SECTION 4 *of* **WHAT DEMOCRACY LOOKS LIKE**

Reforming Executive Branch Ethics

The Trump Administration has been disastrous for government ethics. President Donald Trump, cabinet officials, and other senior appointees have used public resources for their private benefit, disregarded their obligation to avoid conflicts of interest, and in many cases avoided accountability for their conduct.

It is critical, now more than ever, that Congress and the Biden Administration act immediately to overhaul executive branch ethics. Reform starts with the Office of Government Ethics (OGE), which needs greater powers to enforce ethics rules and regulations already in existence, or to be replaced by a new ethics office positioned to enforce federal ethics laws. Congress must also improve and strengthen specific ethics requirements beyond a simple overhaul of the OGE. Most critically, Congress must require that all executive branch officials appointed to the highest levels of the government divest their financial interests and place them in public index funds, treasury bonds, or cash equivalent investments. Congress must also enhance the financial disclosure requirements for executive appointees to ensure that Congress and members of the public can identify potential and actual conflicts of interest.

Other needed reforms would help bolster internal controls against corruption. Congress must strengthen protections for career civil servants, including those who refuse to acquiesce to improper political influence in their agencies. It must rebuild the inspector general apparatus to ensure that these offices have the power and the personnel to ensure accountability at the highest levels.

Issue 1: Underenforcement of federal ethics laws

Across the executive branch, a decentralized collection of officials are charged with enforcing federal ethics laws, with guidance from the Office of Government Ethics (OGE). While this system may work for routine ethics issues, when it comes to the most challenging situations—often very senior officials with very complicated financial or other outside relationships—this power imbalance is fatal. The executive branch needs an ethics office that is charged with enforcing ethics laws across all executive agencies.

The OGE oversees federal ethics policy across the executive branch, with a focus on preventing conflicts of interest from affecting government decisions. However, the OGE lacks tools to respond if prevention fails; for example, it relies on agencies voluntarily providing information in response to a request for information and it can only recommend corrective action to agency heads if it does find a problem. The OGE has, however, taken significant steps in making public ethics-related documents and in training ethics officials and others in the executive branch, so it is important to preserve and build on these preventative successes while addressing the need for major structural changes in enforcement.

Some enforcement issues stem from shortcomings in transparency rules and their implementation. For example, agencies have the legal authority to grant waivers to employees who would otherwise be violating ethics laws, but, for the most part, they have no affirmative obligation to tell the public when they have done so. As a result, it is difficult to know whether something that might appear to be a violation has in fact already been permitted, or whether a waiver is illegally issued after the fact to "paper over" a violation that actually happened. Transparency and enforcement are tightly connected, and improving transparency is critical to improving enforcement.

The purpose of ethics laws is to prevent abuses of power and hold government officials accountable should such abuses occur. While the OGE is currently able to oversee ethics laws and regulations, it does not have the centralized power to ensure compliance. It is therefore imperative to create a single entity that can investigate and sanction executive branch employees.

Solutions

- **Give a single executive branch office the power to enforce executive branch ethics laws by either creating a separate inspector general's office or giving the Office of Government Ethics enforcement authority.**

Create a separate inspector general's office to investigate potential ethics violations across the executive branch, including within the White House. Under this plan, the OGE would be preserved as an advisory agency, but a special executive branch inspector general's office would be created to receive public referrals from the OGE and to investigate potential violations of ethics laws and rules. The inspector general's office, which would have the authority to conduct investigations, would either publicly accept or decline the referral from the OGE in writing, and if the referral is accepted, complete a full investigation and issue a public report of its findings to the relevant parties, and compel monetary sanctions for particularly egregious misconduct; or

Vest the OGE with enforcement authority. The second model would add investigative and enforcement authority to the OGE's existing responsibilities. In this model, one division of the OGE would issue ethics advice and guidelines, and a separate division of the OGE would wield investigative and enforcement authority to compel compliance with demands for documents and testimony, and compel sanctions for egregious misconduct.

- **Protect the Office of Government Ethics' independence.** The director of the OGE (or any ethics enforcement agency) should continue to be appointed for seven-year terms, but should only be able to be removed from office for cause with 30 days advance written notice to Congress and the OGE. Additionally, Congress should grant the Council of the Inspectors General on Integrity and Efficiency the authority to investigate the allegation of "cause" in the case of a firing.

- **Give the Office of Government Ethics the independence to communicate directly with Congress.** The OGE does not currently have the authority to reach out to Congress on policy or enforcement matters without White House approval, unless Congress solicits the OGE's input. The OGE could help Congress conduct oversight of agencies and help propose solutions to systemic ethics failures.

- **Require political appointees in the executive branch to participate in annual ethics training.** Congress and the executive branch should mandate semi-annual ethics training and education programs, including additional continuing ethical education requirements for all agency ethics officials.

- **The Office of Government Ethics should create a public repository for all executive branch ethics records.** Congress should require the OGE to maintain and make available to the public executive branch ethics records in an online, searchable, sortable, and downloadable format. At a minimum, those records should include recusal decisions, waivers and exemptions, ethics advisory opinions, financial disclosure reports, certificates of divestiture, and compliance reviews. Records that cannot be made public should be made available to Congress upon request.

- **Congress should amend the Ethics in Government Act of 1978 to create an express private right of action for members of the public to sue either agencies or individual officials for failing to file personal financial disclosures or omitting required information from their personal financial disclosures.** The legal structure would be similar to the scheme for Freedom of Information Act requests: a member of the public would file a request, and the agency would have a certain number of days to release the report with all details required to be disclosed under the Ethics in Government Act of 1978. If the agency fails to comply within statutory time limits, or provides an inadequate response, then the requester would have a cause of action to compel compliance.

