

SECTION 6 *of* WHAT DEMOCRACY LOOKS LIKE

Reforming Congressional Ethics

The Constitution gives each chamber of Congress the power to self-regulate, but both the House and Senate have largely failed to establish meaningful ethics regimes. Congress has failed to create or enforce rules that ensure that members of Congress and their staff are serving the public interest rather than their own personal or financial interests. Congress's ethics rules are insufficient, outdated, riddled with loopholes and inconsistencies that permit outlandishly unacceptable conduct, and unenforceable.

Existing ethics rules allow members of Congress, high-level aides, and the immediate families of both to hold personal stakes in businesses that members regulate, and whose profits and losses are directly impacted by congressional decisions. The rules also do not insulate members from pressure to improperly use their position on behalf of relatives, friends, and powerful financial interests and constituents within their district. Elected representatives can place their own financial or personal interests over the interests of their constituents. While executive branch agencies have had some success in prosecuting ethics violations that violate criminal standards of conduct, that type of scrutiny is insufficient. The failure to establish and enforce stronger ethics rules undermines public trust in Congress and, by extension, our representative democracy.

Additionally, the ethics committees tasked with enforcing these rules lack the necessary investigative tools, and transparency measures, such as financial disclosures, to fill these gaps. This structure has allowed nepotism and mismanagement to flourish and has granted outsized power to lobbyists and powerful corporate and financial interests. And while Congress has subjected the executive branch to appropriately powerful sunshine laws, it has largely exempted itself, a practice that makes it almost impossible for outside organizations to properly regulate the legislature.

The degradation of congressional ethics is compounded by the critical underfunding of Congress, addressed in Section 2 of this report. Congress must increase its funding so members can meet their ever-growing workload by hiring more staff and paying them a living wage.

By addressing these shortcomings, Congress might improve [low public trust](#) in the institution. Self-regulation is never easy, but if we are to usher in a new era of ethical government, Congress would be wise to clean its own house too.

Issue 1: Inadequate protections against financial conflicts of interest

All public service is embedded within a basic premise of public trust: that those who serve act in the interest of their constituents and the country, not their own financial interests. Members of Congress and high-level aides (and their immediate families) are permitted to hold [financial interests](#) in businesses whose profits and losses are [directly impacted](#) by the decisions that these members are required to make as part of their service to the country. In fact, [studies show](#) that members of Congress tend to outperform the market in a statistically significant manner—an outcome that, at the very least, provokes questions about how members trade. The public’s concern about how members of Congress might have their decision-making impacted by the stocks they own is not merely theoretical. One [study](#) found that, when controlled for extraneous factors, members of Congress who were investors in financial institutions during the 2007-2008 financial crisis were more likely to vote in favor of the Emergency Economic Stabilization Act than congressional counterparts who did not hold assets in financial institutions.

In addition to members’ passive interests in businesses, elected officials [also](#) have active investment accounts, where they, their spouse, their investment adviser or broker make trades in the stock market. Officials who personally engage in trading activity (rather than delegating all trading to a mutual fund or a trustee), pose a difficult conflict concern, as they are especially likely to be tempted (or even to appear to be tempted) to make trades on nonpublic information. Even ultimately innocuous trading can ([and has](#)) posed an immediate threat to the public’s perception of the integrity of the institution. In fact, this problem has been magnified during the coronavirus pandemic, as [numerous lawmakers](#) were involved in ethically dubious and reputationally damaging trading activities in the weeks before the virus caused a major market crash.

This conflict strikes at the very heart of our democratic system of government: it forces our representatives into a position where they must choose between their own interests and the interests of the people they represent.

In order to address this problem, the House adopted a [rule](#) prohibiting members from voting in some extremely specific scenarios where they have a direct conflict. However, as the [House Ethics Manual](#) points out, prohibitions on voting can “result in the disenfranchisement of a Member’s entire constituency on particular issues.” This may be why the Senate has not adopted a corresponding rule, instead [reasoning](#) that, “public financial disclosure provides the

mechanism for monitoring and deterring conflicts.” Unlike in most executive branch positions, recusal is not a viable or democratic option for members of Congress, because it denies their constituents a voice. Thus, Congress must, as an overall body, eliminate conflicting financial interests.

Solutions

- **Prohibit members and senior aides from owning individual interests in companies, and instead require them to hold only publicly traded index or**

diversified mutual funds, U.S. treasury bonds, or other similar assets. Newly-elected members and new high-level staff should convert their assets into non-conflicting public assets. By converting their individual stock holdings into a fully diversified, publicly traded investment portfolio, members can continue to earn investment income without holding specific investments that are likely to be impacted by a member's vote or other action.

