left off. It should restrict the president to exempting no more than 1,500 positions and prohibiting current government employees from being swept into exempt positions.⁹²

Congress should take additional steps to shore up protections. For example, it should grant MSPB appeal rights to most non-probationary employees who lack them, including Department of Veterans Affairs executives, and extend the full protection of the prohibited-personnel-practices law to most employees who lack such protection.⁹³ Congress should also amend the Hatch Act to prohibit any political appointee in the Executive Office of the President from recommending a personnel action against a career employee not in the appointee’s chain of command. Finally, Congress should limit the president’s authority to restrict union activity in the executive branch, which President Trump abused.⁹⁴

Balanced against these expanded due-process rights, Congress should extend all one-year probationary periods to three years and extend all two-year probationary periods to five years. To reduce the risk of abuse, the Office of Special Counsel should receive a line-item appropriation that can only be used for investigating claims of politically motivated terminations of probationary employees.

Protecting U.S. Democracy Against Foreign Influence

By Claire Finkelstein

The 2016 general election provided a crash course for the U.S. intelligence community and lawmakers on malign foreign interference with U.S. elections and democratic institutions more generally.⁹⁵ It showed that foreign powers can influence the opinions of American voters, both through disinformation and through hacking and release of information, and that such covert-operation campaigns can be sufficiently powerful that the potential exists for foreign powers to affect the outcome of our elections and other democratic processes.⁹⁶ Similar impact has been identified outside the U.S., and the signs of Russian attempts to undermine the foundations of democratic governance across Western Europe are unmistakable.⁹⁷ Russian covert operations in the UK appear to have played a role in garnering public enthusiasm for BREXIT, according to a report of Parliament.⁹⁸ Russian propaganda efforts and funding of far-right candidates in the French, German, Italian, Spanish, and Danish elections have proven a persistent threat to democratic governance,⁹⁹ and consistent attacks on the NATO alliance have assaulted the unity of democratic nations and targeted their ability to protect one another against Russian attacks.¹⁰⁰ Interestingly, Western Europe appears to have fought back more effectively against Russian disinformation and efforts to fund right-wing candidates than either the UK or the U.S., though such measures may come at the price of incursions on freedom of the press and other civil liberties.¹⁰¹

The public, however, both in the U.S. and abroad, still fails to grasp the magnitude of foreign influence peddling and cyber incursions across the globe. In the U.S., we are confronting the most intrusive Russian cyber operation in U.S. history, one that successfully targeted multiple agencies, including the Department of Homeland Security and the Department of Energy.¹⁰² This goes far beyond previous cyber attacks, in which the Kremlin hacked into networks and disseminated unflattering information about candidates they disfavored or sought to create confusion with polarizing posts on social media.¹⁰³ These attacks have exacerbated existing divisions within the American public and fanned the flames of political polarization and racial hatred.¹⁰⁴ Even without cyber interference, the Russians and other nations have proven themselves effective with lobbying efforts directed at members of Congress and other holders of public office.¹⁰⁵ And they have attempted to reshape the nature of U.S. alliances abroad, worsening discord among allies and advancing alliances among countries with profoundly different orientations.¹⁰⁶

The problem now goes far beyond Russia. In addition to the baleful influence of the Kremlin on U.S. politics and on Ukraine, recent reports of cyber interference have broadened the focus from Russia to Iran, China, and Saudi Arabia.¹⁰⁷ While foreign lobbying and foreign meddling in U.S. politics have been consistent

threats throughout U.S. history, the advent of cyber techniques has transformed the nature of the threats and their likelihood of success.¹⁰⁸

If democratic nations do not learn to self-censor the most extreme material, particularly on the internet, their very openness to differing viewpoints will act as a door through which illiberal foreign nations can exploit them.

The coming decade will be a dangerous one from the standpoint of foreign interference. Russian attempts to hijack U.S. democracy as well as democratic governance elsewhere on the globe has been phenomenally effective, despite the fact that Russian efforts in support of Donald Trump fell short in 2020.¹⁰⁹ Russia may have lost the battle but ultimately won the war, however, as other countries have learned from Russia's efforts. China, North Korea, Saudi Arabia, and Iran¹¹⁰ have mounted sophisticated cyber campaigns that display an evolving understanding of the power of social media and prey on the vulnerabilities of our cyber defenses. In the long run, we will need to examine our own practices and the vulnerabilities they create. Democratic nations, with their robust traditions of free speech and political self-expression, are particularly subject to attack via open-internet platforms.¹¹¹ If democratic nations do not learn to self-censor the most extreme material, particularly on the internet, their very openness to differing viewpoints will act as a door through which illiberal foreign nations can exploit them.¹¹² In a world connected by social media and internet functionality, there is no longer a way to remain internally open, yet guarded, with respect to malign foreign actors.

Against this background, this section will review the available legal tools to combat foreign interference and assess their efficacy. As we shall see, the primary tool in the United States, the Foreign Agent Registration Act, has been largely ineffective in combating foreign interference, and ironically it has at times been misused and distorted to serve as a vehicle of foreign interference. FARA reform is in the air, and until we replace FARA with more effective weapons in the battle against foreign attacks on democratic governance, it will be critical to understand how to make FARA more effective as a tool for fighting foreign interference.

The Foreign Agent Registration Act

Prior to the 2016 U.S. elections, few Americans had heard of FARA, 22 U.S.C § 611 *et seq.*, a disclosure statute originally passed in 1938 pursuant to the recommendations of a Congressional committee investigating anti-American activities in the United States.¹¹³

FARA was not intended to eliminate the lobbying efforts of foreign powers, but to ensure that the American people and U.S. policymakers knew when political, legislative, and public relations are being carried out in furtherance of the interests of a foreign principal.¹¹⁴ Transparency, as opposed to regulation, was the idea, as this would avoid the need to evaluate the motivations, aims, and content of foreign lobbying campaigns.¹¹⁵ FARA was designed in particular to forestall the use by foreign powers of American citizens to influence domestic public opinion while concealing the true source of the sponsoring government.¹¹⁶

Recent cases, however, have shown just how impoverished the Department of Justice's tools are for combatting foreign influence and cyber intrusions, as well as just how weak a tool FARA is for combatting the use of propaganda in foreign covert operations.¹¹⁷ Despite an increase in the enforcement efforts of the DOJ National Security Division, there have been very few prosecutions brought on the basis of FARA violations, and even fewer convictions. Most FARA enforcement actions result in compliance on the part of the subjects, or else an agreement that the subject does not need to register under the statute.¹¹⁸ Where prosecutions take place, they are usually on the basis of false statements made to DOJ investigators.¹¹⁹

Broadly speaking, there have been two impediments to making FARA an effective tool in fighting foreign interference. The first difficulty is the fairly minimal nature of the DOJ's prosecution efforts under FARA over the years, which is at least in part a function of the statute's poor design. FARA requires voluntary disclosure of foreign lobbying efforts, and it contains no provision for civil investigation. This makes violations difficult to detect.¹²⁰ Unsurprisingly, the statute fails to motivate compliance and generates only minimal penalties for violators.

Second, there is the difficulty of bringing effective enforcement under the statute once an action has been initiated.¹²¹ FARA actions have typically resulted in very few convictions, since they can usually be cured by voluntary compliance, which blunts the deterrent effect of FARA prosecutions. Between 1938 and 1965, one source indicates that there were only nine reported completed cases and 31 indictments.¹²² The audit by the Office of the Inspector General concluded there were only seven prosecutions between 1966 and 2015.¹²³

In addition to the foregoing problems with prosecution, several of the exemptions from the reporting requirements significantly limit the reach of the statute as well as undermine compliance. The Lobbying Disclosure Act (LDA) exemption, for example, allows foreign agents to register their activity through a more streamlined application process and with less direct supervision.¹²⁴ The weakly supervised exemptions for "scholastic" or "non-political" activities make the process significantly easier for foreign agents seeking to hide their activities.¹²⁵ By design, such a loosely worded exemption coupled with a voluntary compliance scheme is prone to exploitation.¹²⁶

There are also significant problems enforcing FARA due to a lack of clarity regarding the scope of the Act.¹²⁷ Indeed, the Act is so vaguely worded that the statute may violate a fundamental principal of due process and create a constitutional problem of notice. As Judge Jackson noted in dismissing the second of the two charges in a recent FARA case, the "rule of lenity" requires that vagueness in Congress' intent about who should fall within the scope of the statute gives the benefit of the doubt to the defendant.¹²⁸

In light of the foregoing factors, there is understandable resistance to strengthening FARA as a tool to combat foreign interference. The greatest concerns have to do with the fear that FARA will have—and indeed already is having—a chilling effect on media outlets that do not fall under the exemption, if they are wholly controlled by a foreign principal.¹²⁹ There is a similar concern that FARA may have a negative impact on universities and research organizations, many of whom receive foreign grant assistance and other forms of financial support from foreign governments, and that the scholarly exemptions may not be clearly articulated enough to forestall such effects.¹³⁰ I explore these concerns in detail in the following section. As we shall see, there is a readily available solution to the First Amendment concerns

with the statute. Some such solution must be put in place before FARA can be adequately strengthened to serve its purpose.