- **Congress should make the director of the Office of Government Ethics the statutory White House designated agency ethics official.** Currently, the White House counsel is responsible for the White House's compliance with the ethics laws. Congress should remove this important duty from the White House counsel, and vest it in an office that is specifically and eminently qualified to handle these issues.

Resources

Sen. Warren and Rep. Jayapal's Anti-Corruption and Public Integrity Act, S. 3357, § 511 et seq. (115th Congress, 2018).

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 8031 et seq. (116th Congress, 2019).

Rep. Lynch's White House Ethics Transparency Act of 2019, H.R. 391 (116th Congress, 2019).

Rep. Raskin's Executive Branch Comprehensive Ethics Enforcement Act of 2019, H.R. 745 (116th Congress, 2019).

Sen. Blumenthal's Executive Branch Comprehensive Ethics Enforcement Act, S. 896 (116th Congress, 2019).

Trump-Proofing the Presidency: A Plan for Executive Branch Ethics Reform, *Public Citizen and CREW*, October 2, 2018.

Testimony of Walter M. Shaub, Jr., *House Committee on Oversight and Reform*, February 6, 2019.

Cynthia Brown, Executive Branch Ethics and Financial Conflicts of Interest: Disqualification, *Congressional Research Service*, January 31, 2019.

Issue 2: Inadequate financial disclosure reports

The current requirements for personal financial disclosures do not mandate executive branch officials to reveal adequate details, including the value of assets, income, transactions, and liabilities within reasonable ranges, as well as information critical to assessing potential conflicts of interest, such as the identities of specific creditors, investors, and customers of whole or partially owned business assets. These shortcomings have always been problematic, but they have become particularly salient during the Trump Administration.

Financial disclosures are designed to prevent conflicts of interest, promote public confidence, and ensure institutional and individual ethics. The current law mandates reporting of ownership in privately held companies and assets; specifically, officials must provide the name of the company/asset, its line of business, and the type of asset/company. This information provides a general knowledge of direct and substantive private interests that may conflict with official duties or the public interest.

While these disclosures are well-intentioned, they lack sufficient detail. An official can own a business with significant debt obligations to a foreign government or other problematic entity, and disclose only the asset name and a few other details. Such a precedent creates a two-pronged issue: ethics officials—and the public—face a lack of transparency, which produces a lack of accountability and opens the door to ethics violations or conflicts of interest.

This is not just a hypothetical danger. The Office of Government Ethics refused to certify Commerce Secretary Wilbur Ross' 2018 financial disclosure report due to misreporting of stock holdings, putting Ross in violation of his ethics agreement. Facing scrutiny, Secretary Ross made a statement in which he claimed he was under the impression that some shares had been sold in 2017. Similarly, Senior Advisor to the President Jared Kushner misrepresented his financial holdings on his March 2017 financial disclosure report; in an updated disclosure form it was revealed that Kushner concealed over 70 assets totaling a minimum of $10.6 million. Ross and Kushner's lack of specificity in financial disclosure reports drastically diminishes trust in public officials. Without comprehensive financial disclosure reports, it is impossible to know if public officials may be compromised as a result of their financial holdings.

Solutions

- **Congress should increase the required level of detail for financial disclosures to include underlying asset creditors, investors, and customers, and require disclosure of gift transfers.** The Ethics in Government Act of 1978 should be amended to demand a more thorough disclosure process.

    Identify any major creditor of the underlying asset/limited liability company (LLC); categorize the total value of liabilities owed that exceed $10,000;

    Identify any major investor and categorize the total values of its investment. Disclose any investors in LLCs or other privately held businesses exceeding $50,000, by numerical categories;

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

Require disclosure of gift transfers. Require public disclosure within 30 days after any gift transfer by the filer of assets that exceed $1,000 in value when the gift is undertaken by the filer to comply with divestiture commitments made to agency ethics officials.

- **Congress should require cabinet-level officials to release all their tax returns while in office, and preemptively release returns dating back six years prior to joining the government.** Tax returns provide greater detail of an official's finances and potential conflicts of interest. Their release allows the public to see, with more specificity, the individual investments, debts, incomes, and cash flows.

- **Congress should enhance public financial disclosure requirements for the president, vice president and other senior officials.** Amend the Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101-111, to require that the president, vice president, cabinet members and senior White House staff file enhanced financial disclosures that report all income, assets, transactions and liabilities that exceed $5 million. Additionally, Congress should narrow the disclosure ranges for these high-level officials to allow the public to have a more complete picture of the official's finances.

- **Congress should require a new entrant report for the president and vice president.** Amend the Ethics in Government Act of 1978, 5 U.S.C. app. § 101(a), to require that the president and vice president file a public financial disclosure report by May 15 of the first year in which they take office by deleting "or as a candidate for the position" from 5 U.S.C. app. § 101(a).

Resources

Rep. Eshoo's Presidential Tax Transparency Act of 2019, H.R. 273 (116th Congress, 2019).

Rep. Sanchez's FAIR Act, H.R. 682 (116th Congress, 2019).

Rep. Lieu's Restoring the Public Trust Act, H.R. 706, § 221 et seq. (116th Congress, 2019).

Rep. Raskin's Executive Branch Comprehensive Ethics Enforcement Act of 2019, H.R. 745 (116th Congress, 2019).

Rep. Ruiz's Public Service Transparency Act, H.R. 3688 (116th Congress, 2019).

Rep. Porter's Transparency in Executive Branch Official Finances Act, H.R. 5433 (116th Congress, 2019).

Sen. Blumenthal's Executive Branch Comprehensive Ethics Enforcement Act, S. 896 (116th Congress, 2019).

Rep. Cicilline's White House Open Data Act, H.R. 7580 (116th Congress, 2020).

Trump-Proofing the Presidency: A Plan for Executive Branch Ethics Reform, *Public Citizen and CREW*, October 2, 2018.