- **Congress should require that members divest interests in closely held businesses (including family businesses).** Closely held businesses expose members to a myriad of potential conflicts of interest arising not simply from a stock price but from the members' relationships to these businesses' non-governmental dealings, including their major creditors, investors, and customers. These conflicts of interest may go unnoticed if they are permitted because private businesses have no obligation to disclose the identities of their creditors, investors and customers, unlike their publicly-traded counterparts.
- **Prohibit all individual stock trading by members of Congress.** Unfortunately, the reputational risk to the institution is too high to allow individual elected representatives (or their spouses) to participate actively in the stock market. Instead, members with large portfolios should place those investment accounts into a blind trust to be managed by an outside investment firm.

Resources:

Representative Craig's [Halt Unchecked Member Benefits with Lobbying Elimination Act](#), H.R. 3419 (116th Congress, 2019).

Representative Gabbard's [IPO Act](#), H.R. 6461 (116th Congress, 2020).

Senator Merkley and Representative Krishnamoorthi's [Ban Conflicted Trading Act](#), S. 1393 (116th Congress, 2020).

[Testimony](#) of Donald K. Sherman, *House Committee on Ethics*, July 26, 2019.

[Supplemental Testimony](#) of Donald K. Sherman, *House Committee on Ethics*, August 13, 2019.

Michael Sozan and William Roberts, [10 Far-Reaching Congressional Ethics Reforms to Strengthen U.S. Democracy](#), *Center for American Progress*, April 25, 2019.

Issue 2: Failure to address personal and professional conflicts of interest

Financial conflicts of interest are not the only potential conflicts that can motivate a member of Congress to not act in the interest of the public. As CREW [explained](#) to the House Ethics Committee in 2019, while the executive branch agencies have addressed these risks in ways specific to the roles of the officials in question, Congress has not. [Personal](#) conflicts—such as members or staff serving on corporate boards (which the House [prohibits](#), but the Senate allows in [certain circumstances](#)), giving special treatment to individuals that have some relation to the member, privileging meetings with former staff or colleagues who have become lobbyists, or members participating in public [fundraising](#) activities—have the potential to cut constituents out of the democratic process by unjustly privileging some voices over others.

The executive branch ethics program addresses these issues via a specialized series of [regulations](#) on employee conduct, including a prohibition on participation in particular matters [where](#): “he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.” The judicial branch has also developed a code of ethics that prohibits judiciary employees from conflicts of interest. In the Judicial Conference’s commentary on this canon, it notes that judges’ “[a]dherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.”

Both the judiciary and the executive branch ethics programs rely, in part, on prohibiting employees from participating in certain activities. Prohibiting members of Congress from participating in the political process generally is not a democratic solution to this problem. As such, Congress should establish preventative rules that stop non-financial conflicts—and the appearance of these conflicts—from the outset.

Solutions

- **Congress should prohibit members, officers, and employees from holding any position with an outside entity that includes a fiduciary relationship.** Members and staff should be prohibited from taking any position where they have a legal obligation to act in the best interest of an outside entity. Any legal responsibility to act in the interest of a private organization is likely in conflict with an official’s preeminent duty to uphold the laws and constitution of the United States. An official who is legally required to act in the interest of a private entity cannot fulfill that duty.
- **Congress should strengthen protections against conflicts arising from members raising money for nonprofit organizations.** Congress should pass a law clarifying that members are prohibited from holding any paid or unpaid position with a nonprofit if the position requires more than a *de minimis* fundraising responsibility, unless the position falls into any one of a very clear and limited set of exceptions.
- **Congress should restrict members’ participation in organizations that lobby.**

Congress should establish clear rules prohibiting members from holding positions with for-profit or nonprofit organizations that engage in more than a *de minimis* amount of lobbying to avoid the appearance of a conflict of interest

- **Congress should establish a congressional workforce advisory board that would be empowered to promulgate broad guidelines regarding staff qualifications, and assist members in hiring a qualified, diverse, and regionally representative workforce.** The board should be empowered to establish [merit system](#) principles to help guide members in hiring personal office and committee staff, and to propose ways to increase the racial, regional, and economic diversity of the congressional workforce. Finally, the board should be empowered to audit and publicly report on the composition of the congressional workforce.
- **Congress should rewrite the part of the congressional ethics manual that pertains to gifts given to members and staff.** Currently, the gift rules are hard to apply and contain monetary thresholds that are not tied to inflation. Even though such standards may appear to be “strict,” it is more important that they be understandable and enforceable.