FARA as a Blunt Instrument: The Threat to Media and Research Organizations

In this section, I address actions under FARA pertaining to press organizations doing business in the U.S. who are required to register under the Department of Justice guidelines as “agents of a foreign principal.” Although press organizations are generally exempt from registration requirements under 22 U.S.C. § 611(d), the exemption does not apply when the organization is largely under the control of a foreign governmental entity.¹³¹ In such cases, the press or media organization will be considered as acting in the political or publicity interests of a foreign government.¹³²

Concerns relating to foreign-controlled media outlets that have been required to register as agents of foreign principals under FARA have sparked concern among First Amendment advocates as well as those focused on academic freedom and respect for academic research.¹³³ The critical question is whether FARA can be made more effective in its essential purpose without infringing upon the rights of the press under the First Amendment as well as the general commitment in a free and open society not to censor or otherwise restrict media organizations. Protection of national security and the health and safety of the nation are two rare, but cautiously claimed exceptions to these principles. FARA seeks to strike an effective balance between

protecting media organizations and protecting the right of U.S. citizens to be protected against the interference of foreign nations with the foundations of their democracy, by identifying, rather than censoring, press organizations whose primary purpose is to advocate for the interests of a foreign principal. The need to register as a foreign agent is not a direct imposition on the rights of the press.¹³⁴ However, registration under FARA does presently entail loss of Congressional press standing as well as a certain amount of social stigma that may serve to discredit the work of any organization so situated.¹³⁵

The vagueness of the statute in its present form has had a particularly damaging impact on press organizations, an ironic result in light of the media exemption.¹³⁶ The ambiguity creates uncertainty and arguably a serious risk of lack of adequate notice to prospective registrants under the statute. Whenever the potential targets of an enforcement action are identified with insufficient clarity, there is a risk of a chilling effect and a possible further risk of over-deterrence or abuse of the legislative scheme.¹³⁷

The exemption contained in § 611(d) makes clear that the term “agent of a foreign principal” is a prerequisite for registration under the statute. Under § 612(a), it does not include “any news or press service or association organized under the laws of the United States,” provided that the organization is (i) at least 80 percent owned by a U.S. person or U.S. person(s), and (ii) such news organization “is not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by any foreign principal or by any agent of a foreign principal required to register under this subchapter.” One of the principal difficulties is the need to interpret the concept of “control by a foreign principal.” What exactly constitutes control? When is a U.S. person or organization engaged in “political activities” on behalf of a foreign principal? When is a U.S. person

or organization acting as a “publicity agent” of a foreign principal?

Some First Amendment advocacy groups, such as the Knight Foundation, have expressed grave concerns about requiring media and press organizations to register under FARA under any circumstances.¹³⁸ The price we pay for increased control over foreign propaganda, they believe, is not worth the risk that such press organizations will have their activities chilled by the pressure to demonstrate they are not under the control of a foreign principal, or that research organizations will be concerned to accept foreign funds because of potential allegations of falling under the auspices of FARA, thus potentially chilling or impairing legitimate research.¹³⁹

In recent years, numerous bills have been introduced both in the House and Senate in an attempt to reform FARA. They have sought to strengthen its enforcement, tighten its exemptions, or otherwise amend FARA to better face the challenges posed by foreign-agent registration in today's global climate.¹⁴⁰ A plethora of pending FARA legislation comes from both sides of the aisle. The bills' sponsors hope that through addressing the loose exemptions and other holes in FARA, they may mitigate the abuses of FARA's present requirements.¹⁴¹

The following are proposed reforms to FARA.¹⁴²

Reform the Media Exemption under 22 U.S.C. 611(d)

The exemption for media under 22 U.S.C. § 611(d) should be reformed to maximize First Amendment

protection and avoid over-deterrence based on ambiguity with respect to who satisfies the requirements of the statute. As discussed above, clarity regarding the press exemption from the FARA provisions is urgently needed. There are several possibilities that may be worth considering in the immediate future.

One possibility is to amend 22 U.S.C. § 611(d) to require registration only for news organizations that are subject to the direction and control of content by a foreign government or foreign political party. As indicated in the previous section, the current approach of the provision is conjunctive: The media organization must be owned 80 percent or more by U.S. persons, and none of its policies may be determined by any foreign principal or any agent of a foreign principal.¹⁴³ Thus it is compatible with the registration requirement that a media organization would have to register under FARA that was more than 80 percent owned by U.S. persons, but where under the final subsection of § 611(d), the organization was found to have its policies “determined” by a foreign principal.¹⁴⁴ Under this suggestion, then, the only question would be whether the organization is “subject to the direction and control of content” by a foreign government or foreign political party.¹⁴⁵

In short, 22 U.S.C. § 611(d) requires clarification regarding the phrase “owned, directed, supervised, controlled, subsidized, or financed ...” as well as the phrase “determined by any foreign principle....”¹⁴⁶ The relevant amendment should provide a substantive test for identifying media organizations whose policies are “determined” by a foreign principal, since formal factors alone do not reliably establish individuals or organizations that should be thought of as agents of a foreign principal.

Establish Civil Investigative Demand Authority

Congress should provide the Department of Justice with civil investigative demand (CID) authority to enable effective investigation of possible FARA violations.¹⁴⁷ This is consistent with H.R. 1 Sec. 7101 and 7102, which provides for the establishment of an enforcement unit within the National Security Division (NSD) empowered to impose civil fines,¹⁴⁸ but goes further to plainly give the relevant unit the civil investigative demand authority to impose and enforce subpoenas and other binding investigatory tools; and (2) establish the relevant CID authority within the Counterintelligence and Export Control Section (CES) in the National Security Division, which currently houses the FARA enforcement division in the Department of Justice. The CES supervises the investigation and prosecution of cases involving national security, foreign relations, and the export of military and strategic commodities and technology. It also provides legal advice to the U.S. Attorney's Offices regarding all matters relating to FARA.

Reform the Relationship of FARA to the Lobbying Disclosure Act

Congress should amend 22 U.S.C. § 613(h), which currently exempts individuals or organizations registered under the Lobbying Disclosure Act of 1995, 2 U.S.C.A. § 1601 *et. seq.*, to eliminate the exemption once an individual or organization has registered under the LDA.¹⁴⁹ While this would result in duplicate registrations in a number of cases, the redundant registrations would in fact be a welcome check on activities relating to foreign lobbying. Repealing the LDA exemption should increase FARA registrations and therefore more accurately represent the body of foreign agents at work. To expand the authorization of the DOJ in handling FARA cases, the U.S. may begin to enable better enforcement mechanisms for FARA. With the number of bills drawing attention to FARA's shortcomings, the question may be asked why only one has received a mark-up and the others have yet to leave their assigned committee.¹⁵⁰ With the redundancy in FARA evaluations which call for better DOJ enforcement mechanisms and the removal of the LDA exemption, there is no rationality behind delaying FARA reform further.

Restoring the Rule of Law in the Department of Justice

By Claire Finkelstein and Richard Painter

The Department of Justice plays a unique role in protecting U.S. democracy. In order to assure the American public that the decisions of the DOJ are based on legitimate prosecutorial discretion rather than on political favoritism or electoral politics, prosecutions must be politically neutral and motivated only by the aim to enforce the law evenhandedly. DOJ's mission is to "enforce the law and defend the interests of the United States according to the law,"¹⁵¹ not to claim legal justification for politically motivated actions.

When the DOJ faithfully conforms to the law, it serves as powerful reinforcement for the rule of law and for democratic governance. But the flip side is also true: The DOJ is particularly well situated to corrupt the rule of law given its ability to manipulate the law to achieve partisan political aims. Any attempt to justify illegal or unethical conduct by claiming the authority of the law itself will do disproportionate damage, since such distortions strike at the very concept of legality itself. Treating legal compliance as a creative exercise in public relations will quickly lead to the disintegration of rule-of-law values, not just in the DOJ, but in government as a whole.