Issue 3: Misuse of public office for private gain

Executive branch ethics laws are insufficient to ensure that public office is not abused for private gain. For example, existing laws and regulations do not clearly prohibit executive branch agencies from contracting with businesses that are owned or controlled by senior officials within the executive. This loophole allowed Postmaster General Louis DeJoy to initially retain his large interest in a United States Postal Service highway route contractor called XPO Logistics.

There have been other egregious examples of this type of financial conflict at the highest levels of the Trump Administration. In 2017, Commerce Secretary Wilbur Ross held an interest in a company that does business in China and is part-owned by a Chinese government enterprise. After becoming secretary, Ross met with Chinese officials who shared financial interest in this firm. Additionally, Secretary Ross was also invested in a company that said it would benefit from an expansion of the exploration and shipping of natural gas, while, in his official capacity, negotiating a trade deal that would increase U.S. natural gas exports to China.

These potential conflicts were made possible by the fact that ethics officials allowed Secretary Ross to keep a number of substantial assets—including investments in shipping and energy—and granted him several unusual extensions to divest from potentially problematic holdings that he committed to sell as part of his ethics agreement. This problem raises both the specter of executive branch officials enriching themselves off the back of the taxpayer, while leading to an inefficient allocation of taxpayer money appropriated to fix critical societal problems.

Even after the tumultuous years early in the Trump era, the Administration's financial conflicts of interest have continued to rage on. The pandemic caused by the novel coronavirus, and the government's scattershot, chaotic approach to managing the crisis, has allowed for unscrupulous actors to enmesh themselves in the unclear chains of command and potentially score lucrative contracts and profits for companies that they own. For example, as CREW outlined in June, July, and November 2020 complaints, Vice President Mike Pence's Chief of Staff, Marc Short, may be participating in the government's coronavirus pandemic response while holding significant conflicting financial interests. Critically, in an interview with Fox News host Lou Dobbs, Short discussed Vice President Pence's trip to meet with executives of 3M Company—one of the businesses whose stock Short reported in his financial disclosure report. During the interview, Short touted a related legislative effort to enact product liability protection for 3M Company and other manufacturers involved in the coronavirus response.

While these direct and clear financial conflicts demonstrate the immense disregard for our government's most basic norms and rules against self-dealing, they are only part of the larger implosion of the executive branch's ethical standards. Another example, and one that caused an immense amount of pain and misery, was the decision to award a $300 million contract to a tiny, inexperienced Montana-based firm, which was funded by a big donor and supporter of President Donald Trump's, and was also run by a "friend" of then-Interior Secretary Ryan Zinke, to rebuild a significant portion of Puerto Rico's electrical grid following the devastating Hurricane Maria. The company's CEO even admitted to discussing the details and logistics of the contract with then-Secretary Zinke. The firm, which had never handled a project even close to the scale of rebuilding the island's electric grid, was not up for the job and, years later, the island has still not come close to recovering from the catastrophe.

The lax enforcement of federal criminal conflicts of interest laws and regulations has contributed to the degeneration of the norms governing executive branch conflicts of interest. The primary criminal conflict of interest law, 18 U.S.C. § 208, prohibits employees from participating personally and substantially in any particular matter in which the employee knows they have a financial interest, if that particular matter directly and predictably affects the financial interest. In the Trump Administration, however, political appointees could violate this standard knowing that the Department of Justice was unlikely to pursue charges.

Nor was there a sincere effort to address potential conflicts as they arose. The Office of Government Ethics (OGE) has been hamstrung by lack of support from the President. Agency heads, including former Environmental Protection Agency Administrator Scott Pruitt and United States Postmaster General Louis DeJoy, failed to provide ethical leadership.

It is time to revamp and strengthen executive branch ethics rules by clarifying exactly what we expect from our public servants.

Solutions

- **Require all agency heads to entirely divest all non-diversified assets that are reasonably related to the duties of the agency they have been appointed to run.** Publicly traded index funds, treasury bonds, or other similar assets do not pose the same risks as investments that could stand to benefit more directly from action taken by government officials. Requiring people who have been chosen to run an entire executive branch agency to divest any non-diversified asset that is reasonably related to the mission of the agency they have been appointed to lead will reduce the need for outright recusals and bolster public confidence that decisions are not being influenced by the impact a course of action might have on an official's investments. Implementing a divestiture requirement at the top of the agency will have the added benefit of encouraging a culture within the agency of service to the people rather than service to individuals.

- **Expand and clarify the definition of assets that give rise to conflicts of interest for all presidentially-appointed executive employees.** The Trump Administration has made legal arguments that strain credulity and allow agency executives to hold assets that a reasonable person would assume conflict with their job. This is why Congress should expand the definition of conflicting assets: instead of allowing Senate-confirmed appointees to hold assets that, in the past, would require recusal from particular matters, Congress should mandate that all Senate-confirmed executive branch personnel divest entirely from all assets that could reasonably be impacted by any action taken by the agency the appointee plans to join.

- **Create a safe-harbor from criminal conflicts of interest prosecutions for people who follow ethics advice to divest assets.** Congress should amend 18 U.S.C. § 208 to explicitly state that a government employee cannot be prosecuted under 18 U.S.C. § 208 if they divest their assets or convert them into widely held publicly traded mutual funds or cash equivalents, either before they become government employees or should they discover unknown holdings flagged by the OGE as potentially conflicting.

- **Expand the recusal requirements to explicitly state that employees cannot participate in matters that might reasonably impact their family, a past employer, or any employer with whom they have any type of agreement for future employment.** Congress should create a specific standard, beyond the OGE's current regulations, requiring that:

    > Employees recuse from any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter where the employee or the employee's family have any type of financial relationship with any of the parties potentially impacted by the employee's participation; and
    >
    > The employee recuse from any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter involving a specific party that the employee reasonably believes, or reasonably should believe, plans to offer the employee a new job opportunity, or, in the case of a previous employer, a return bonus, should the employee choose to leave public service.