Resources

Donald K. Sherman, [Regulation on outside positions held by House Members, officers, and employees](#), *CREW*, July 11, 2019.

Donald K. Sherman, [Additional input on regulating outside positions held by House Members, officers, and employees](#), *CREW*, August 13, 2019.

Issue 3: Poor enforcement of congressional ethics rules

The [Constitution](#) provides that “[e]ach House may determine the [r]ules of its [p]roceedings, punish its Members for disorderly [b]ehaviour, and, with the [c]oncurrence of two thirds, expel a Member.” Both the House and the Senate have ethics committees composed of their own members that can hear and investigate complaints about their colleagues. On [rare occasions](#), these committees will recommend disciplinary action against a member, though in practice neither the House Ethics Committee nor the Senate Ethics Committee robustly enforces ethics rules.

A [study](#) of annual reports from the Senate Ethics Committee revealed that it investigated fewer than 15 percent of complaints between 2007 and 2017, and the sum total of the disciplinary actions it took was five letters of admonition. The ethics committees perform other important functions, including providing advice to members and staff seeking to avoid unethical behavior. Thus, the number of investigations does not reveal the full story of the committees’ work; but it does demonstrate that, in the current system, ethics investigations are not happening on a scale that suggests effective enforcement.

The House has taken one step toward addressing underenforcement by creating a separate body, the Office of Congressional Ethics (OCE), to receive and investigate complaints, and provide the House Ethics Committee with recommendations about potential ethics violations. OCE [reported](#) that between 2009, when it started receiving complaints, and the end of 2016, it received 18,156 “citizen communications.” The OCE chose to investigate only 172 of those communications, and referred 69 of those matters to the House Ethics Committee, demonstrating that the OCE plays a useful role in sifting through complaints and elevating those most worthy of investigation.

Solutions

- **The Senate should create an independent ethics office comparable to the Office of Congressional Ethics.** The OCE plays an important role in receiving citizen complaints about the behavior of their representatives—a practice that allows the public to feel respected and heard—and then sifts through these complaints, conducts investigations of matters it believes warrant further review, and then elevates only the most serious allegations to the House Ethics Committee for final review. The Senate would benefit from this type of intermediary agency to receive and process citizen complaints.
- **Give both independent ethics offices subpoena power and adequate resources to investigate ethics violations.** Congress should empower the OCE and an independent Senate ethics office to conduct depositions, compel member and witness participation, and grant the office other statutory tools to obtain documentary and physical evidence of ethical violations. Congress should also staff the independent ethics offices appropriately, with sufficient financially expert staff to accurately understand the information on financial disclosure forms and transaction reports.
- **Empower both the independent ethics offices to recommend punishment for offenses it deems sufficiently egregious.** While the committees should retain the

power to actually impose discipline on members, the OCE and its Senate counterpart should be able to issue recommendations for punishment in cases where it deems the conduct sufficiently egregious without the approval of the House or Senate ethics committees. Ethics committees may always be at least somewhat biased towards inaction because they are the internal policing mechanism for their chambers, and thus the subjects of their investigations are their colleagues and friends. Allowing the independent ethics offices to note specifically egregious ethical violations would free the committees to issue more powerful rebukes, and it would mitigate any potential bias towards inaction that is inherent in the structure of internal policing.

- **Each chamber should give its independent ethics office (assuming the Senate creates one) the authority to report ethics violations and propose changes to House and Senate ethics rules.** The two independent ethics offices should be empowered to recommend changes to congressional ethics rules, and the heads of the bodies should be required to make periodic reports to Congress on the number of ongoing and completed investigations and suggestions to improve or clarify ethics rules.
- **Congress should substantially increase the staff of the House and Senate ethics committees.** Both committees require a significant increase in professional staff with sufficient knowledge of a broad range of topics in order to review all member and staff financial disclosures and make ethical determinations about what must be disclosed, what must be divested, and whether members or staff are in compliance with the bodies' expanded ethics rules and regulations rules.

Resources

Representative O'Halleran's [CLEAN Act](#), H.R. 1388 (115th Congress, 2017).

Senator Warren and Representative Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357, § 551 et seq. (115th Congress, 2018).

[Enforcement of Congressional Rules of Conduct: A Historical Overview](#), *Congressional Research Service*, February 23, 2015.