During the summer of 2020 the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania and Citizens for Responsibility and Ethics in Washington (CREW) convened a bipartisan

working group to examine the conduct of the DOJ during the tenure of Attorney General William Barr. The working group presented a number of serious concerns relating to the functioning of the DOJ from 2019 to 2020 in a public report.¹⁵² A core theme connecting this misconduct was the extreme politicization of the Department across its many different functions. The working group concluded that the politicization was so extreme that the DOJ effectively functioned as a *de facto* arm of the president's political campaign for re-election.¹⁵³

Mr. Barr appears to have engaged in a systematic effort to use the DOJ's powers of investigation offensively against Donald Trump's critics or against individuals from the Obama administration who had a role in initiating the Russia probe known as "Operation Crossfire Hurricane." By initiating politicized counter-investigations, the DOJ helped to foster an atmosphere of suspicion and intimidation relating to the intelligence community. The politicization of the intelligence function weakens U.S. national security by casting doubt on the agencies whose job it is to help keep us safe from foreign and domestic adversaries. Attacks on the intelligence community were amplified in Congress, possibly coordinated by Mr. Barr, where three Senate committees placed roughly 50 former Obama-era officials on a "subpoena watch list," causing enormous personal distress and creating an atmosphere of vicious

public attacks. Such coordinated disinformation campaigns across the branches represent a grave threat to our democracy.

The Levi-Bell Reforms and Aftermath

The CERL/CREW working group was in part inspired by the example of Attorney General Edward Levi, a Republican appointed by President Ford in the aftermath of the Watergate scandal.¹⁵⁴ Levi's reforms included guidelines for FBI surveillance and other law-enforcement activities, reinforcing the ideal of professionalism and adherence to separation of powers and new rules and structures to assure the integrity of DOJ actions.¹⁵⁵ Attorney General Griffin Bell continued Levi's reforms during the Carter administration.¹⁵⁶

When government breaks the law, but uses the trappings and language of law to justify its conduct, the very concept of legality is damaged.

Most of the Levi-Bell reforms were short-lived. This was in part because these reforms could easily be changed by subsequent attorneys general. Another problem was the increased politicization of the DOJ beginning in the 1980s. This was followed after 9/11 by the DOJ promotion of the controversial, and illegal, effort to justify the use of torture to obtain information from detainees.¹⁵⁷ A series of misleading Office of Legal Counsel memos in 2002 and 2003 professing the legality of harsh interrogation techniques was one of the lowest points in the history of the DOJ

and significantly damaged the agency's credibility.¹⁵⁸ Some of these memos were subsequently withdrawn by the Department.¹⁵⁹

When government breaks the law, but uses the trappings and language of law to justify its conduct, the very concept of legality is damaged and the rule of law is badly compromised.¹⁶⁰ Below we summarize the recommendations of the working group, offered in the spirit of the Levi-Bell reforms, to repair the DOJ's credibility before the American people and to restore fidelity to the rule of law in the executive branch.

The CERL/CREW Report included specific recommendations designed to enhance the independence of the DOJ from partisan politics and to ensure the DOJ's commitment to the rule of law.¹⁶¹ The two authors of this section were co-reporters for the CERL/CREW Report. The recommendations are set out in the discussion that follows.

Enhance the Independence of Investigators and DOJ Attorneys

Congress should strengthen the independence of DOJ lawyers who are investigating the president, vice president, their campaigns, and close family. In the 1988 decision *Morrison v. Olson*, the Supreme Court upheld the former independent-counsel statute. That suggests that a new independent-counsel statute would be constitutional and would stand up to judicial scrutiny.¹⁶² In the meanwhile, the president could establish an office of special counsel in the DOJ by executive order, with authority to investigate alleged

criminal conduct in the previous administration. One important investigation within the purview of such an independent counsel would be obstruction of justice, a crime that makes it illegal for the president or other high-ranking official to remove any prosecutor for the purpose of obstructing an ongoing criminal investigation.¹⁶³

U.S. attorneys should be protected from removal by establishing fixed terms in office, such as 10 years. Such a statute would prevent the president from removing a U.S. attorney other than for cause. Like the independent-counsel statute, such a restriction on the removal power of the president might be challenged on the grounds that it was inconsistent with his powers under Article II.¹⁶⁴ The Supreme Court should recognize the unique functions of prosecutors, responsible for enforcing existing law, and protect them by upholding a statute providing reasonable job security for U.S. attorneys.

In a similar vein, inspectors general have a critically important independent role in investigating alleged waste, fraud, and abuse within the agencies they oversee.¹⁶⁵ Inspectors general are not infrequently the bearers of bad news as the officers tasked with verifying compliance with law, regulation, and policy within their respective governmental agency. They need to be protected from reprisals and political pressure. One approach would be to have fixed terms for inspectors general as we have suggested for U.S. attorneys. Although there is uncertainty about whether such a statutory restriction on presidential removal power is constitutional, we believe it is essential to the independence of an inspector general.¹⁶⁶

It would also be helpful to transfer some of the responsibilities of the Office of Professional Responsibility (OPR) to inspectors general. The Inspector General Access Act of 2019 (S. 685 / H.R. 202) would provide

for this needed change.¹⁶⁷ It is important that the DOJ inspector general be empowered to investigate alleged misconduct in the DOJ without such investigations being delayed because of OPR.¹⁶⁸ Inspectors general must make reports to Congress, and OPR's handling of a matter should not interfere with this important aspect of Congressional oversight.

Similarly, partisan politics will have less influence on the work of the DOJ if career DOJ attorneys have more influence relative to political appointees. One approach is to reduce the number of political appointees in the DOJ. Another approach is to require the DOJ to document material disagreements between career DOJ attorneys and political appointees in writing unless the political appointees defer to career attorneys. Political appointees should not be allowed to intrude into the hiring, evaluation, promotion, or firing process for career civil servants. The Office of Special Counsel, charged with enforcing the civil service laws and the Hatch Act, should be protected in its ability to exercise oversight of the DOJ.

Protecting the Intelligence Community

A series of counter-investigations conducted by the DOJ in connection with Russian interference in the 2016 election may have caused lasting damage to the United States intelligence community.¹⁶⁹ DOJ investigations can undermine the independence of the intelligence community, particularly if those investigations are politically motivated.¹⁷⁰ Carelessly handled DOJ investigations in the intelligence community could compromise sources and methods of obtaining intelligence. Disclosure of even a small amount of information could endanger the lives of intelligence operatives working outside the United States.¹⁷¹

The Office of the Director of National Intelligence (ODNI) Inspector General's office should guide DOJ investigations within ODNI. The DOJ should be required to coordinate with the ODNI Inspector General's office to make sure investigations do not compromise the quality of our intelligence or unfairly intimidate intelligence employees.

Oversight Through Congressional Budgetary Process

Congress should also use the full range of its powers to ensure greater accountability from the DOJ, particularly the power of the purse. This includes requiring regular testimony from the attorney general before Congress and compliance with Congressional subpoenas. The elected representatives of the people who decide on the disbursement of public funds are entitled to demand information on how that money is being spent by the DOJ and, as part of the budgetary process, Congress should make sure that information is provided.

Recusal and Enhanced Compliance with Advice from DOJ Ethics Officials

Federal ethics statutes and regulations do not change from administration to administration and should not be interpreted based upon political ideology. Most DOJ ethics officials are career DOJ attorneys rather than political appointees and, with civil service job protection, are well suited to give ethics advice that

may not be popular with senior DOJ officials. The DOJ should report to Congress when a presidentially appointed DOJ official acts contrary to advice from DOJ ethics officials.

In addition, the DOJ's presidential appointees should recuse from any matter involving the president in his personal capacity, the president's family, business entities owned by the president, the president's campaign, matters involving close associates of the president, and people appointed by the president to positions in the United States government. The same goes for the vice president and the vice president's family and business interests. Presidential appointees in the DOJ should also recuse from matters involving members of Congress who are running for office as well as from matters involving presidential candidates and their families.

Restrict Exercise of Prosecutorial Discretion to Domestic Considerations

With the exception of cases involving extradition, which necessarily involve negotiations with foreign governments, the DOJ's prosecutorial decisions should not be affected by U.S. interests relating to foreign governments. Given the possibility of mixed purposes in a case involving the prosecution of a foreign national, Congress should restrict federal prosecutorial discretion to domestic considerations and thus forbid trade-offs based on foreign relations.

The DOJ's discussions with Australia, for example, may have matured into a cooperation agreement that reportedly also involved the U.S. in Australia's

negotiations surrounding the release of hostages in a third country, Iran.¹⁷² Sometimes foreign governments also seek to influence criminal investigations inside the United States.

DOJ requests for assistance from a foreign nation and DOJ legal assistance to a foreign nation must not be politically motivated and fall squarely within applicable international treaty rights and obligations. Congressional oversight committees—the judiciary and intelligences committees of the House and Senate—should be informed of instances in which legal assistance is requested and given the reasons therefor.