Resources

Rep. Sarbanes' For the People Act of 2019, H.R. 1, § 8001 et seq. (116th Congress, 2019).

Trump-Proofing the Presidency: A Plan for Executive Branch Ethics Reform, *Public Citizen and CREW*, October 2, 2018.

Testimony of Walter M. Shaub, Jr., *House Committee on Oversight and Reform*, February 6, 2019.

Testimony of Virginia Canter, *Office of Government Ethics*, May 22, 2019.

Ethics Primer: For Members of Advisory Committees and Boards of the U.S. Department of Education, January, 2006.

Judith A. Ringle, Investigation into Potential Violation of 18 U.S.C. § 208 – Acts Affecting a Personal Financial Interest, *U.S. Commodity Futures Trading Commission: Office of the Inspector General*, March 30, 2017.

Preet Bharara, et al., Proposals for Reform, *Brennan Center For Justice at New York University School of Law: National Task Force on Rule of Law & Democracy*, October 2, 2018.

Cynthia Brown, Executive Branch Ethics and Financial Conflicts of Interest: Disqualification, *Congressional Research Service*, January 31, 2019.

Issue 4: Abuse of public office for political gain

The Hatch Act provides that, among other limitations, a federal employee "may not use his official authority or influence for the purpose of interfering with or affecting the result of an election." Activity is prohibited if it is "directed at the success or failure of a political party, partisan political group, or candidate for partisan political office." White House aides, including Kellyanne Conway, Dan Scavino, and Jared Kushner, as well as senior officials including Secretary of Agriculture Sonny Perdue, and former officials including former Ambassador to the United Nations Nikki Haley and former Interior Secretary Ryan Zinke, have all engaged in conduct that violates the Hatch Act.

If the Office of Special Counsel (OSC) finds that a federal employee has violated the Hatch Act, the agency can initiate a disciplinary action via the Merit Systems Protection Board (MSPB), a separate body that enforces civil service protections while protecting employees' due process rights. However, if the employee is "in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate," the OSC's finding that the employee broke the law "shall be presented to the President for appropriate action in lieu of" proceeding to the MSPB. The OSC and the Department of Justice have construed this exemption to apply to non-Senate-confirmed presidential appointees in the White House, contrary to the statute's plain text.

There are therefore two different tracks for executive branch employees: lower level appointees face standards adjudicated by the independent MSPB while higher level employees appointed by the president can escape consequence if the president so chooses. That result runs counter to the law, which only stipulates that Senate-confirmed officials are beyond the jurisdiction of the MSPB.

So, for example, when the OSC found that Conway willfully and repeatedly violated the Hatch Act on television and on social media and accordingly deserved to be fired, OSC referred the violations to President Donald Trump despite the fact that the law's text requires these employees to be referred to the MSPB. For senior officials such as these, it comes as no surprise that a president would be less inclined to take disciplinary action—as was the case following the Conway referral.

The Hatch Act itself is also unclear about executive employees becoming candidates for partisan political office. While the statute explicitly defines who is an employee and which elections are covered, it does not explicitly address when a candidacy begins. The OSC has interpreted the law to mean that an employee is not a candidate for partisan political office until he or she "officially announces" the candidacy. This loophole allows abuse of taxpayer funds to go unchecked. For example, Secretary of State Mike Pompeo had been using government resources to "quietly" visit conservative donors and political figures on State Department trips as part of an effort to "nurture[] plans for a presidential bid in 2024 and as he considered a run for the Senate from Kansas." Pompeo subsequently released a letter he received from the OSC stating that this taxpayer-funded travel did not violate the Hatch Act because the OSC "cannot conclude that you are currently a candidate in the 2020 Senate election in Kansas."

Solutions

- **The Hatch Act should be amended to clarify that a person becomes a candidate for partisan political office when they publicly hold themselves out as exploring a run for office.** This would include, but is not limited to, incidents where the person clearly states that they are considering a run for a specific office, or when they clearly do not deny that they are considering a run for a specific office, or when they use federal funds or official travel to meet with prospective political donors and allies.

- **The Office of Special Counsel should be empowered to recommend specific disciplinary action for Senate-confirmed appointees that will take effect unless the president intervenes.** Although ultimate responsibility for determining the appropriate response should still rest with the president in these cases, it is appropriate for the OSC to recommend disciplinary action to enhance the fair and uniform application of the law to all federal employees. The president should be required to send the OSC a written explanation of the decision to accept or decline the OSC's recommendation, and the OSC should be required to make that explanation available to the public along with the OSC's initial report presenting its finding of a violation.

- **The Office of Special Counsel should have an affirmative mandate to investigate rather than waiting for a complaint.** While the OSC currently has the authority to initiate an investigation without a complaint, the current special counsel has interpreted the statute to require a complaint to trigger one. Congress should clarify that this interpretation is incorrect.

- **Congress should clarify that Hatch Act violators who are White House staff but not Senate confirmed appointees must be referred for discipline to the Merit Systems Protection Board by the Office of Special Counsel.** Congress can do so by amending the Hatch Act to clarify that this category of employees is subject to the jurisdiction of the MSPB.

- **Congress should increase the monetary penalties for Hatch Act violations for presidential appointees from $5,000 to $50,000 per violation.** The current monetary penalties are simply too minor to effectively deter senior officials from violating the Hatch Act with impunity.

- **Congress should include a rider in federal appropriations bills indicating that appropriated funds can't be used to pay the salary of any political appointee who has multiple Hatch Act violations.** In addition to increasing the Hatch Act's monetary penalties, preventing officials who repeatedly violate the law from receiving a government salary would serve as a strong disincentive for officials to repeatedly disregard the law.