Craig Holman and Victoria Hall-Palerm, [The Case for Independent Ethics Agencies: The Office of Congressional Ethics Six Years Later, and a History of Failed Senate Accountability](#), *Public Citizen*, October 2014.

[The Ethics Blind Spot: How the House and Senate Ethics Committees fail to uphold high ethical standards—and solutions to fix the problem](#), *Issue One*, February 2018.

Issue 4: Lack of transparency regarding potential conflicts

Because Congress has not adopted a comprehensive divestiture regime, public disclosure of member and staff finances has become critically important. Members of Congress should be prohibited from retaining financial interests in entities that they regulate—and thus, indirectly control—but given the failure thus far to do so, Congress must at minimum take bold steps to ensure that the public is aware of these potential conflicts. Absent a congressional divestment requirement, the public must be able to easily obtain and understand their members' and staff's finances to ensure representatives act in the public interest.

The theory of disclosure regimes revolves around the public's responsibility to hold their leaders accountable should they act in their own, rather than their constituents', interest. However, Congress has fallen far short of developing a regime that would allow this theory to function properly. The required financial disclosures are woefully [insufficient](#). For example, members are not required to undertake any pre-screening of their financial disclosures to ensure that they are both accurate when submitted and comprehensible to even the financially literate staff of the relevant ethics committee. Additionally, members are not required to file in a uniform manner that would allow for easy comparisons of member finances. And, importantly, members of the House are not even required to file electronic forms at all. Many members choose instead to fill out [hand-written](#) or intentionally hard to parse [low-resolution scanned files](#), many of which are completely illegible. To make matters worse, savvy financial actors can create webs of interrelated companies that can function to obscure the source of the income and assets disclosed.

The STOCK Act is an instructive example. Following a 2011 *60 Minutes* [special](#) revealing that congressional insiders were legally allowed to buy and sell stocks based on private knowledge obtained during the course of conducting investigations, Congress passed the [Stop Trading On Congressional Knowledge \(STOCK\) Act of 2012t](#). Among other things, the law contains a [requirement](#) that disclosures of financial transactions be published online in a format that would allow the public to easily access and analyze the information. However, a year later, Congress quietly [gutted](#) the transparency provisions.

Solutions

- **Congress should require members to file more detailed financial disclosure reports.** Members should be required to provide more information about their potential financial conflicts of interest to the House and Senate ethics committees. Member reports should be similar to those used by the Office of Government Ethics for executive branch officers.
- **Congress should establish a uniform, online reporting system for member financial disclosures.** Prohibit members from submitting scanned copies of financial disclosure forms, and require members to submit all disclosures for pre-clearance with the relevant ethics committee in order to ensure that the disclosures are comprehensible and comprehensive.
- **Congress should ensure the public can easily identify financial interests that**

might present conflicts for members and senior staff. Congress should require all members and senior staff to disclose any financial interests they hold in any company or industry that is related to or impacted by matters before any committee on which they serve or work.

- **Congress should require that, prior to any hearing featuring any person representing any corporation, entity, industry group, or other interested party, committee members and committee staff release a statement documenting any interest, financial or otherwise, that is reasonably related to the witnesses.** Congress should require that such statements are included in the hearing notes with the witness statements and truth in testimony forms.
- **Congress should specifically empower the Securities and Exchange Commission to conduct insider trading and other securities investigations of members and staff who are privy to material nonpublic information.** This would include creating a new sub-department at the Securities and Exchange Commission specifically tasked with the duty of overseeing the securities activities of congressional and other government officials.
- **Congress should empower the Internal Revenue Service to conduct yearly audits of member finances.** Yearly audits would be a strong disincentive against members trying to hide financial interests, while simultaneously giving the public confidence that members are playing by the same financial rules as everyone else.
- **Congress should consider updating the civil and criminal insider trading statutes to clarify that government staff are prohibited from using and disseminating material non-public information.** This clarification would help with enforcement and have additional benefits, including ensuring that a broader swath of unethical trading activity would be prohibited by statute.

Resources

Representative Quigley's [Transparency in Government Act of 2019](#), H.R. 5150, § 101 et seq. (116th Congress, 2019).

[Making Government More Efficient and Transparent](#), *Ro Khanna: Democrat for Congress*.

Issue 5: Lack of public access to congressional records

The public's right to scrutinize the workings and records of its government was established by the landmark 1966 [Freedom of Information Act](#) (FOIA). Its crafting, and subsequent modifications, stem from the belief that an informed populace is vital to a healthy democracy. Public access to information about the inner workings of government allows voters to stay informed and helps protect the rights of those impacted by government decisions. The possibility that one's records are obtainable by the public is also a strong incentive for officials to act responsibly and ethically.