Rule of Law Violations in Our Past and the Need for Accountability

Preserving and restoring the rule of law in a democracy requires us to confront illegal conduct that has occurred in prior administrations. Without transparency about the past, and accountability of individuals for their actions, illegal conduct undermining democratic norms is certain to recur in the future.

Such prosecutions of high-ranking officials were on display in the Watergate trials as well as the trial of Oliver North for the Iran-Contra scandal. Despite this precedent, the Obama administration made the unwise decision in 2009 not to investigate and prosecute officials from the George W. Bush administration who had been involved with the torture program. Thus, despite powerful evidence that the interrogation methods were torture, and violated criminal statutes against torture as well as U.S. treaty obligations, there were no prosecutions of any

of the architects of the torture program, and very few prosecutions of anyone who engaged in torture.

If crimes were committed in the Trump administration, even by President Trump himself, those crimes should be investigated and prosecuted if the evidence warrants. These decisions should be made by career DOJ employees supervised by an independent counsel.

The CERL/Crew Working Group concluded that Donald Trump's attorney general compromised the interests of the United States and jeopardized our national security by failing to enforce the law evenhandedly and at a minimum, created the perception that the law was applied as a political tool to support the re-election of the former president. The recommendations set forth here and in our longer book chapter to follow will help to restore the independence and integrity of the DOJ and assure that such abuses never recur.

A Three-Step Approach to Money in Politics

By Richard Painter

Big money in politics remains a threat to American democracy after the presidency of Donald Trump as much as it was before.¹⁷³ Americans of all political views share a common abhorrence of the corruption inherent in our campaign finance system.¹⁷⁴

Although Russia contrived novel ways of interfering in our 2016 election on a relatively low budget through computer hacking and social media propaganda,¹⁷⁵ infusion of large amounts of cash into electioneering communications is the most prevalent way of influencing who wins American elections and of controlling decisions that winners of elections make in public office.¹⁷⁶

If we do not address this problem, our representative democracy will devolve into an oligarchy controlled by corporate wealth. Because of the global character of corporate wealth, this also means that we will *de facto* lose our independence as a nation.

This section proposes a three-step program for first minimizing, second disclosing, and third counterbalancing the influence that big money has on American elections.

Minimizing Big Money in Politics

The first objective is to keep as much of the big money out of our elections as possible. This is critically important not only to the health of our democracy but also to our national security. In a global economy, a considerable portion of corporate money is foreign money.¹⁷⁷ China alone has an enormous amount of concentrated corporate wealth, much of it connected to the families of leading officials of the ruling Communist Party.¹⁷⁸ Russia's economy is not as large as China's, but many of Russia's leading companies and billionaires are closely allied with Vladimir Putin, who already interfered in U.S. elections in 2016 and 2018.¹⁷⁹ The Middle East is another source of heavily concentrated corporate wealth.¹⁸⁰ Even on the domestic side, there is something fundamentally wrong with a political system that goes by the mantra of one dollar one vote instead of one person one vote. Middle- and lower-income voters who feel disenfranchised by such a system are likely to look to political demagogues for extreme ideological solutions.¹⁸¹ The ensuing cynicism and polarization can easily be the undoing of a representative democracy.

The Supreme Court needs to be persuaded to revisit its decision in *Citizens United v. Federal Election Commission*, that corporations and similar business entities are “people” entitled to a First Amendment right to inject limitless amounts of money into electioneering communications up to Election Day.¹⁸² The problem is that with a conservative majority now on the Supreme Court, reversal of the Court’s holding in *Citizens United* is not likely.¹⁸³ Appointment of justices who understand the difference between corporate personhood and natural persons should be a priority, but it may take a while to build a consensus on the Court to overturn *Citizens United*.¹⁸⁴

Another approach is to enact campaign-finance-reform legislation that does not fly in the face of *Citizens United* and other Supreme Court case law. Dollar limits on contributions by an individual to any one candidate were upheld by the Supreme Court in *Buckley v. Valeo* (1976),¹⁸⁵ even though aggregate dollar limits on an individual’s total campaign contributions were struck down in *McCutcheon v. FEC*. (2014).¹⁸⁶ Very low dollar limits on individual contributions also have been overturned by the Court.¹⁸⁷ Nonetheless, dollar limits that have withstood constitutional challenges should be enforced and enforcement efforts should be heightened to target illegal “straw donor” arrangements.¹⁸⁸

To the extent constitutionally permissible, political fundraising by lobbyists who solicit their clients for contributions should be restricted. Presently only disclosure of these aggregate campaign contributions is required, but there are no dollar limits on the aggregate.¹⁸⁹ However, these contributions from clients solicited by the lobbyist should be attributed to the lobbyist on the theory that the client contributions are really part of the consideration paid for the lobbyist’s services. Lobbyists “bundle” these contributions in order to persuade lawmakers to give them what they want.¹⁹⁰ Lobbyists should be banned

entirely from fundraising for political candidates, or at a minimum, dollar limits should be imposed on the size of the “bundles” assembled by lobbyists.¹⁹¹

Also, the Court has not struck down limits on campaign contributions by foreign nationals, as the federal district court in Washington, D.C. has held that the First Amendment protections in *Citizens United* do not apply to electioneering expenditures by foreign entities.¹⁹² This holding was affirmed without an opinion by the Supreme Court. This means that for now at least, the Federal Election Commission (FEC) can tighten up on enforcement against electioneering expenditures by foreign nationals, and if new legislation is needed to facilitate enforcement, ask Congress to enact it.¹⁹³ Republicans and Democrats may disagree about which foreign nationals are trying to influence U.S. elections in favor of which candidates, but both parties can agree that foreign money in U.S. elections is not a good thing and should be regulated.¹⁹⁴

Another area for consideration is the tax treatment of 501c(4) civic groups¹⁹⁵ and the even more favorable tax treatment of 501c(3) nonprofit organizations.¹⁹⁶ 501c(4) civic groups today are used for a very different purposes than when this provision of the Internal Revenue Code was enacted and Congress should consider whether the favorable tax treatment of such organizations is warranted.¹⁹⁷ Currently, “contributions to 501c(4) organizations generally are not deductible as charitable contributions but may be deductible as trade or business expenses, if ordinary and necessary in the conduct of the taxpayer’s business.”¹⁹⁸ This business-expense deduction should be reconsidered. 501c(3) nonprofit organizations receive even more favorable tax treatment including a tax deduction for donors and contributions from foundations that have been endowed with tax-free money.¹⁹⁹ Congress should consider limiting income-tax and estate-tax deductions for contributions

and bequests to foundations as well as the size of deductible contributions to 501c(3) organizations. 501c(3) organizations that spend over 80 percent of their revenues on providing health care, education in an accredited K–12 school or university, or other basic social services could be exempted. The days when the Heritage Foundation, the Federalist Society, and the American Constitution Society get the same favorable tax treatment as donations to a soup kitchen should be over.

Political expenditures that cannot constitutionally be restricted should at least be disclosed. A more robust disclosure regime will go a long way toward helping the media and voters connect the dots.

Disclosing Big Money in Politics

Political expenditures that cannot constitutionally be restricted should at least be disclosed. A more robust disclosure regime will go a long way toward helping the media and voters connect the dots between persons and entities making political expenditures and the public officials who benefit from those expenditures.²⁰⁰

Contributors to super PACs are already disclosed, but there is insufficient information about the business entities behind these contributors.²⁰¹ The FEC needs to vigorously enforce the disclosure rules we already have, and Congress needs to enact

new legislation that will make the actual sources of super-PAC funding more transparent. Another problem is that super PACs in the weeks before an election often spend large amounts of money that is borrowed from media vendors or others and then pay down their debt with contributions or transfers from other super PACs that are reported only after the election.²⁰² These loopholes in the reporting regime should be closed, for example by requiring super PACs to report anticipated expenditures as soon as they become definite (when a television advertising contract is signed, for example) as well as information about the super PACs' intended sources of funding to pay for them.

501c(4) organizations should be required to disclose the sources of their funding, particularly contributions over a certain dollar threshold. Currently such entities must identify in annual reports to the Internal Revenue Service (IRS) contributors of \$5,000 or more,²⁰³ but information identifying contributors is not publicly available.²⁰⁴ This information should be made publicly available.