Resources

Rep. Speier's RIGHT Act, H.R. 1028 (116th Congress, 2019).

Sen. Blumenthal and Rep. Speier's Presidential Appointee Accountability Act of 2019, S. 1990 (116th Congress, 2019).

Rep. Quigley's RNC Act, H.R. 8111 (116th Congress, 2020).

Rep. Schiff's Protecting Our Democracy Act, H.R. 8363, § 1001 et seq. (116th Congress, 2020).

Donald Sherman, Good Governance Paper No. 1: The Hatch Act Ban on Political Use of Government Resources, *Just Security*, October 14, 2020.

Issue 5: Feeble civil service protections

The nonpartisan civil service is the backbone of the executive branch. The federal government relies on competent, nonpartisan public officials to process tax returns, protect consumers from defective products, protect and maintain our natural resources and parks, and more. Under the Trump Administration, these protections have been placed in jeopardy.

Historically, civil servants were hired in order to support the political parties. This "spoils system" was eventually understood to be inefficient, as jobs were not filled according to merit and ability, but rather political affiliation. The Civil Service Reform Act of 1978 (CSRA), which created the Office of Personnel Management, the Merit Systems Protection Board (MSPB), and the Federal Labor Relations Authority was designed to protect career civil servants, and the people they serve, from political influence. Though the congressional findings articulated in the CSRA talk of protecting career employees, the purpose of these underlying safeguards has always been to protect the American people against partisan abuses of governmental power. This means that civil servants should never be unduly influenced by changing administrations as they carry out their necessary nonpartisan functions. Instead, they should feel secure in their positions, and should be comfortable coming forward with issues as they arise.

Under the Trump Administration, protections for members of civil service have eroded. To start, the MSPB, the agency where civil servants can appeal when they are fired or disciplined unfairly, has lacked a quorum since 2017. While President Donald Trump has nominated people for the positions that need to be filled, they have not yet been approved by the Senate. The lack of a quorum on the MSPB means that, among other things, whistleblowers seeking protection are in bureaucratic limbo.

Additionally, President Trump recently issued a sweeping executive order further slashing protections for career civil service employees. Arguing that the government's "current performance management is inadequate," President Trump unilaterally stripped long-held civil service protections from employees whose work involves policymaking, allowing them to be dismissed with essentially no cause and less recourse. President Trump's plan to treat career civil servants, who have dedicated their lives to government service above party loyalty and personal preferences, like political appointees, who are both expected to serve in the national interests and are specifically charged with serving a specific president, is an attempt to remake the government workforce to conform to his ideals of loyalty to a specific president over loyalty to the country generally.

President Trump has attacked the practice of whistleblowing, and even implied that whistleblowers who come forward should be treated the same as spies. He has made many attempts to identify whistleblowers, defying protections in the Intelligence Community Whistleblower Protection Act. Furthermore, President Trump has fired those who testified against him in impeachment trials, seemingly as "retribution." The Trump Administration has also admitted to long-standing attempts to fire those viewed as disloyal to the president.

Current law does not provide adequate protection for whistleblowers. Currently, a government employee who files a whistleblower complaint must take the complaint through the arduous process of the MSPB in order to protect themselves from retaliation. The MSPB will then primarily adjudicate the whistleblower's complaint, and make a determination about whether retaliation has actually occurred. The problem, of course, is that in many cases, especially when the MSPB lacks a quorum and cannot rule, the MSPB determination occurs after the alleged retaliation—and while the MSPB can, and has, resolved disputes on the side of the whistleblower, the process can leave the whistleblower in the dark for months about whether they will be eligible for back pay or getting their job back. This has only gotten worse in recent years, as the MSPB currently lacks a quorum, thus leaving cases in a massive queue to be resolved at some future date. This process, on top of the Trump Administration's continued attack on federal whistleblowers, weighs heavily against employees' brave decision to come forward should they see signs of mismanagement or misconduct.

Additionally, as the federal government has increasingly relied on contractors, whistleblower protections for federal contractors have become even more critical. Federal contractors have been at the center of numerous scandals during the Trump Administration, including, for example, the atrocities that have been alleged at numerous Immigration and Customs Enforcement detention centers. To date, only a few whistleblowers have emerged from these private prison contractors to sound the alarm over the contractors' treatment of detainees; but when they have, their allegations have been stunning and critical in ensuring accountability. If the government plans to expand its contractor workforce, or to even leave it as is, then Congress must expand whistleblower protections to all federal contractors, and ensure that these brave employees are protected from retaliation regardless of the political impact of the information they reveal to the public.

The Trump Administration's aggressive position against whistleblowing and the President's various attempts to weaken protections for nonpartisan civil servants risk dissuading career civil servants from reporting instances of waste, fraud, or abuse in government, and, more generally, risk undermining the nonpartisan nature of the civil service entirely. Whistleblowing ensures against the abuse of power and is extremely important to maintaining accountability within our democracy. And the nonpartisan, merit-based civil service is the backbone of our democratic order. Without increased protections for our civil servants, the difficulty of securing fair treatment for government workers will continue.

Solutions

- **Congress should strengthen employee protections in the absence of a quorum of the Merit Systems Protection Board.** Congress should provide that initial decisions by administrative judges be deemed final and thus appealable to the Federal Circuit Court of Appeals in the absence of a quorum on the MSPB. Such a system would encourage the executive branch and the Senate to ensure that the MSPB is filled.

- **President-elect Joe Biden should reverse President Donald Trump's executive order politicizing the hiring and firing of policy-making members of the civil service.** Returning civil service protections to these federal employees preserves a role for nonpartisan policymakers in the executive branch.