Although this logic applies as much to the office of a legislator as it does a regulator, Congress has not seen fit to make its own records available under the FOIA. In fact, there are no mechanisms for the public to request and obtain specific information on activities of their elected representatives, nor is Congress subject to any proactive disclosures.

There are sweeping implications caused by the decision not to make Congress subject to the FOIA. Although most official legislative business is conducted on the record, members of Congress can meet with lobbyists, constituents, and others without even disclosing the fact of the meeting—much less its substance. And legislative agencies, such as the Capitol Police and the Government Accountability Office, are [not subject](#) to FOIA requests even though they have important governmental functions.

There are numerous examples of members of Congress and congressional staff abusing the lack of FOIA transparency and oversight of the legislative branch. Representative Jeb Hensarling [recently sent](#) letters to a dozen executive agencies arguing that all correspondence with his committee is exempt from the FOIA. The House Ways and Means Committee also took similar steps to limit access to its communications with outside entities. The then-general counsel of the House was generally sympathetic to such claims, arguing that released correspondence could “impair congressional scrutiny.” And just recently, Congress [made all](#) outgoing communications with federal agencies exempt from the FOIA.

Citizens need access to the information that forms the basis for government decisions in order to evaluate, criticize and ultimately hold elected officials accountable for their decisions. This concept applies to the elected legislative branch just as it applies to the executive branch. Yet, while Congress has taken [incremental steps](#) toward opening its governing to public scrutiny over the course of its existence, it's been 50 years since its last major transparency milestone—the Legislative Reorganization Act of 1970—which [made all committee hearings public](#). It's time for another transparency overhaul effort in Congress.

Solutions

- **Congress should expand the Freedom of Information Act to apply to its own records.** The FOIA is among our country's most impressive and important legislative accomplishments. Its premise: that sunlight is the best way to cure the rot in an institution, does not only apply to the executive branch. Congress should extend the FOIA to itself: shining a light on how laws are made would help the public understand what their elected leaders are doing and how they are going about their business. All

of this would have the potential to greatly improve public confidence in the legislative branch and increase civic participation in the process of making laws.

- **Congress should create a Congressional Records Act.** The executive branch is governed by two related laws that prohibit the destruction of potentially important documents—the Federal Records Act and the Presidential Records Act. Congress, however, has no such governing law, and thus congressional offices and committees are free to discard potentially important information should they so choose. Congress should hold itself to the same standard that it demands of the executive branch.
- **Congress should establish an independent records office for each chamber, with duties similar to the National Archives and Records Administration and executive agency Freedom of Information Act offices.** Individual member offices and committees should not be responsible for reviewing, cataloguing and disseminating Congress’s public records. Establishing a congressional archives and records office, overseen by the House and Senate clerks or the Committees on Administration, would be a necessary part of any expanded congressional transparency regime.
- **Congress should proactively disclose records of lobbyist and visitor contacts.** Congress should require that congressional offices and committees automatically and publicly release any logs of their meetings, discussions, foreign travel, visitor requests, and any documents left behind by lobbyists and visitors. Those contacts should be made available to the public in an online, searchable, sortable and downloadable format. This information would help constituents know who their elected representatives are meeting with and who might be exercising influence over their decisions.
- **Congress should pass the Transparency in Government Act.** The Transparency in Government Act focuses on increasing transparency and accountability throughout the federal government, including measures to improve public access to information about members’ personal financial information, their disbursement reports, and budget justifications by the Office of Management and Budget, and requiring U.S. Capitol Police to publish all arrest information online in a structured data format.
- **Congress should apply proactive data reporting requirements to the Capitol Police.** In addition to passing the Transparency in Government Act, Congress should expand the disclosure requirements listed in the Transparency in Government Act to also include data disclosures consistent with those that are included in the George Floyd Justice in Policing Act of 2020.

Resources

Representative Quigley’s H.R. 5150, [Transparency in Government Act of 2019](#) (116th Congress, 2019).

Representative Bass’s H.R. 7120, [George Floyd Justice in Policing Act of 2020](#) (116th Congress, 2020).

Judy Schneider, Colton Campbell, Christopher M. Davis, and Betsy Palmer, [Reorganization of the House of Representatives: Modern Reform Efforts](#), *Congressional Research Service*, October 20, 2003.