Although 501c(3) "charitable" organizations under IRS rules may not support or oppose candidates in partisan elections, they may engage in issue advocacy.²⁰⁵ Issue advocacy, particularly immediately prior to an election, can have an impact similar to electioneering communications.²⁰⁶ The federal and state tax subsidy for 501c(3) organizations through tax deductions should be conditioned on more transparency. Tax deductions for 501c(3) contributions over a certain amount should be disallowed unless the identity of the donor is publicly disclosed. Foundations that contribute to 501c(3) organizations should be required to reveal the contribution on their Form 990 and not donate through donor-advised funds (e.g. Donors Trust) that allow donors to conceal their identity by using the fund as a conduit.²⁰⁷

Congress has considered requiring Securities and Exchange Commission (SEC) rulemaking that would require all public companies (companies filing annual SEC Form 10-K) to disclose all expenditures on electioneering communications whether directly or through payments made to 501c(4) organizations, super PACs, or any other organizations that fund electioneering communications.²⁰⁸ Expenditures by public companies on “issue advocacy”—often a veiled form of electioneering communication²⁰⁹—should also be publicly disclosed. Furthermore, a public company should be required to submit to its shareholders for a proxy vote a proposal from a shareholder that the company ban or restrict electioneering expenditures.

Counterbalancing Big Money in Politics

The third step in campaign-finance reform is to bring more small donors in to counterbalance the influence of big money in politics. The more candidates depend upon smaller donors the more they can free themselves from the big donors and big spenders on electioneering communications who often want something in return.

I have proposed elsewhere²¹⁰ that every American taxpayer should get a \$200 tax credit for contributions to a political candidate(s) of the taxpayer's choice.²¹¹ Given the substantial amount of tax revenue collected from most Americans, it seems reasonable that the first \$200 should be allocated by the taxpayer to have a meaningful voice in choosing the elected officials who will decide how to spend the rest.²¹² This tax credit, if offered to 143 million taxpayers and used by 100 million taxpayers, could cost the government \$20 billion every two-year election cycle.

However, the tax credit would probably reduce the size of the federal budget,²¹³ keeping in mind that the annual federal budget is around \$4 trillion²¹⁴ and the defense budget alone is over \$700 billion.²¹⁵ Defense and other federal expenditures are heavily influenced by political spending of federal contractors including the defense industry.²¹⁶ Making elected officials less dependent upon these contributions could go a long way toward cutting government waste.

The more candidates depend upon smaller donors the more they can free themselves from the big donors and big spenders on electioneering communications who often want something in return.

Protecting American democracy from internal decay and foreign influence requires a reassessment of the role of money in our campaign-finance system. The President, Congress, and the Federal Election Commission should work together to find ways to minimize, disclose to the public, and counterbalance the influence that big money has on our elections.

The Role of Transparency In a New Administration

By Anne Weismann

Many proposals on how to restore the presidency and our democracy post-Trump focus on actions Congress and a new administration can take.²¹⁷ But they ignore a key component: the American public. Rather than give in to the cynicism that contributed to the rise of Donald Trump, citizens must play a prominent role in reinstating norms, a role that does not end at the ballot box. First, however, Congress must arm citizens with the necessary tools for transparency: a FOIA law that works, recordkeeping laws that ensure the preservation of our nation's history, and access to a wealth of reliable data.

The actions of the Trump administration revealed the critical role that an open government plays in countering attacks on the foundations of our government.²¹⁸ Far from an abstract concept, transparency represents a structural necessity that allows the public to hold government officials accountable and enables full public participation in our democracy. The Biden administration faces the daunting task of repairing breaches in mechanisms designed to provide transparency²¹⁹ and taking affirmative steps to fulfill the promise of open government in statutes like the Freedom of Information Act. Both the message and the medium comprise an essential part of any plan to restore and reinforce government accountability. The new president must embrace transparency as a core value and reinforce that message with concrete actions. These include

proactively releasing high-value information, revising classification policies and procedures to counter the problem of over-classification, and improving the quality and usability of data.

At the same time, the new administration will face calls to take actions that hold the Trump administration accountable. A growing chorus of individuals and groups, acting on the well-founded belief that our nation cannot move forward without understanding its past, already has called for some kind of truth-in-reconciliation process to fully examine the conduct of the Trump administration and provide a mechanism for accountability.²²⁰ Others suggest the cost of a truth tribunal is too high, as it undermines our democratic tradition of ending an election with a winner and a loser and moving on from there. Jill Lepore, for example, advocates instead for "the ordinary working of justice, the strengthening of democratic institutions and the writing of history over time, through the study of carefully preserved records."²²¹ Despite daylight between these approaches, they both recognize that we must assemble and preserve the record of the Trump presidency. For that, we can look to FOIA requests as the best barometer of those documents likely to be most useful in evaluating the Trump presidency.

During the Trump administration the number of new FOIA requests soared.²²² A wide range of requesters

used the statute to determine what the Trump administration was doing and why. Some requesters were laser-focused on a specific subset of documents, while others sought to vacuum up all documents on a policy or action. Whatever their approach, they shared the view that knowing what the Trump administration was doing and why was critical to holding it accountable now and in the future. FOIA litigation also spiked. In October 2015, the FOIA Project reported an average of 44 new cases per month for the preceding year; four years later the average had risen to 73.²²³

These Trump-era requests, particularly those in litigation, provide a roadmap for identifying the information most revealing of the actions of the Trump administration. Accordingly, the new administration should start with a pledge to disgorge publicly all of the Trump administration documents requested through FOIA, starting with those requests in active litigation, and limiting redactions to classified and personal information. The requesters can best mine the documents for useful information and place it in a larger context. This approach, as a form of crowd-sourcing, would capitalize on the expertise and work already done by a large number of FOIA requesters and expand that group to the public at large.

No previous administration has made such a bold and encompassing commitment to transparency, but no previous administration has faced the need to reconstruct our democracy by restoring and building anew the norms and rules of law that the Trump administration batted away. That reconstruction depends on understanding what happened and why; a nation that cannot remember and understand its past is, in the words of George Santayana, “condemned to repeat it.”²²⁴ Only by leveraging the tools of transparency can we hope to strengthen the norms that failed in the Trump era to rein in the president’s most autocratic and antidemocratic impulses.

The new administration should take additional steps to ferret out evidence of misconduct or worse in the Trump administration. They should conduct an audit, or request that Congress direct the Government Accountability Office to conduct an audit, of all federal funds paid to Trump businesses. A large part of President Trump’s graft and corruption stemmed from his efforts to use the power of his office for his and his family’s personal enrichment, whether it was advocating for the G7 Conference to be held at one of his struggling golf resorts in Florida or the 41 trademarks that China fast-tracked for companies linked to Ivanka Trump right after she joined

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the White House.²²⁵ According to the *Washington Post*, the president’s businesses received at least \$8.1 million dollars from U.S. taxpayers and political supporters during his term in office,²²⁶ while the president repeatedly accepted emoluments in the form of payments to his businesses by foreign governments, despite the constitutional prohibition against this conduct. Profits at his Washington, D.C. hotel alone exceeded \$40 million in 2018, with at least part of that money paid by foreign governments, lobbyists, and state officials seeking to curry favor with the president.²²⁷ At the same time, the Trump administration thwarted efforts to ascertain the full scope of the president’s corruption with both Congress and the public.²²⁸

The new administration must also support major FOIA reforms and commit to a radically different level of transparency in its own actions. The last four years have revealed the full extent to which the FOIA is broken.²²⁹ Repudiating the FOIA's guiding principle of disclosure agencies have made compliance with their FOIA obligations the lowest of priorities.²³⁰ Problems with the FOIA have been mounting steadily over the last decade, but the outcry for documents explaining the actions and policies of the Trump administration exposed the statute's serious shortcomings at a time when the public needed maximum transparency and quick access to critical information that literally was the difference between life and death.²³¹

On paper the FOIA holds great promise, but it has rarely lived up to that promise. Its command for a 20-business-day response remains elusive; many agencies rarely respond within two months, and for some the wait exceeds years, not days.²³² Congress provided expedition as a means to quickly secure documents when the need is particularly acute or the public interest especially compelling, yet time-sensitive requests offer no guarantee of a much shorter response time.²³³ Agencies wrongly apply and over-rely on the FOIA's nine exemptions, especially to withhold records that would reveal the flaws in an agency policy.²³⁴ And during the Trump administration many agency officials exercised undue political influence over their FOIA processes, tainting the results and depriving the media and good-government groups—their perceived “enemies”—of critical information.²³⁵

To restore the statute's promise of government accountability through transparency the FOIA and FOIA processing must undergo a fundamental overhaul. The government must shift from a culture of secrecy and withholding to one of disclosure. The new attorney general should direct agencies not to rely on discretionary FOIA exemptions, such as

Exemption 5, which protects documents subject to litigation privileges, except in the most limited of cases where the need for secrecy overwhelmingly outweighs the public interest. Agencies must devote significant and sufficient resources to ensure timely processing of requests. This will require Congress to appropriate additional resources, including through a separate budget line item to ensure agencies do not divert those funds to other uses. Agencies must treat the FOIA as mission critical, not a responsibility that can be readily abandoned when meeting its requirements becomes politically inconvenient. All of these represent policy choices that an administration can make without any legislative action.