- **Congress should make certain Office of Special Counsel determinations final when the Merit Systems Protection Board lacks any members.** The simple fact that a president has chosen not to appoint members to the MSPB should not prevent whistleblowers from obtaining a stay of any retaliatory personnel action. While some whistleblowers choose to bring their requests for stays of retaliatory actions directly to the MSPB administrative judges, others choose to ask the Office of Special Counsel (OSC)—the agency which advocates for whistleblowers—to obtain a stay on their behalf. However, the OSC can only obtain a stay of a retaliatory action by appealing to a member of the MSPB. Without any MSPB members, the OSC can't obtain this relief. Congress should amend 5 U.S. Code § 1214(b)(1)(A) to provide that, when the Merit Systems Protection Board has no members, any determination by the Office of Special Counsel that a stay of any personnel action is merited because there are reasonable grounds to believe that retaliation has occurred or is occurring shall have the same effect as if a member of the Merit Systems Protection Board had so determined.

- **Congress should allow all federal employee whistleblowers to sue for retaliation if the Merit Systems Protection board fails to adjudicate their complaint within 210 days.** Congress should give federal employee whistleblowers the same rights as federal contractor whistleblower have in 41 U.S.C. § 4712. Whistleblowers who have experienced retaliation should be entitled to skip the MSPB administrative process and sue if the MSPB has not issued a ruling on their petition within seven months. Without this protection, whistleblowers will continue to be forced to put their lives on hold and await the relief they are owed without knowing when the process might end.

- **Congress should expand the protections for federal contractor whistleblowers to allow the contractor whistleblower to initiate an inspector general reprisal complaint before the retaliation has gone into effect.** Currently, federal contractors are allowed to bring retaliation complaints to the agency inspector general with jurisdiction over the contract only after the retaliation has occurred. But, in many cases, the whistleblower will know of the retaliation before the retaliatory action has been made final—for example, a federal contractor whistleblower may be given notice, either of dismissal or of a demotion. Congress should allow federal contractor whistleblowers to bring a preemptive complaint to the relevant Office of Inspector General, and Congress should grant the Office of Inspector General the power to issue a preliminary report to the agency head. Congress should then give the agency head the power to order a stay of any planned personnel action based on the preliminary report during the pendency of the inspector general's investigation.

Resources

Rep. Schiff's Protecting Our Democracy Act, H.R. 8363, § 801 et seq. (116th Congress, 2020)

Rep. Maloney's Whistleblower Protection Improvement Act of 2020, H.R. 7935 (116th Congress, 2020).

Rep. Connolly's Interim Stay Authority to Protect Whistleblowers Act, H.R. 2530 (116th Congress, 2020).

Testimony of Noah Bookbinder, *House Committee on Oversight and Reform: Subcommittee on Government Operations*, May, 2019.

Liz Hempowicz, The State of Whistleblower Protections and Ideas for Reform, *Project on Government Oversight*, January 28, 2020.

Issue 6: Vulnerable inspectors general

Congress created agency inspectors general in the wake of the Watergate scandal to restore public trust in executive branch agencies. Inspectors general are tasked with rooting out waste, fraud and abuse in their agency, and Congress specified that they must be chosen "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." Inspectors general are empowered to conduct intensive investigations, meet and interview agency employees, publicize their findings, recommend disciplinary action, and develop recommendations for corrective actions.

Unsurprisingly, these positions were not quickly accepted by presidents who did not want to be constrained by probing investigators, and even established inspectors general were removed possibly for political reasons. To protect inspectors general from being fired when their investigations embarrass or otherwise cause political trouble for the administration, Congress passed a suite of reforms in 2008, including a process that requires the president to notify Congress 30 days before an inspector general can be fired; in theory, this gives Congress the chance to intervene in an improper firing. However, recent experience shows that these reforms did not go far enough.

In the summer of 2019, President Donald Trump sought to pressure Ukraine into announcing the launch of a criminal investigation of President-elect Joe Biden, then a rival candidate for president. The effort was exposed by a whistleblower; however, before the whistleblower's allegations became public, the whistleblower raised concerns about the conduct with Michael Atkinson, then-Inspector General of the Intelligence Community. Ultimately, Atkinson notified Congress about the complaint, and after further investigation by the House, President Trump was impeached for this conduct.

President Trump later notified Congress of his intent to fire Atkinson, saying that Trump "no longer" had "the fullest confidence" in Atkinson. This notification reportedly followed several months of internal White House discussions in which President Trump expressed the desire to fire Atkinson because he viewed him as "disloyal."

A few days after this announcement, a bipartisan group of senators objected to Atkinson's removal, expressing the view that "an expression of lost confidence, without further explanation, is not sufficient." Ultimately, Senator Chuck Grassley withdrew his objection to the firing after the White House counsel objected, though he noted that "Congress must clarify the statute to ensure inspectors general are able to continue operating without undue interference."

The firing of Inspector General Atkinson is only one example of the actions President Trump has taken to undermine inspectors general throughout this Administration. For example, President Trump fired State Department Inspector General Steve Linick while Linick was reportedly investigating Secretary of State Mike Pompeo for various potential instances of misconduct. He also fired acting Transportation Inspector General Mitchell Behm while Behm was reportedly investigating Transportation Secretary Elaine Chao for allegedly steering a large grant to her husband Senator Mitch McConnell's home state of Kentucky. It is time for major reform and a renewed commitment to a powerful, independent, and nonpartisan inspector general community.

Solutions

- **Congress should make inspectors general removable only "for cause."** Inspectors general should be protected from politically motivated firings. Preventing the president from purging inspectors general for political reasons would ensure that these officials do not suffer retribution or—more importantly—avoid taking actions that could anger or frustrate the president.

- **Congress should create a mechanism by which, should a president remove an Inspector General, a list of ongoing investigations is disclosed to the Council of Inspectors General for Integrity and Efficiency, which would then determine which investigations must be disclosed to Congress to ensure proper oversight.** Following such a disclosure, should a relevant congressional oversight committee request, the Office of Inspector General should furnish the committee with the underlying documents of any of the ongoing investigations disclosed by the Council of Inspectors General for Integrity and Efficiency (CIGIE).

- **Congress should require that the White House notify Congress of any planned dismissal of an inspector general as well as the specific legal grounds for the dismissal.** Additionally, Congress should require that any disciplinary action against an inspector general trigger an automatic review by the CIGIE's integrity committee to verify allegations of wrongdoing. Finally, Congress should require the CIGIE to publicly report its findings before the 30-day window between notice and removal lapses.

- **Improve channels for inspectors general to report serious misconduct to Congress and the American people.** Congress and the public should have access to inspector general reports and investigations as quickly as possible, including periodic quarterly reports from the inspectors general to Congress. President-elect Biden should reverse the Trump Administration's position that inspectors general must submit "particularly serious or flagrant problems, abuses, or deficiencies" to the agency head prior to transmitting them to Congress.

- **Congress should require the Council of the Inspectors General on Integrity and Efficiency to play a larger role in the selection of inspectors general**. This should include:

    Congress should require the CIGIE to make the names of all individuals they recommend as inspectors generals under the Inspector General Reform Act of 2008 publicly available;

    Congress should also require that the CIGIE provide information about their recommendation process and their assessment of the candidates to the Senate committee of relevant jurisdiction;

    Congress should require that the CIGIE make a public statement of support, deference, or disapproval regarding all inspector general nominees. This would allow the public to have a non-partisan assessment of the candidate's credentials and independence prior to Senate confirmation; and

Congress should require that all inspectors generals appointed by agency heads be appointed for a term of years only after the agency head consults meaningfully with the CIGIE.

Resources

Rep. Maloney's Inspector General Independence Act, H.R. 6984 (116th Congress, 2020).

Sen. Grassley's Securing Inspector General Independence Act of 2020, S. 3994 (116th Congress, 2020).

Donald Sherman, Congress Should Take Steps to Protect the Independence of Inspectors General, *Just Security*, April 17, 2020.

Statutory Inspectors General in the Federal Government: A Primer, *Congressional Research Service,* January 3, 2019.

Charles A. Johnson and Kathryn E. Newcomer, U.S. Inspectors General: Truth Tellers in Turbulent Times, *The Brookings Institution*, December 3, 2019.

Charlotte Butash, How to Legally—and Illegally—Fire Inspectors General, *Lawfare*, April 22, 2020.

Former Inspectors General Call on Congress to Pass Overdue Reforms to IG System, *Project on Government Oversight*, May 5, 2020.

Danielle Brian and Liz Hempowicz, Good Governance Paper No. 11: Strengthening Inspectors General, *Just Security*, October 27, 2020.

Issue 7: Unethical temporary appointments

Presidential administrations often want, and benefit from, the expertise of people who are not government employees including academics or businesspeople. While there are good reasons to permit the temporary government employment of these "special government employees" (SGEs), such as the unique expertise that they can offer, their appointment raises ethics and transparency concerns.

Federal laws and regulations allow the executive branch to hire experts on a temporary basis to consult on limited policy questions. Under 18 U.S.C § 202, SGEs are defined as employees hired "to perform, with or without compensation… temporary duties either on a full-time or intermittent basis." Unlike full federal employees SGEs are not necessarily expected to give up other jobs, since their duties are temporary.

Critically, SGEs who are paid below the rate paid to a GS-15 employee, or expected to serve for less than 60 days, do not have to submit a public financial disclosure report. As we have seen time and again during the Trump Administration, SGEs forego compensation (or are compensated a miniscule amount) for their work in government, and thus are granted the option to only file financial disclosure reports on a confidential basis. This basic mechanism allows for SGEs with extremely lucrative financial profiles to gain access to the levers of power in government without publicly disclosing the potentially myriad conflicts lurking within their finances.

Federal law requires SGEs to file these confidential disclosures if they, the unpaid or underpaid SGE, personally believe that their decision-making could have an economic effect on a non-federal entity—or in a few other limited circumstances. While the general edicts of the criminal conflicts of interest law, 18 U.S.C § 208, nominally apply to SGEs, because of the reduced and opaque disclosure requirements, non-governmental watchdogs and other members of the public have found it nearly impossible to ensure that SGEs are abiding by the standards of conduct. Specifically, for example, because the standards of conduct address matters that do not affect an SGE's financial interest but which could reflect on the SGE's impartiality, it is critical that the public—and not just the Office of Government Ethics or the agency ethics official—have a sense of the SGE's past, current, and future entanglements. While it is generally accepted policy that SGEs have less stringent ethical requirements than normal government employees, that policy should not outweigh the overarching goal of the federal ethics program: to ensure that the public has faith that their institutions are working on their behalf.

One example of the risk of outside advisors is billionaire investor Carl Icahn's tenure as "special adviser to the president on overhauling federal regulations." The Trump Administration claimed that Icahn "would be an adviser with a formal title" but that he would "be advising the President in his individual capacity," meaning Icahn would not be subject to SGE ethics requirements. Icahn's conduct in this role vividly demonstrated the reason such arrangements are improper and unwise. In his role as advisor to President Donald Trump, Icahn reportedly advocated for rollback of a particular environmental regulation that he felt put an unfair burden on an oil refining company in which he held a major investment, reportedly drawing a subpoena from federal prosecutors in New York. Icahn stepped down from his role as Trump's adviser in August 2017.

President Trump also infamously allowed a cadre of members of his Mar-a-Lago private club to wield direct influence over employees of the Department of Veterans Affairs (VA). Ike Perlmutter, chairman of Marvel Entertainment, Bruce Moskowitz, a Florida doctor, and attorney Marc Sherman reportedly "leaned on VA officials and steered policies affecting millions of Americans," and "spoke with VA officials daily … reviewing all manner of policy and personnel decisions." As of this writing, there has been no indication that any of the three chose to register as SGEs, according to documents obtained by various media organizations. Even if they had, the SGE rules would likely not have required them to take any steps to address potential conflicts of interest.