To reinforce his commitment to transparency, President Biden must revert to the policy implemented by the Obama administration to provide public access to White House visitor logs, and expand that access to logs of visits to other locations the president frequents or where White House officials conduct business.²³⁶ Cloaking the White House in a veil of secrecy fundamentally conflicts with an agenda that fosters openness and recognizes the public's right to know. Every agency should adopt a robust proactive disclosure policy that includes agency visitor logs and other frequently requested documents.

The Department of Justice should publish all Office of Legal Counsel opinions, subject to redactions only for classified or personal information and excluding purely legal advice it provides to the president or attorney general. The D.C. Circuit has described OLC as “[f]or decades ... the most significant and centralized source of legal advice in the Executive Branch.”²³⁷ Despite its prominent role in providing interpretations of law that bind the executive branch, OLC historically has kept its opinions secret unless disclosure is politically expedient.²³⁸ An office not known for its political independence, OLC during the

Trump administration provided the president with justifications for some of his most autocratic tendencies and his administration's most heinous policies. For example, a May 2019 OLC opinion claimed White House advisors had "absolute immunity" from testifying in the impeachment inquiry,²³⁹ while a June 2019 OLC opinion justified Treasury Secretary Mnuchin's refusal to turn over President Trump's tax returns to Congressional committees authorized by statute to request such returns.²⁴⁰ A January 2017 OLC opinion blessed President Trump's executive order banning immigrants and refugees from several Muslim-majority countries.²⁴¹ This governance by secret law undermines our democracy, which functions best in the sunlight.

Efforts to assemble and digest the history of the Trump presidency can succeed only if the administration fulfills its recordkeeping obligations under the Federal Records Act (FRA) and the Presidential Records Act (PRA). On both fronts the Trump administration failed. From early on President Trump showed his disregard, if not outright contempt for his recordkeeping obligations by ripping up his notes and insisting that no notetakers be present for some

of his most consequential meetings with foreign leaders.²⁴² Because the courts have interpreted the PRA as giving presidents almost unreviewable discretion in how they implement the statute, we face a very real risk that President Trump not only failed to create, but also destroyed large numbers of his documents, fearing the personal consequences to him should they become public.²⁴³ Congress must amend the statute to guard against this risk and protect records that belong to the American public. Among needed reforms, Congress should impose on the White House a periodic reporting requirement to Congress and the Archivist of the United States concerning its compliance with recordkeeping statutes as a way to guard against systemic noncompliance.

If we are to fulfill Abraham Lincoln's dream of a "government of the people, by the people, and for the people," we must provide the public with the necessary tools for participatory democracy. Most prominent among them are statutes like the FOIA, the FRA, and the PRA. But these modes of transparency will be useful only if the new administration full-throatedly embraces the twin goals of transparency and accountability.

International Ethics and Rule of Law Issues

By Norman Eisen and Joseph Foti

Any approach to ethics reform at home will benefit from coordination with international efforts. Such an approach will need to move on several fronts simultaneously.

1. Carrying out comprehensive domestic reform around democracy, ethics, and rule of law;
2. Promoting rule of law abroad through exchange, support, and cooperation;
3. Enhancing law enforcement and accountability for violations of human rights and corruption.

Done well, such an approach could lead to mutually reinforcing outcomes—with international attention raising recognition and expectation for domestic reform, and with domestic reform helping to restore U.S. credibility and democracy promotion abroad.

Fortunately, there is no need to reinvent the wheel. The Biden-Harris administration can recommit to and double down on existing multilateral efforts that continued despite the United States' four-year retreat from multilateralism.²⁴⁴ These include two multi-stakeholder partnerships—the Open Government Partnership²⁴⁵ and the Extractive Industries Transparency Initiative.²⁴⁶ In addition, there will be critical moments across the year to re-engage other country governments, to showcase domestic reforms, and to learn from other countries.

The Open Government Partnership

In 2011, the Obama-Biden administration founded OGP with leaders from seven other major democracies and civil society from around the world.²⁴⁷ It has since grown to 78 nations and a rapidly growing cohort of cities and local governments.²⁴⁸ Working with civil society, these governments have collectively committed to over 4,000 reforms through independently reviewed two-year action plans to strengthen transparency, participation, and accountability.²⁴⁹ One in five of the reforms evaluated have been evaluated as profoundly changing government practice, such as helping to reduce corruption and giving citizens a stronger voice in government.²⁵⁰ OGP brings added international visibility and accountability for domestic reforms with an independent reporting mechanism and structured exchanges to learn across borders.²⁵¹

A renewed commitment to OGP will work best with investment in both domestic and international processes. During the Obama-Biden administration, the U.S. used its action plan for major reform ranging from protecting national-security whistleblowers, improving access to justice,²⁵² enhancing procurement reform in the American Recovery and

Reinvestment Act,²⁵³ and establishing the highly successful Police Data Initiative.²⁵⁴ At the same time, OGP's Independent Reporting Mechanism documented underinvestment in ethics and democracy reform as well as under-engagement with the legislative branch.²⁵⁵

Now is an excellent time to reinvest in these critical areas. What were stress cracks during the Obama administration became fault lines during that of Trump. OGP can serve as a critical means of implementation, as a vessel for regulation and administrative reform stemming from anti-corruption legislation with the passage of the 2021 National Defense Reauthorization Act²⁵⁶ and any potential changes coming from H.R. 1/H.R. 4.²⁵⁷ In the absence of legislation, OGP also succeeds as a proving ground for bold new ideas—whether that is developing politically exposed persons databases, restricting money in politics, or moving to limit illicit financial flows to the United States.²⁵⁸ Importantly, these recommendations should emerge from the dialogue between the users—watchdog organizations, journalists, civic organizations—and the various agencies with equity in improving ethics, democracy, and rule of law. Importantly, because OGP is a large-tent organization—with its membership using good-governance approaches to tackle any number of problems from homelessness to organized crime and from education policy to civil liberties—it creates a structure within which the White House can encourage agencies to engage with international partners and to innovate.²⁵⁹ While it may lack the standard-setting aspirations of a treaty-based organization, it allows for adaptation and innovation across regions of the world. In 2021, more than 100 OGP members will design and submit their new action plans and the organization will celebrate its tenth anniversary in Seoul.²⁶⁰

The Extractive Industries Transparency Initiative

EITI is a 53-member global multi-stakeholder initiative that seeks to address these phenomena with cooperation from governments, civil society, and major extractive companies.²⁶¹ EITI aims to make revenue payments along the entire natural resource value chain more transparent to lower corruption, raise domestic revenue, and improve the quality of investment.²⁶² Unlike OGP, it is primarily a standard-setting body, with validation of its members' transparency for oil, gas, mining, and other extractive industries.²⁶³ The United States committed to joining in 2011 and withdrew in 2017, moving from being an “implementing country” to a “supporting country.”²⁶⁴

Such an approach could lead to mutually reinforcing outcomes—with international attention raising recognition and expectation for domestic reform, and with domestic reform helping to restore U.S. credibility and democracy promotion abroad.

Since the U.S. withdrawal, EITI has expanded beyond a narrow focus of publishing resource revenue to cover contract disclosure, resource production, environmental payments, and employment data.²⁶⁵ This may mean that, should the United States rejoin EITI, the Department of Interior (the lead agency for EITI) will need to re-establish the federal advisory committee it established in 2012 and commit to an even more ambitious set of reforms.²⁶⁶

In addition, the United States will need to re-examine the severely delayed rollout of regulations for Section 1504 (the Extractive Industries Transparency Act) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010).²⁶⁷ The law obligates publicly traded extractives corporations to disclose revenue reporting.²⁶⁸ The SEC, tasked with implementing the law, has delayed publication of the final regulation and early drafts of the current form are riddled with loopholes—anonymous reporting by companies and no disaggregation below the country level—that would green light continued corruption in some of the world's poorest or most oppressive countries. A new SEC chair may be able to build on dissents from the two commissioners opposed to the current draft.²⁶⁹

To restore U.S. credibility in this area, the United States will need to demonstrate leadership in domestic implementation and ensure that its own markets do not encourage kleptocracy abroad.

International Democracy and Rule-of-Law Forums

The U.S. has a number of high-visibility opportunities to promote and leverage its values—proving that “America is back” not only through speech, but also through a bold package of credible domestic reforms. Chief among these opportunities is the so-called “Biden Summit for Democracy.”