The public has been routinely left in the dark by moves like this, and the public remains in the dark because the SGE disclosure rules allow these actors to keep their actions and interests opaque. In addition to questions about the general propriety of their influence over agency officials and policies, questions of self-dealing arose with respect to initiatives reportedly pushed by Perlmutter and Moskowitz, resulting in Marvel characters joining the VA secretary in ringing the closing bell on the New York Stock Exchange and Moskowitz's son being suggested to advise the VA an effort to develop an app for veterans to find care nearby.

Absent the basic disclosure and regulation that the SGE rules create, the government will be deprived of expertise that it needs to best serve the public, and the public will be forced to wonder whether every outside advisor is simply out to take advantage of their access.

Solutions

- **Close loopholes in the definition of special government employee by amending it to include a more extensive list of individuals.** This includes anyone:

    Who has received a formal government title in recognition of their advisory services or designation of responsibility over a subject area;

    Who is provided with official government resources to conduct such activities, including a phone, email account, computer equipment, or office space (including home office equipment); or

    Who serves as a conduit for official directives or communications.

- **Subject special government employees to similar disclosure and ethical standards as regular government employees.** Congress should require all SGEs, regardless of their pay grade or planned tenure, to file financial disclosure reports, and require the reports be certified by the relevant agency ethics official.

- **Require special government employees to consult with agency ethics officials about how to comply with the law.** Congress should require the ethics official to present the SGE with a list of potentially conflicting assets, and explain to the special government employee in writing the best way to avoid running afoul of the criminal conflicts laws.

- **Enhance disclosure of the scope of a special government employee's legal obligations.** Congress should require all SGE waivers to be disclosed so that the public can understand the full scope of any individual special government employees' responsibilities.

Resources

Sen. Warren and Rep. Jayapal's Anti-Corruption and Public Integrity Act, S. 3357, § 106 (115th Congress, 2018)

Trump-Proofing the Presidency: A Plan for Executive Branch Ethics Reform, *Public Citizen and CREW*, October 2, 2018.

Yvonne D. Jones, Federal Workforce: Opportunities Exist to Improve Data on Selected Groups of Special Government Employees, *United States Government Accountability Office*, July, 2016.

Isaac Arnsdorf, The Shadow Rulers of the VA, *ProPublica*, August 7, 2018.

Issue 8: Transition teams lack transparency and accountability

Presidential transition teams, which begin the work of building a new administration even before election day, are critical to the peaceful transition of power. They are also potential opportunities to influence a new administration; while there is a historical norm of transition teams adopting and abiding by ethics rules to mitigate these risks, such norms are not uniformly followed.

Transition teams can be a vector for improper influence because they have historically been paid for at least in part by donations. This fundraising led to a predictable result: interested parties gained improper access to administrations. Congress has stepped in to provide some taxpayer funding, but it has not provided enough funding to make outside fundraising unnecessary (nor has it prohibited such fundraising).

Transparency is also important to an ethical transition. In 2008, then-President-elect Barack Obama's transition team attempted to maintain transparency by launching the website "Your Seat at the Table," which recorded every meeting of three or more non-transition team members, copies of non-classified materials received, and space for public comment. By contrast, then-President-elect Donald Trump's 2016 transition included requirements for individuals who joined the Trump transition team to sign non-disclosure agreements that barred them from disclosing their work. A nonprofit assisting the Trump transition gave $150,000 to a dark money group that supported Trump appointees, and the dark money group sponsored a reception for them at the Trump International Hotel, Washington, DC.

Addressing the role of lobbyists on transition teams has also been an issue. Initially, then-President-elect Trump brought on several lobbyists aboard his transition team. In response to some criticism, the Trump transition team issued ethics pledges creating the appearance of purging lobbyists; as a result, at least five lobbyist transition team members de-registered as lobbyists to continue in their roles, only to re-register following Trump's inauguration. This brought to light the flawed transition team accountability framework.

In 2020, Congress took a step toward improving the situation, requiring an ethics plan as part of the creation of a transition team. It mandates the plan address lobbyists, foreign agents, financial conflicts, the candidate's plan for his or her own financial conflicts, and a transition Code of Ethical Conduct with some minimum requirements. However, Congress has not fully funded presidential transitions, nor has it prohibited outside fundraising, which together would be the next step toward ethical transitions.

Solutions

- **Congress should fully fund transition teams with taxpayer dollars and prohibit them from fundraising.** A transition serves an important public purpose: ensuring that the incoming administration is prepared to be up and running the moment the president-elect is inaugurated. Congress should appropriate sufficient funds for transition teams to do their work so that they do not need to seek or rely on outside funding.

- **Congress should require that transition expenditures be disclosed.** As with any expenditure of taxpayer funds, transition team spending should be disclosed in a timely manner and in sufficient detail to ensure taxpayer funds are being used responsibly. The funds should not be used to improperly enrich members of the transition team, their family members, or associates.

- **Congress should require transition teams to publicly disclose all staff.** Transition team members are needed for their expertise, but it is critical the public knows who they are and what their role is in the transition in order to protect against potential conflicts of interest.

Resources

Shalini Hicklin-Coorey, The costs of presidential transition, *Partnership for Public Service Center for Presidential Transition*, August 3, 2016.

Trump-Proofing the Presidency: A Plan for Executive Branch Ethics Reform, *Public Citizen and CREW*, October 2, 2018.

Taylor Lincoln, Six Steps to a Healthy Transition: Candidates' Pledges on Ethics and Transparency Will Set the Course of the White House for the Next Four Years, *Public Citizen*, April 8, 2020.