The proposed summit²⁷⁰ will necessarily need to have a “thick definition” of democracy—one that includes elections, but also goes further by embracing human rights, rule of law, and fighting corruption. A U.S.-hosted 2021 Summit for Democracy could include political advocacy for policies such as enhanced support to civil society in emerging

democracies, beneficial-ownership transparency, and digital-governance reforms to combat disinformation and undermining of democracy online. Many such summits can be overly focused on definitions of democracy, lists of attendees, international declarations, or establishing new organizations. Rather than spend precious diplomatic resources on these issues, such a summit could instead focus on credible implementation for democracy, ethics, and rule of law. Multi-stakeholder partnerships such as OGP can provide the scaffolding and infrastructure for design, as well as the follow-up and implementation of commitments made on the international stage.

Of course, the Summit for Democracy will not be the only opportunity for reform. A litany of other events will have some focus on good governance. In particular, the G7, led by the United Kingdom, will focus on controlling kleptocracy and improving open societies.²⁷¹ At a time when there will be significant motivation to strengthen the U.S.-UK relationship, this provides a good occasion to reiterate shared commitments to democracy and rule of law. There are numerous opportunities for multilateralism on this topic, including the G20 and the Special Session of the UN General Assembly, which will focus on the international drug trade.²⁷² Finally, there will be room for enhanced cooperation on specific thematic topics ranging from enforcing and harmonizing the EU, U.S., and Global Magnitsky Acts,²⁷³ transatlantic harmonization of lobbying regulations,²⁷⁴ regional and global enhancement of beneficial-ownership reporting standards,²⁷⁵ and other critical democracy and law-enforcement areas.

Regardless of the specific steps taken, success internationally, more than ever, will depend not just on what the United States claims to stand for, but also what it is willing to do to repair its image as a beacon of liberal democracy and rule of law.

Conclusion

America has always aspired to an office of the presidency guided by the public trust,²⁷⁶ which should dictate the conduct of the president and his appointees. President Trump compromised and nullified this fundamental principle by retaining business interests in pursuit of personal wealth,²⁷⁷ which made him vulnerable to corruption,²⁷⁸ and seeking or obtaining assistance from foreign governments to influence the outcome of presidential elections to further his partisan political interests.²⁷⁹

While the fight against corruption is an ongoing process that ebbs and flows in the best of times, the assault on integrity by the Trump administration may have been the worst in our nation's modern history. Leadership at the Department of Justice failed to uphold the rule of law and maintain its independence, opting instead to use the agency's vast powers to further the president's personal and partisan political interests.²⁸⁰ The current campaign-finance system, supported by volumes of cash from special interests whose identities are oftentimes shielded from public disclosure,²⁸¹ not only distorted the system of checks and balances established by our Framers, but contributed to a corrosion of public trust.²⁸² Trump's incessant tweeting and plethora of public lies,²⁸³ reinforced by a powerful media propaganda machine,²⁸⁴ left the true operations of the federal government virtually impenetrable from traditional means of public access such as the FOIA and meaningful

Congressional oversight, both of which were met regularly with overwhelming resistance.²⁸⁵

The excesses of the Trump administration only made more evident what was already apparent to ethics experts—meaningful reform is long overdue. Executive-branch ethics laws enacted during the Watergate era have not kept up with the evolving nature of financial investments and outside influences.

Within days of his election, Trump announced that as president, he could not have conflicts of interest.²⁸⁶ This statement not only put him at odds with long-standing ethical norms that governed the conduct of his predecessors but forewarned of many ethical transgressions yet to come. Trump's failure to divest his business interests allowed him to profit from his companies' business dealings with foreign, federal, and domestic governments in violation of the U.S. Constitution, as well as from the corrupt influences of special interests and other groups.²⁸⁷ If the failure to divest his business interest in the Trump Organization was his original sin, his decision to appoint his son-in-law and daughter to senior White House positions was a close second.²⁸⁸ To help prevent similar abuses in the future, Congress should enact laws that prohibit future presidents from sharing in profits derived from business dealings with foreign, federal, and domestic governments

or special-interest groups; mandate disclosure of presidential tax returns; and ensure the president is covered by the criminal conflict-of-interest law and restrictions on nepotism.

Additional needed reforms focus on raising the floor or shoring up gaps in the existing framework for executive branch ethics, including by establishing a range of divestitures for “very senior employees” and “senior employees” whose authority poses heightened risks of conflicts of interests.²⁸⁹ To mitigate the financial impact of the proposed new mandatory divestitures, Congress should authorize a new type of blind-managed account that, like blind trusts, would be exempt from the conflict-of-interest statute. Congress can significantly reduce the risk of outside influence by enacting restrictions that prohibit or restrict the types of payments the employer of an incoming official can make.

Congress should supplement the criminal laws with an additional noncriminal conflict-of-interest law that has a broader reach, lighter penalties, and an effective administrative mechanism for enforcement that would, as a noncriminal statute, likely lead to greater enforcement. Additional reforms should protect the independence of inspectors general and whistleblowers from possible retaliation.

The 2016 general election showed that foreign powers can reach the American people and influence opinions with the potential to control the outcome of our elections and other democratic processes.²⁹⁰ Other countries have learned from Russia’s efforts and have mounted sophisticated cyber campaigns that display an evolving understanding of the power of social media and the vulnerabilities of cyber defenses.²⁹¹ Democratic nations, with their robust traditions of free speech, are particularly subject to attack via open-internet platforms. These

threats necessitate reform of the Foreign Agents Registration Act²⁹² to strengthen its enforcement, tighten its exemptions, and improve the ability of FARA to deal with the challenges posed by foreign agent registration in today’s global climate.

Although most evident during the Trump administration, our experience with the DOJ since the Nixon administration raised concerns of politicization.²⁹³ To restore the DOJ’s independence from partisan politics and assure its commitment to the rule of law, this report incorporates several recommendations from those included in the CERL/CREW report.²⁹⁴ The proposals would strengthen the independence of the special counsel, U.S. attorneys, inspectors general, and career DOJ attorneys and likewise restore independence to the intelligence community. To ensure greater accountability, Congress should use its power of the purse and transfer some of the oversight responsibility from the Office of Professional Responsibility to the DOJ inspector general.

Although Russia contrived novel ways of interfering in our 2016 election on a relatively low budget through computer hacking and social media propaganda,²⁹⁵ infusion of large amounts of cash into electioneering communications remains the most prevalent way of influencing who wins American elections and of controlling decisions that winners of elections make once in public office.²⁹⁶ If we do not enhance disclosure requirements, limit donations, and counterbalance the influence of big money, our representative democracy will devolve into an oligarchy controlled by corporate wealth.

Rather than give in to the cynicism that contributed to the rise of Donald Trump, citizens must play a prominent role in reinstating norms. To do so, Congress must arm citizens with the necessary tools for transparency: a FOIA law that works, recordkeeping

laws that ensure the preservation of our nation's history, and access to a wealth of data ranging from accurate and current ethics information on public officials to reliable scientific data. An informed democracy demands the public be equipped with the necessary tools and for its elected officials to full-throatedly embrace the twin goals of transparency and accountability.

Though sorely tested, our democratic institutions have survived the unprecedented challenges of a Trump presidency. The newly elected president presents us with the opportunity to restore the public trust through meaningful reform.

About the Authors

Ambassador Norman Eisen (ret.) is a senior fellow in Governance Studies at Brookings and an expert on law, ethics, and anti-corruption. He most recently served as special counsel to the House Judiciary Committee from 2019 to 2020, including for the impeachment and trial of President Trump, and was a “critical force in building the case for impeachment” (*Washington Post*). His book about his service, *A Case for the American People: The United States v. Donald J. Trump* (Crown 2020), was praised as “tantalizing” (*New York Times*), “compelling,” (*Washington Post*), and as “an important piece of the historical record” (*Mother Jones*). Eisen is also the author of *The Last Palace: Europe’s Turbulent Century in Five Lives and One Legendary House* (Crown 2018) and *Democracy’s Defenders: U.S. Embassy Prague, The Fall of Communism in Czechoslovakia, and Its Aftermath* (Brookings Institution Press 2020). From January 2009 to January 2011, Eisen worked in the White House as special counsel and special assistant to the president for ethics and government reform. The press dubbed him “Mr. No” and the “Ethics Czar” for his tough anti-corruption approach. He also advised President Obama on lobbying regulation, campaign finance law, and open government issues, helping to assure the most scandal-free White House in modern history. From 2011 to 2014, Eisen was U.S. Ambassador to the Czech Republic. Before government service, Eisen was a partner in

the D.C. law firm Zuckerman Spaeder LLP, where he specialized in litigation and investigations. His cases included Enron, the ADM antitrust case, the subprime financial collapse, the Monica Lewinsky matter, and the 2000 and 2004 presidential recounts. He was named one of DC’s top lawyers by *Washingtonian*. Eisen received his J.D. from Harvard Law School in 1991 and his B.A. from Brown University in 1985, both with honors.

Virginia Canter is the chief ethics counsel for Citizens for Responsibility and Ethics in Washington (CREW), a nonpartisan organization dedicated to promoting government ethics and accountability. Ms. Canter joined CREW in 2016 after a career in public service, most recently with the Department of the Treasury’s Office of General Counsel, which she rejoined in 2015 after serving as the ethics advisor to the International Monetary Fund (2010–2015); associate counsel to President Obama (2009–2010); and ethics counsel to the Obama-Biden Presidential Transition (2008–2009). Ms. Canter served in the Obama administration and Transition while on detail from her position as associate director for the Office of Foreign Assets Control at the Department of the Treasury (2005–2010). Ms. Canter previously served as senior counsel for ethics at the Department

of the Treasury (2001–2005), general counsel for the National Endowment for the Humanities (1998–2001), deputy counsel to Vice President Gore (2000–2001), associate counsel to President Clinton (1997–1998), and assistant ethics counsel to the Securities and Exchange Commission (1990–1997). She also served ex officio as counsel to the Federal Council on the Arts and Humanities (1998–2001). Earlier in her career, Ms. Canter was a government contracts lawyer serving as attorney-advisor to the Securities and Exchange Commission (1987–1990) and the Naval Sea Systems Command, Department of the Navy (1984–1987). Ms. Canter received her B.A. and J.D. from the University of Baltimore and is a member of the Maryland State Bar.

Claire Finkelstein is the Algernon Biddle Professor of Law and Professor of Philosophy at the University of Pennsylvania, teaching there since 2000, and director of the University's Center for Ethics and the Rule of Law. Professor Finkelstein's current research addresses national security law and policy, with a focus on ethical and rule of law issues that arise in that arena. In 2012, Professor Finkelstein founded Penn Law's Center for Ethics and the Rule of Law (CERL), a nonpartisan interdisciplinary institute that seeks to promote the rule of law in modern-day conflict, warfare, and national security. Before she began teaching in Philadelphia, she was a tenured professor of law at the University of California, Berkeley. In 2019, she was named senior fellow at the Foreign Policy Research Institute (FPRI). An expert in the law of armed conflict, military ethics, and national security law, she is a co-editor (with Jens David Ohlin) of *The Oxford Series in Ethics, National Security, and the Rule of Law*, and a volume editor of its four titles thus far: *Targeted Killings: Law & Morality in an Asymmetrical World* (Oxford University

Press 2012); *Cyber War: Law and Ethics for Virtual Conflicts* (Oxford University Press 2015); *Weighing Lives in War* (Oxford University Press 2017); and *Sovereignty and the New Executive Authority* (Oxford University Press 2018). Professor Finkelstein has briefed Pentagon officials, U.S. Senate staff, and JAG Corps members on various issues in national security law and practice. Her prior scholarly work focuses on criminal law theory, moral and political philosophy, jurisprudence, and rational choice theory. She is also the editor of *Hobbes on Law* (Ashgate Publishing 2005) and is currently completing a book called *Contractarian Legal Theory*.

Joseph Foti is the chief research officer of the Open Government Partnership (OGP). He leads the Analytics and Insights team which is responsible for major research initiatives, managing OGP's significant data resources, and ensuring the highest quality of analysis and relevance in OGP publications. He has over a decade leading research and accountability efforts across a range of sustainable development issues. With over 30 publications to his name, he has expertise in environmental policy, impact assessment, justice reform, civic space, and access to information. His most recent major work was as the chief editor of OGP's first global report, *Democracy Beyond the Ballot Box*. Before his current role, he was the founding director of OGP's Independent Reporting Mechanism, which evaluates Open Government Action plans in nearly 80 countries. Prior to his work at OGP, he was a senior associate for the Access Initiative, a network led by the World Resources Institute (WRI). Prior to this, he worked as a public school teacher.

Richard W. Painter has been the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School since 2007. He has served as a tenured member of the law faculty at the University of Oregon School of Law and the University of Illinois College of Law, where he was the Guy Raymond and Mildred Van Voorhis Jones Professor of Law until 2005. From February 2005 to July 2007, he was associate counsel to the President in the White House Counsel's office, serving as the chief ethics lawyer for the President. He is a member of the American Law Institute and is a reporter for the ALI Principles of Government Ethics. He was vice chair of Citizens for Responsibility and Ethics in Washington (CREW) from 2016 to 2018 and a founding board member of Take Back our Republic, a campaign finance reform organization. He is also on the Board of Advisors of the Center for Ethics and the Rule of Law at the University of Pennsylvania. From 2014 to 2015 he was a residential fellow at Harvard University's Safra Center for Ethics, which funded his work on a book, *Taxation only with Representation: The Conservative Conscience and Campaign Finance Reform* (Take Back our Republic 2016). He received his B.A., *summa cum laude*, in history from Harvard University and his J.D. from Yale University. Following law school, he clerked for Judge John T. Noonan Jr. of the United States Court of Appeals for the 9th Circuit with whom he coauthored three editions of a professional responsibility casebook. He later practiced at Sullivan & Cromwell in New York City and Finn Dixon & Herling in Stamford, Connecticut before entering law teaching in 1993.

Walter Shaub is a senior ethics fellow at the Project on Government Oversight (POGO). Shaub served as the Senate-confirmed director of the U.S. Office of Government Ethics (OGE) from January 2013 until July 2017. The OGE director position also entailed ex officio roles on the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and CIGIE's Integrity Committee. Mr. Shaub served at OGE for a total of nearly 14 years as attorney, supervisory attorney, deputy general counsel, and director. He also served in the General Counsel offices of the Department of Health & Human Services and the Department of Veterans Affairs. Outside government, he has worked for POGO; Citizens for Responsibility and Ethics in Washington; the Campaign Legal Center; the law firm of Shaw, Bransford, Veilleux & Roth; and CNN (as a contract contributor). In 2020, he delivered the Elson Ethics Lecture for the St. George's House Trust of Windsor Castle in the United Kingdom; in 2019, he received the Paul H. Douglas Award for Ethics in Government from the University of Illinois System; in 2018, he received the Neta Gallas Award for Exemplary Professional Service in Public Service from the American Society for Public Administration and a Distinguished Alumnus Award from the James Madison University. Mr. Shaub is licensed to practice law in the District of Columbia and Virginia. He graduated with a J.D. from American University's Washington College of Law and a B.A. in History from James Madison University.

Anne Weismann served as chief counsel and chief FOIA counsel for Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit organization committed to identifying, analyzing, and deterring unethical government conduct. On behalf of CREW, Ms. Weismann has handled a wide range of high-profile litigation from lawsuits seeking public access to White House visitor records and opinions of the Office of Legal Counsel to a lawsuit seeking to compel President Trump to comply with his recordkeeping obligations under the Presidential Records Act. She previously served as the executive director of Campaign for Accountability, a nonprofit organization that uses research, litigation, and communication to hold those who act at the expense of the public accountable for their actions. Before entering the nonprofit arena, Ms. Weismann served as the deputy chief of the Enforcement Bureau for the Federal Communications Commission and as an assistant branch director at the Department of Justice, where she oversaw the Department's government information litigation. Ms. Weismann has received numerous honors for her transparency work and is a frequent lecturer on transparency and ethics issues. She received her B.A., *magna cum laude*, from Brown University and her J.D. from George Washington Law School.

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- 41 Divestiture also would be satisfied by placing business interests into a qualified blind or diversified trust, provided they also commit to the sale of those assets. Congress may also want to consider whether family-owned and operated farms should also be permitted, See For the People Act, H.R. 1, 116th Cong. 1st Sess. (2019); "Trump-Proofing the Presidency: A Plan for Executive Branch Ethics Reform," *CREW and Public Citizen*, October 2, 2018, <https://www.citizensforethics.org/wp-content/uploads/legacy/2018/10/Trump-Proofing-the-Presidency.pdf>.

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- 47 Major party presidential candidates should be required to release their three most recent federal income tax returns on or before May 15 of the filing year in which they become an official candidate. Disclosure by presidential and vice presidential candidates would be made to the FEC and for elected presidents and vice presidents to OGE to be posted electronically by the respective agency on their official agency website with appropriate redactions to protect necessary privacy interests (e.g., Social Security numbers, addresses etc.). Recommendations in this section that apply to presidential candidates and elected presidents would likewise apply to vice presidential candidates and elected vice presidents, See For the People Act, H.R. 1, 116th Cong. 1st Sess. (2019); "Trump-Proofing the Presidency," *CREW and Public Citizen*.
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